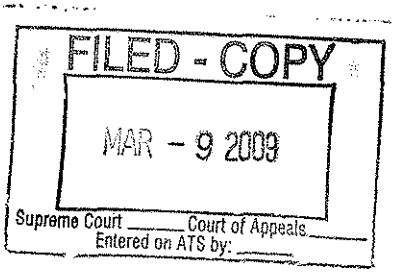
3-9-2009

Capstar Radio Operating Co. v. Lawrence Appellant's Brief Dckt. 35120

No.: **35120**

IN THE SUPREME COURT OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING COMPANY, Plaintiff-Respondent, Vs. DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, Husband and Wife, Defendants-*Pro Se* Appellants.	DISTRICT COURT OF THE FIRST JUDICAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE STATE OF IDAHO CV 2002 7671



Appeal from the District Court of the First Judicial District for Kootenai County
Honorable John T. Mitchell, presiding

APPELLANTS OPENING BRIEF

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STANDARD OF REVIEW

When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion. *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). Summary judgment is proper when "the pleadings, depositions, 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 judgment as a matter of law." Idaho Rules of Civil Procedure 56 (c). If there is no genuine issue of material

fact, "only a question of law remains, over which this Court exercises free review." *Watson*, 141 Idaho at 504, 112 P.3d at 792

On appeal from summary judgment, the court will determine whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. In making the determinations, it will construe all facts in the record, together with all reasonable inferences from the evidence on file, in the light most favorable to the party opposing the summary judgment. *Smith v. Thompson,* 103 Idaho 909, 655 P.2d 116 (Ct.App. 1982), *Golbraith v. Vaugas Inc.,* 103 Idaho 912, 655 P.2d 119 (Ct.App. 1982).

When reviewing a district court's determination that a private prescriptive easement exists, the Supreme Court must determine whether the district court properly applied the legal requirements for a prescriptive easement to the facts that the district court found. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997).

STATEMENT OF THE CASE

PREFACE

This is one of two complaints involving access rights across a private roadway that crosses the Lawrence's property located approximately four miles south of Post Falls in Kootenai County, Idaho. The companion case, *Tower Asset Sub., Inc. v. Lawrence CV 2003-4621,* was never consolidated with the instant action as the request for a jury trail was overlooked in Capstar, but in fact, requested in Tower.[1] A motion for summary judgment (for both complaints) was heard on November 28, 2007 in the District Court of the First Judicial

District of the State of Idaho, in and for the County of Kootenai, Honorable Judge John T. Mitchell presiding. The Pro Se Appellants appeal to the Idaho Supreme Court from orders entered in the above-entitled action.

BACKGROUND

On or about July 1996, the appellants, Douglas and Brenda Lawrence, husband and wife, purchased eighty (80) acres of remote forest land in an area known as Blossom Mountain laying approximately four miles south of Post Falls Idaho. On or about October 1997, Nextel Communications was granted a Conditional Use Permit allowing them to construct, maintain, and operate a cellular communications facility on a portion of a one acre parcel Nextel was leasing from Robert and Mark Hall. The following month, (November 1997) the Lawrences entered into an (irrevocable) Access License Agreement[2] with Nextel West Corp. dba Nextel Communications, whereby Nextel Communications agreed to pay the Lawrences a monthly license fee in exchange for the Lawrences allowing Nextel and its employees and agents ingress and egress access across the Lawrence property.

Blossom Mountain is home to other communications facilities operated by other business entities; one of which is owned by the plaintiff Capstar. In the fall of 2001, a company called Great Northern Broadcasting, Inc., dba Blue Sky Broadcasting, installed new broadcasting equipment on plaintiff Capstar's tower site. The defendants entered into a similar Access License Agreement with Great Northern Broadcasting on October 11, 2001.[3] On November 7, 2002, Capstar filed a complaint seeking to quiet title an easement access across the Lawrences

property. Several months later in June 2003, a company identifying themselves to be Tower Asset Sub Inc., and claiming to be the successor in interest to the Nextel Communications lease holding on the Hall property, filed a similar complaint seeking to quiet title an easement across the Lawrence property as well[4]. Capstar initiated this lawsuit seeking declaratory and injunctive relief by arguing that it had the right to use Blossom Mountain Road to access its parcel, and alleged four causes of action to support its position: (1) express easement; (2) implied easement; (3) easement by necessity; and (4) easement by prescription.

B. PROCEDURAL HISTORY

Plaintiff filed the present action in the District Court of the First Judicial District of the State of Idaho on November 7, 2002. On November 8, 2002, Capstar files a motion for a temporary restraining order and posts a $1000 bond. On March 9, 2004, plaintiff moves the court to summary judgment which is ultimately heard on April 14, 2004. The Lawrences were *Pro Se* defendants at the hearing. Because of a discovery dispute, the court ordered that the pleadings, discovery, and arguments for summary judgment will be limited to the plaintiff's express easement theory. The motion for summary judgment was granted and the order entered on June 7, 2005. The Lawrences appealed the summary judgment. The security bond posting was exonerated back to Capstar on May 3, 2006.

The Idaho Supreme Court ruled in favor of the defendants and reversed and remanded the proceedings back to the district court. The remitter was received by the district court on March 30, 2007 and the case reopened on April 20, 2007. On May 14, 2007, Capstar renews their

motion for summary judgment and it is scheduled to be heard on June 13, 2007. On May 31 2007, the Lawrences file a motion for enlargement and on June 6, 2007, the Lawrences file a motion for disqualification; which is the only motion heard at the June 13th, 2007 hearing. The court adjured without ruling on the motion for disqualification and on June 25, 2007, the court enters it order denying the motion for disqualification. The motion for summary judgment is rescheduled for August 7, 2007. On July 9, 2007, the Lawrences file a motion to reconsider together with a motion for permission to appeal an Interlocutory order. These later motions were heard on August 6, 2007 and the court summarily denied both motions.

At the August 7, 2007 hearing, the court granted the Lawrences motion for enlargement in order to take the depositions of Harold Funk, Robert Hall, Tower Asset, and Capstar and the plaintiff's motion for summary judgment was rescheduled. On November 8, 2007, the Lawrences renew their motion to disqualify for cause as well as renewing their motion for permission to appeal from an interlocutory order and these renewed motions were scheduled to be heard on November 27, 2007.

At the November 27, 2007 hearing, the defendants renewed motions were denied. The plaintiff's motion for summary judgment was heard on November 28, 2007 and again, the motion for summary judgment was granted and the order entered on February 6, 2008.

C. STATEMENT OF FACTS

On April 9, 1969, Harold and Marlene Funk, entered into a real estate contract to purchase three parcels of land from Edward and Colleen Raden, and Harold and Viola Marcoe.[5]

Parcel A (Government Lot 3), was the Southwest Quarter of the Southwest Quarter of Section 15;[6] parcel B was the Southeast Quarter of Section 21;[7] parcel C consisted of the Southwest Quarter of the Northwest Quarter (Section 22) and the Southwest Quarter of Section 22, except for an approximately one acre lot which had been previously separated from the land and sold to General Telephone Corporation, all located in Township 50 North, Range 5 West, Boise Meridian, Kootenai County, Idaho.[8] Parcel B abuts Parcel C to the west and Parcel A abuts Parcel C to the north forming one large contiguous land estate.[9] A statutory warranty deed for the above described parcel was conveyed to the Funks on April 11, 1974.[10] The Funks purchased the land for investment purposes.[11] There were very few merchantable timber on the land when the Funks purchased it.[12] The Funk Estate, which consisted of previously harvested or burned forest land,[13] was wild, open, unimproved land located generally on top of Blossom Mountain.[14]

There were two roads entering the Funk Estate: Mellick Road, *a public road*, entered the Funk Estate in Government Lot 3, Section 15 from the north,[15] and a *private easement road which leaves* Signal Point Road (to the west) and entered the Funk Estate in Section 21.[16]

On July 1, 1975, the Funks entered into a real estate contract, as sellers, with Human Synergistics, Inc., a Minnesota Corporation, as purchaser, of the Southeast Quarter of the Southeast Quarter of Section 21, Township 50 North, Range 5 West.[17] The warranty deed conveying title to Human Synergistics is dated October 29, 1992.[18] (The east half of this parcel, would later become the Lawrence parcel, the subject of this complaint.)

Between the time the Funks purchased the land in April 1969 and the time they sold the land in Section 21 to Human Synergistics in 1975, Funk's use and enjoyment of their property generally involved the picking of huckleberries and target practice[19] in the Southwest Quarter of the Southeast Quarter in Section 21[20]; more specifically, the land that lies directly west of the land currently owned by the Lawrences.[21] During this approximately six year period,[22] the Funks made approximately 20-30 trips to the top of the mountain.[23]

The private easement road known as Blossom Mountain Road, begins at its departure from Signal Point Road in the Southwest Quarter of Section 21[24]; travels in a south-easterly direction into the Northeast Quarter of Section 28 before turning and traveling in a north-easterly direction and entering the south property line of Funk's land in the Southeast Quarter of Section 21.[25] The road extends east across the Southeast Quarter of Section 21 where it enters the Southwest Quarter of Section 22[26]. Soon after entering Section 22, Blossom Mountain road divides[27] with the main body of the road continuing in a Northeasterly direction where it eventually turns into Mellick Road.[28] A spur continues to travel in a westerly direction where it ends near the Nextel Site in Section 22.[29] After leaving Signal Point Road, Blossom Mountain road crosses two privately owned parcels of land that were never owned by the Funks or the Funks predecessor in interest to the Funk estate.[30] The Blossom Mountain Road access was gated[31] in the Southwest Quarter of Section 21 and appears to have been locked from as early as 1966[32] and requiring the use of a key for access.[33] According to Funk, GTE gave him a key to

the gate.[34] Wilber Mead also testifies that his gate was locked until October 1998.[35] (There is nothing in the record that contradicts Funk's permissive use of Blossom Mountain Road.)

In November 1972, Wilber and Florence Mead grant the Funks an ingress/egress easement to use the road as it crosses the Southwest Quarter of Section 21.[36] Wilber Mead did not own any land in the Northeast Quarter of Section 28 and did not, nor could not, grant the Funks the right to use the road as it crosses into Section 28.[37] Funk was also aware that the Meads did not own land in Section 28.[38] Funk never attempted to contact the owners of the land in Section 28 for an easement.[39] Funk testifies that they generally didn't cross through Section 28[40]. Rather, they cut over prior to entering Section 28 on a spur that led to the top of the mountain.[41] There is nothing in the record to show that Funk had any ingress/egress rights on Blossom Mountain Road as it crosses the Northeast Quarter of Section 28.[42] On the contrary, the record actually testifies to the lack of an easement thereof.[43] Don E. Johnston and Fern A. Johnston, together with John McHugh and Mary Ann McHugh, were predecessor in interest to the Lawrence land[44]. In July 1977, Idaho Forest Industries (then owner of the Northeast Quarter of Section 28), grants the Johnstons and McHughs an ingress/egress easement over said North-east Quarter of Section 28.[45] Without this easement, the Lawrence's would be devoid of a legal access to Signal Point Road.

In the fall of 1975, Mr. Funk moves to the American Falls/Aberdeen area[46]; Mrs. Funk moves the following June.[47] After 1975, Funk only visits the mountain 2-3 more times[48] and never visits his remaining property after 1981.[49]

The chain of title with respect to the subject property in Section 21 from Funk to the Lawrences is recited in the trial court's February 6, 2008, Memorandum Decision and Order Granting Plaintiffs Motion for Summary Judgment, and Order Granting Plaintiffs Motion to Substitute Real Party in Interest.[50] The chain of title with respect to Capstar's property in Section 22, is recited in the trial court's February 6, 2008, Memorandum Decision and Order Granting Plaintiffs Motion for Summary Judgment, and Order Granting Plaintiffs Motion to Substitute Real Party in Interest.[51]

In September 1989, Funk sells 5 acres of land in the Southwest Quarter of Section 22 to a broadcasting company owned by John Rook.[52] At the time, Blossom Mountain road was being used by GTE, Kootenai Electric, and possibly others.[53] The road was gated[54] and required the use of a key for access.[55] Rook received a key from Wilber Mead to get through the gate.[56] There were rules imposed on using the gate[57] and there is no evidence in the record to show that Rook ever disobeyed the rules. Rook only visits the property three or four times a year.[58] Rook testifies at deposition, that he believed that there was an access agreement between him and GTE that gave him the rights to use Blossom Mountain Road[59] and that his use of the road was permissive.[60] Rook has no personal knowledge of Mellick Road[61] and never tried to drive down it.[62] Funk's last use of the road occurred some eight to nine years prior to Rook's purchase.[63] Rook cannot testify as to the Funk's use of the road.[64] Funk never took Rook to the land and access was never discussed.[65] Rook first traveled to the land only after the purchase from Funk had closed.[66] Rook does not remember signing an affidavit in this case.[67] Rook is not a surveyor[68]

and he never had the road surveyed.[69] Rook never knew which properties the road crossed[70] and never knew who owned them.[71] Rook could not draw a map of the Blossom Mountain land or the access to the land.[72] Rook transfers his interest in his land in Section 22 to AGM in November 1998[73] and in October 2000, AGM transfers its interest in the property to the plaintiff Capstar.[74]

As Wilber Mead testifies to in his affidavit, his gate was kept locked until October 1998.[75] The Lawrence's lock the gate on their southern property line in 2001.[76] In October 2001, the Lawrences enter into an Access License Agreement with Great Northern Broadcasting, a tenant of Capstar.[77] Defendants did provide Great Northern Broadcasting with a key to the Lawrence gate.[78] Great Northern Broadcasting never terminated the Access License Agreement with the Lawrences;[79] rather, they quit making monthly license fees just prior to Capstar filing this complaint.[80] Capstar admits that prior to 2001, the Lawrences did not restrict Capstar's use of the road.[81]

ISSUES PRESENTED ON APPEAL

A. Did the trial court err in its determination that an easement by implication from prior use existed because *no easement to the county road existed prior* to the separation; Capstar has failed to show how the use was intended to be permanent; Capstar has failed to show reasonable necessity existed for the easement; and Capstar has failed to show apparent continuous use existed before the separation?

B. Did the trial court err in its determination that an easement by necessity existed because the separation of the parcels did not create the separation from the public road; prior to the

separation, the original estate had a public road access via Mellick road; and the original landowner cannot create the necessity by his or her own actions?

C. Did the trial court err in its determination that an easement prescription existed because Funk could not have establish a prescriptive easement over the land he currently owned; Funks use of the road as well as the successor in interests use of the road has always been permissive; Capstar has failed to show open and notorious use; Capstar has failed to show how the use was adverse and under a claim of right; and Capstar has failed to show continuous and uninterrupted use for the statutory period?

D. Did the trial court abuse it discretion by granting plaintiff prejudgment access to Defendant's land without first requiring a bond, undertaking, or preliminary injunction order?

E. Did the trial court abuse its discretion by granting plaintiff's application for sixth access on a motion that was untimely and not supported by affidavit or rule citing?

F. Did the trail court abuse its discretion by granting summary judgment when the defendants made a showing that a genuine issue of material fact did exist in the affidavits, pleadings, depositions, and admissions?

G. Did the trial court abuse its discretion by refusing to disqualify itself for cause?

H. Did the trial court abuse its discretion by conducting an independent investigation into the defendant's motion for disqualification?

I. Did the trail court err in determining there was no merit to the appellants defense of latches and statute of limitations?

J. Did the trial court abuse its discretion by admitting Plaintiff's affidavits in their entirety over defendant's objections while striking whole paragraphs from the defendant's affidavits?

ATTORNEY'S FEES ON APPEAL

The Lawrences are seeking the award of attorney fees on appeal. Capstar (Clear Channel) is a big corporate wall street conglomerate with highly paid corporate attorneys who know how to use the courts to get what they want. Their *modus operandi* is simply to wear the opponent down by tying them up in litigation for years with the specific intent of running the opponent out of money, energy, and hope so they just give up and cave in to their demands. The Lawrences contend that this complaint (as well as the Tower complaint) were *frivolously* filed in order to breach the Access License Agreements they or their tenants negotiated with the Lawrences.

Capstar's own witness John Rook describes this company as being a scavenger[82] and stated in his deposition testimony "When deregulation came along, giant companies with public money can come in and tell you, *Get the hell out of the water. We're taking your station. If you don't want to take the price we're going to give you, we'll take it.* And, they did."[83]

Rook further testifies in deposition at page 21:20 (R Vol. 2 p. 406):

> Q. Okay. That doesn't offend me in the least bit. Okay. So if I got the various conveyances right, then ultimately this property transferred to a company named Capstar?
> A. Capstar, a branch of Clear Channel.
> Q. Clear Channel. Okay. And that's one of the big companies with public money?
> A. The biggest there is.
> Q. Okay. And they like to sue people and drag them into court and do all that sort of thing?
> A. They find a way to get what they want. [Emphasis added]

Rook further testifies in deposition at 43:3 (R Vol. 2 p. 411):

> Q. Okay. So if I understand you correctly, somebody like AGM would come in, and on paper it was owned by AGM, but essentially it was being operated by Clear Channel?
> A. Oh, yeah. I'll be 70 this year and I wonder what it's going to be like in the years ahead. I wish I could remember the name of what it is called, but there was an agreement that they came up with. Lawyers figured out a way. "Okay. Now we've got the FCC out of your hair. We can find a way for you to run these stations anyway, and we'll come up with a so and so agreement which you'll be running it for them." And they did, and they did it quite successfully all over the nation.
> Q. Without getting sued for fraud?
> A. Well, I – part of my heartburn goes back to I sued Clear Channel and Citidel broadcasting for antitrust, and I reported and paid all of my documentation noted to the federal court, to the FCC, and to the justice department, and to Michael Powell, Colin Powell's son, who's the head of the justice department at the justice department. He's the head of the antitrust division. They looked at everything I had and said, "Boy, it's antitrust. We're right behind you. We'll back you all the way.
> Q. So as soon as the smoke cleared, what happened?
> A. After hundreds of thousands of dollars came out of my pocket for lawyers and expert witnesses and lawyers and expert witnesses, finally the federal judge said, "Okay. Now you've proven 12 million dollars in damages Mr. Rook. Time for trial. And my antitrust lawyer said, "We need 600,000 more to even get started." I said, "I don't have 600,000 more." "Well, maybe we better try and find a way." So Clear Channel paid my lawyer 200,000 for us to drop out and not have any problem with it. Because they said, "we'll appeal even if we lose, and he'll be dead. He won't live through it."

And again at 45:14-15 (R Vol. 2 p. 411)

> Q. Capstar is just a shell for Clear Channel?
> A. Yes.

The fact is, the Lawrences negotiated an Access License Agreement with Capstar's tenant (Great Northern Broadcasting) in good faith. Capstar then sues Lawrence for an access and gets injunctive relief, enabling Great Northern Broadcasting to breach the Access License Agreement with the Lawrences and benefit from free access while everything is tied up in litigation.

Capstar's attorneys were at the depositions of Harold Funk and John Rook and they have the transcripts to those depositions. They are well aware of the conflicting testimony offered by their own witnesses. Yet, Capstar continued to pursue a motion for summary judgment to further postpone and deny the Lawrences a fair and speedy trial.

ARGUMENT

I. The trial court erred in its determination that an easement by implication from prior use existed because 1. no easement to the county road existed prior to the separation and therefore no unity of title or common ownership; 2. Capstar has failed to show how the use was intended to be permanent; 3. Capstar has failed to show reasonable necessity existed for the easement; and 4. Capstar has failed to show apparent continuous use existed before the separation.

Creation of easements by implication rests upon exceptions to the rule that written instruments speak for themselves, and because implied easements are contrary to that rule, the courts disfavor them. *Sutton v. Brown,* 91 Idaho 396, 400, 422 P.2d 63, 67 (1966); *Cordwell v. Smith,* 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct. App. 1983). An easement is implied because it is presumed that if an access was in use at the time of severance it was meant to continue. *Bob Daniels and Sons v. Weaver,* 105 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984).

In order to establish an easement by implication from prior use, the party attempting to establish such easement must prove: 1) unity of title or ownership and subsequent separation by grant of the dominant estate; 2) apparent continuous use; and 3) the easement must be reasonably

necessary to the proper enjoyment of the dominant estate. *Bear Island Water Association v. Brown,* 125 Idaho 717, 725, 874 P.2d 528, 536 (1994); *Cordwell v. Smith,* 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct.App. 1983); *Close v. Rensick,* 95 Idaho 72, 76, 501 P.2d 1383, 1387 (1972); *Davis v. Gowen,* 83 Idaho 204, 210, 360 P.2d. 403, 406-07. *See also Phillips Industries, Inc. v. Firkins,* 121 Idaho 693, 698, 827 P.2d 706, 711 (Ct. App. 1992); and *Davis v. Peacock*, 133 Idaho 637, 642, 991 P.2d 362, 367 (1999). Apparent continuous use refers to the use before the separation of the parcels that would indicate the roadway was intended to provide permanent access to the parcels. *Cordwell,* 105 Idaho at 78, 665 P.2d at 1088. The party seeking to establish the easement has the burden of providing the facts to establish the easement. *Id.,* 105 Idaho at 77, 665 P.2d at 1087. No easement by implication could arise as to lands that were never part of a former common owner's holdings. *Cordwell v. Smith*, 105 Idaho 76, 665 P.2d 1081 (1983)

It is undisputed that Funk used *a portion*[84] of Blossom Mountain Road to access his land in the Southwest Quarter of the Southeast Quarter of Section 21. Funk's deposition testimony establishes the fact that when he would drive to his property, he would *cut-over*[85] just past Wilber Meads gate and drive to the mountain top in the Southwest Quarter of the Southeast Quarter of Section 21, not crossing into the Northeast Quarter of Section 28 or driving across the Lawrence parcel. Funk was aware that he did not have a legal access across Section 28. And, according to his own testimony, he never talked to anyone to obtain an easement. The owner of the Northeast Quarter of Section 28 is not a party to this complaint and there is no unity of title that extends into Section 28. Capstar in essence, is attempting to create something that did not exist prior to

the separation by seeking a quiet title to the Lawrence land and obtaining a judgment that it has the right to use Blossom Mountain road. A judgment that if granted, will establish the precedent that Capstar has a legal right to cross Section 28.

The Capstar parcel was created in 1989. Prior to 1989, the land was just part of the land Funk retained in Section 22. There is absolutely no evidence in the record that suggests that in 1975 there was an existing access road to the land that would eventually become the Kootenai Broadcasting parcel when Funk severed what would become the Lawrence parcel (the servient estate) from Funk's other holdings (the dominant estate). Therefore, the easement claimed by Capstar did not exist in 1975 when the servient estate was severed from the dominant estate.

Capstar has also failed to show how the use of the road was intended to be permanent. The fact is, Funk never sought nor obtained an easement to cross Section 28. How can the argument be made that Funk's use of the road as it crosses the Lawrence land was intended to be permanent when Funk himself realized he didn't have a legal right of way? There clearly wasn't an access in 1977 when the predecessors in interest to the Lawrence parcel negotiated an easement across Section 28 from Idaho Forest Industries.

Because no easement existed prior to the separation, the element of reasonable necessity becomes largely a moot point. Irrespective of that, Capstar has still failed to prove that a reasonable necessity existed. It is well established that the public portion of Mellick Road extended into the Funk estate in Section 15. Contrary to the Funk affidavit, Funk testifies to the road's existence in deposition and that he chose not to use the road because it had become

overgrown. There is nothing in the record that would indicate that the Mellick Road access had any problem that couldn't be cured by cutting branches and scraping the road. Funk also testifies that prior to his purchase of the property, he had knowledge of someone using the road for logging. If a large logging truck can navigate the roadway, it is hard to understand how one makes the argument that necessity for another route exists.

Finally, Capstar has failed to show apparent continuous use of the road as it applies to the Lawrence property. The land on Blossom Mountain is wild, open, and unimproved lands and as Funk testified at deposition, his use of the road before moving to Aberdeen amounted to three to four times per year. Hardly enough use for anyone to notice. Wilber Mead, testified in his affidavit that to his knowledge, Funk was not using the road between 1966 and 1972. Funk's lite and infrequent use of the road, most likely went unnoticed. Furthermore, Funk sold the land to a company (Human Synergistics), who, by all indications, was conducting business in Minnesota and would hardly have any knowledge of Funk's use of his Idaho property. Harold Funk moved to Aberdeen the year he sold the property to Human Synergistics. So even if Human Synergistics was local, Funks use of the Blossom Mountain Road for all practical purposes ends when he sells the land. Finally, Funk establishes at deposition that he never used the road at all after 1981, some eight years before John Rook purchases the Capstar parcel. Funk never met Rook. Funk didn't take Rook to the property. And, Rook testifies at his deposition, that he didn't know what access route the Funks used to drive to their property. Rook couldn't even identify whose land the road crossed.

II. The trial court erred in its determination that an easement by necessity existed because 1. the separation of the parcels did not create the separation from the public road; 2. prior to the separation, the original estate had a public road access via Mellick road; 3. the original landowner cannot create the necessity by his or her own actions.

The elements required to establish an easement by necessity are: (1) that the dominant parcel and the servient parcel were once part of a larger tract under common ownership; (2) that the necessity for the easement claimed over the servient estate existed at the time of the severance; and (3) the present necessity for the claimed easement is great. *Id., citing B&J Development & Inv. Inc. v. Parsons,* 126 Idaho 504, 507, 887 P.2d 49, 52 (Ct.App. 1994), *MacCaskill v. Ebbert,* 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct.App. 1987); *Bob Daniels & Sons v. Weaver,* 106 Idaho 535, 543, 681 P.2d 1010, 1018 (Ct.App 1984). *See also, Bear Island Water Ass'n, Inc. v. Brown,* 125 Idaho 717, 725, 874 P.2d 528, 536 (1994).

Easement by necessity arises where part of a tract is conveyed and, as a result of severance, the part conveyed or the part retained is deprived of legal access to public road. *Roberts v. Swim,* 117 Idaho 9, 784 P.2d 339. When lands have been severed, grantee or his successor in interest, cannot, by subdividing, create new and different "necessity" for rights of way, where no such necessity existed before severance. *Cordwell v. Smith*, 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct.App. 1983) Owner of property cannot create necessity for easement by his or her own actions. *B & J Development and Inv., Inc. v. Parsons,* 126 Idaho 504, 887 P.2d 49, Rehearing denied (1994).

An easement by necessity arises when the conveyance of land results in a deprived legal access to a public road for either the part conveyed or the part retained. That is not the circumstances in the present action. Here, the severance of the Lawrence parcel did not create the deprivation of a legal access, as no legal access existed on Blossom Mountain Road before the separation due to the fact that the Funks never obtained an easement across Section 28, the section of road that lies between the public road and the Lawrence property.

It was Funk's own actions that created the present day "necessity" to the Capstar parcel. It is well established that Mellick Road provided a legal access to the Funk estate. However, by Funk's own admission, he *chose* not to use that access route because it had become overgrown. Unimproved forest roads do require maintenance and upkeep in order to keep them open, usable, and passable. The Capstar parcel was under Funk's ownership for nearly twenty years before Funk sold to John Rook. All indications are, that over that twenty year period, the Funks totally neglected the Mellick Road access. What caused the deprivation of legal access for Capstar, was not the sale of the Lawrence parcel, but Funk's neglect of the Mellick Road access and Funks conveyances of his other lands in Section 15 and 22. Capstar should be suing Funk for access, not the Lawrences. After all, it was Funk that created Capstar's current access problems.

III. The trial court erred in its determination that an easement by prescription existed because Funk could not have establish a prescriptive easement over the land he owns and Capstar has failed to prove with clear and convincing evidence, any of the elements required to establish a prescriptive easement.

To establish an easement by prescription, the claimant must prove by *clear and convincing evidence* use of the subject property, which is characterized as follows: 1) open and notorious; 2) continuous and uninterrupted; 3) adverse and with a claim of right; 4) with the actual or implied knowledge of the owner of the servient tenement; 5) for the statutory period I.C. §5-203. *Hodgins v. Sales,* 139 Idaho 225, 76 P.3d 969. To establish an easement by prescription, a party must establish by clear and convincing evidence all of the elements necessary for a prescriptive easement. *Hodgins v. Sales,* 139 Idaho 225

Where the claimants of a prescriptive easement purchase their property at different times and use the subject property for different purposes with different frequency, the trial court must make findings specific to each property owner's claim; such findings are necessary, in part, because prescriptive rights are defined by actual prescriptive use of the property over the statutory period. I.C. §5-203. *Hodgins v. Sales,* 139 Idaho 225, 76 P.3d 969.

The purpose of the requirement that the prescriptive use be open and notorious is to give the owner of the servient tenement knowledge and opportunity to assert his rights against the development of an easement by prescription. I.C. §5-203 *Anderson v. Larsen,* 136 Idaho 402, 34 P.3d 1085 (2001). Open and notorious use of prescriptive easement must rise to level reasonably expected to provide notice of adverse use to servient landowner maintaining reasonable degree of supervision over his premises. *Kaupp v. City of Haily,* 110 Idaho 337, 715 P.2d 1007. If the lands of the servient estate are wild, unenclosed, or unimproved, it is presumed that the use is permissive. *Christle v. Scott*, 110 Idaho 829, 718 P.2d 1267 (Ct. App. 1986)

Establishment of an easement by prescription requires use of an easement in such a way as to constitute some actual invasion or infringement of right of the owner of the servient property for the prescribed time. *Schultz v. Atkins,* 97 Idaho 770, 554 P.2d 948 (1976). Use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part, negates any presumption of individual right there in his favor. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997).

Because it is no trivial thing to take another's land without compensation, easements by prescription are not favored by the law. *Simmons v. Perkins,* 63 Idaho 136. A prescriptive right cannot be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner. *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006).

The trial court's decision (R Vol. 3 p. 575) last paragraph states:

> Lawrence's fail to realize that Funk's use of his property and the use he made of the Lawrence property from *1975 to present is not relevant*. The uncontradicted evidence is that Funk used the property consistently for the six year period from the day he sold to Human Synergistics to the day he moved from the area. This is one year more than the five years required for the prescriptive use. This isn't the type of property of which one would expect daily use. The property is on top of a mountain. Capstar seeks this easement to maintain its radio equipment on top of this mountain. The use Capstar seeks is no different than *the prescriptive use Funks made of the Lawrences' land for that six year period from 1969 to 1975*.

Here, the trial court specifically concludes that Funks' use of the road from 1975 to the present is not relevant and that the relevant prescriptive period is the six year period from 1969 to 1975. In other words, the court is only considering the time the Funks were in actual

possession of the Lawrence parcel as being the relevant prescriptive period. It is unclear how Funk could have made a prescriptive use of his own land as the trial court doesn't really explain how it is possible for one to be adverse to oneself. As the Idaho Supreme Court noted in its earlier ruling about the sales agreement between Funk and Human Synergistics, in *Capstar v. Lawrence,* 143 Idaho 704, 152 P.3d 575 (2007)

> This was a title retaining contract where the grant of the Lawrence parcel (and the creation of any easement over it) was contingent upon the fulfillment of the sales agreement. The document does not disclose any intent to convey any property interest until the balance owing on the sale agreement was paid.

Obviously, the trial court either misconstrued the facts or simply got the facts wrong. Funk could not have made a prescriptive use of his own land. Since Funk retained title to the property until November 18, 1992, it is unclear how Funk could have made a prescriptive use of the property prior to 1992. However, Funk moved away from the area in 1975. Until he sold his remaining interest in Section 22 in 1992, he made *at most* two to three visits to his property over a seventeen year span. These are the facts established by Funk's own deposition testimony.

Capstar has failed to produce any evidence that would prove Funk's use of the road, and later, Funk's successors use was anything other than permissive. The affidavit of Wilber Mead, collaborated by the deposition testimony of both Rook and Funk, establishes that Blossom Mountain road was gated and locked and required the use of a key. Both Rook and Funk admit that their use of the road was permissive. And, the fact that the land in question is wild, open, and unenclosed, unless evidence is provided to the contrary, the use is deemed to be permissive.

The trial court misconstrued other facts associated with the prescriptive easement theory. The court's decision (R Vol. 3 p. 573-574) states :

> A review of Rebeor's affidavit shows he managed the tower site for Capstar, and that on November 3, 1997, Nextel West Corp. entered into an "Access License Agreement" with Douglas and Brenda Lawrence in an effort to avoid litigation regarding access to a leased parcel upon which it was locating a communications tower ..." Affidavit of Daniel E. Rebeor, p.2, ¶¶ 2, 3. On January 13, 2003, Nextel assigned the Access License Agreement to Capstar. Id. ¶ 4. The uncontroverted evidence is the license was entered into in 1997 "in an effort to avoid litigation." That certainly is not evidence that there was permissive use of the road at that time."

Daniel Rebeor's affidavit shows he managed the tower site for Spectrasite, *not* Capstar. Furthermore, on January 13, 2003, Nextel assigned the Access License Agreement to Spectrasite, *not* Capstar. Daniel's Rebeor's affidavit was submitted in the Tower case, not the Capstar case.

The court also finds that "*Apparent continuous use from no later than 1975 is also shown by the affidavit of Wynn Wenker. Affidavit of Susan Weeks in Support of Motion for Summary Judgment filed March 9, 2004, Exhibit FF at ¶10.*" Wynn Wenker did not offer that affidavit in support of the present action, rather it was offered in *Verizon v. Lawrence* and Wynn Wenker was testifying to GTE's use of the road only. It is well established that GTE has been using the road since 1966 and neither Funk nor Capstar benefit in anyway from the easement granted to GTE.

In the recent case *Hughes v. Fisher,* 124 Idaho 474, 129, P.3d 1223 (2006), the Idaho Supreme Court created an exception to the general rule that the regular crossing of another's property is presumed to be adverse. Where a landowner constructs a way over the land for his

own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of permission.

The conclusionary statements offered by Capstar in support of its motion for summary judgment do not constitute clear and convincing evidence of adverse use that would benefit Capstar. Capstar, itself, makes no claim of any sort that it has used the Lawrence parcel openly, notoriously, continuously, and in a hostile manner for the statutory period. No prescriptive claim has been established and Capstar's use of the Lawrence access road has always been permissive.

IV. The trial court abused its discretion by granting plaintiff prejudgment access to Defendant's land without first requiring a bond or undertaking. The trial court also abused its discretion by granting plaintiff's untimely motion for application of a sixth access that failed to cite a rule basis, was not supported by affidavit, and failed to give proper notice.

On November 15, 2002, the court held a preliminary injunction hearing in which the court issued a preliminary injunction preventing the Lawrences from interfering with Capstar's use of the road. Capstar was required to post a bond. This preliminary injunction was in effect until it was superseded by a permanent injunction that was issued when the court granted the Capstar's motion for summary judgment in 2004 and entered a decree of quiet title on June 7, 2005. The security bond was exonerated back to Capstar on May 3, 2006. Upon appeal, the Idaho Supreme Court overturned the trial court's judgment and remanded the case back.

Lawrence argues, that the issuance of the permanent injunction rescinded the preliminary injunction. The nullification of which is evidenced by the exoneration of the security bond.

Therefore, when the Idaho Supreme Court reversed the trial court's decision that created the permanent injunction, that had the effect of reversing the permanent injunction; leaving no injunction in place.

A hearing was held on October 31, 2007 on Capstar's motion to shorten time and application of a sixth access. The motion for an application for sixth access was received without the proper fourteen day notice, only on three days notice.[86] The motion didn't cite any rule basis and there was no affidavit attached in support of the motion offering any facts as to why the motion should be granted.

I.R.C.P. Rule 65 (c) states:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages including reasonable attorney's fees to be fixed by the court, as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any political subdivision, or of an officer or agency thereof.

There was no bond pending. There was no temporary restraining order. There was no preliminary injunction. Proper notice was not given and there was no rule basis cited.[87] The motion should have been denied on its face and the court abused its discretion by granting it.

V. Summary judgment was not proper as the defendants made a showing that a genuine issue of material fact did exist in the affidavits, pleadings, depositions, and admissions.

Summary judgment should not be granted if reasonable people could reach different conclusions or draw conflicting inference from the evidence, as summary judgment is proper

where the evidence reveals no disputed issues of material fact. *Farm credit of Spokane v. Stevenson*, 125 Idaho 270, 869 P.2d 1365; Rule 56(c), Idaho R. Civ. P

Summary judgment is only proper if the pleadings, depositions, and admissions on the 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 judgment as a matter of law. I.R.C.P. 56 (c).

If the evidence reveals no disputed issues of material fact, the trial court should grant the motion for summary judgment. *Farm Credit Bank v. Stevenson*, 125 Idaho 270, 272, 896 P.2d 1365, 1367 (1994). If the non-moving party does not come forward with evidence as provided in I.R.C.P 56(c), then summary judgment, if appropriate, shall be entered against the party. *Meikle v. Torry Watson*, 138 Idaho 680 (2003). Summary judgment is properly granted in favor of the moving party when the non-moving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Meikle v. Torry Watson*, 138 Idaho 680 (2003).

Where a jury has been requested, the non-moving party is entitled to the benefit of reasonable inference drawn from the evidenciary facts. *Ambrose ex. Rel. Ambrose v. Buhl Joint School District No. 412*, 126 Idaho 581, 887 P.2d (Ct.App. 1984)

Facts are to be liberally construed in favor of the party opposing the motion for summary judgment and he is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Jones v. Jones*, 100 Idaho 510, 601 P.2d 1 (1979)

Much of the plaintiff's claimed easement theories and much of the court's analysis and conclusions, rests in large part, on the affidavits produced by Harold Funk, John Rooke, and Robert Hall. The court summarily rejects the defendants evidence as being insufficient to show a genuine issue of material fact and granted summary judgment to the plaintiffs.

In the courts written decision, the court sets forth its analysis of the plaintiff's various claimed easement theories and offers the specific evidence the court relies upon in developing its conclusions of law. For the most part, the court is silent on the defenses rebuttal evidence. The defendants took the deposition on Harold Funk[88] and John Rook.[89] The entire deposition transcripts are attached the September 10, 2007 affidavit of John Whelan.

The trial court's written decision lists approximately twenty-six findings of fact that the court relies on in granting summary judgment to the plaintiff. Is some cases, it is apparent that the court plainly had its facts wrong.[90] Generally, the court just summarily dismissed the appellants evidence and completely ignored the areas where the deposition testimony either contradicted or offered explanation to the affidavits of Harold Funk and John Rook.

VI. The trial court abused its discretion by refusing to disqualify itself for cause.

Public confidence in judicial system is undermined when citizenry concludes, even erroneously, that cases are decided on basis of favoritism or prejudice rather than according to law and fact; because concern is the appearance of partiality, this concern is not overcome by recusal. *Matter of Disciplinary Proceeding Against Niemi,* 820 P.2d 41, 117 Wash.2d 817

Test for determining whether judge's impartiality might reasonably be questioned, such that a judge should be recused, is an objective test that assumes that a reasonable person knows and understands all the relevant facts. CJC 3(D)(1). *Sherman v. State*, 905 P.2d 355, 128 Wash.2d 164, reconsideration denied, and amended. In determining whether a trial judge should be disqualified, inquiry is not only whether there was an actual bias on judge's part, but also whether judge's conduct or words created "such likelihood of bias or an appearance of bias that judge was unable to hold balance between vindicating interest of court and interest of accused. U.S.C.A. Const. Amend 14. *State v. Garza*, 865 P.2d 463, 125 Or.App. 385, review denied 876 P.2d 783, 319 Or. 81

Even in the case in which a judge may be convinced of his or her own impartiality, the appearance of bias or prejudice can so undermine litigants confidence in proceeding or public's confidence in system as to require judges disqualification. *Comiskey v. District Court In and For the County of Pueblo* 926 P.2d 539, Rehearing denied.

Due process, the appearance of fairness, and the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may reasonably be questioned. CJC 3(D)(1). *Wolfkill Feed and Fertilizer Corp. v. Martin*, 14 P.3d 877, 103 Wash.App. 836. "Bias" requiring change of judge connotes leaning of mind or inclination toward one person over another. Rules Civ.Proc. Rule 40.1(b)(2) *Brown v. Avery*, 850 P.2d 612, Wyoming 1993. The truth of the filed affidavit charging bias or prejudice on the part of the judge is not what disqualifies the judge, but the affidavit itself. *Price v. Featherson*, 64 Idaho 312, 130

P.2d 853. The Idaho Code of Judicial Conduct Canon 3 states a judge shall perform the duties of judicial office impartially and diligently and a judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.[91]

The appellants sincerely and truthfully believe a strong bias or prejudice exists with the trial court and that the proceedings are prejudiced against the appellants and the appellants legal consul and is biased to favor both plaintiffs Tower and Capstar. The appellants are entitled to a fair, just, and impartial proceeding and are absolutely and undeniably convinced, that after nearly seven years of litigation in Capstar and nearly six years of litigation in Tower, and tens of thousands of dollars in legal fees, that the trail court has not been an impartial trier of facts. Having the experience of being in front of the district court now for seven years in Capstar, and six years in Tower, a pattern of favoritism and/or prejudice emerged, which when taken collectively, would give reason to question the courts impartiality.

John P. Whelan offered several affidavits that established grounds by which the court was biased against him and/or his representation of the appellants. The record speaks for itself in that regard. Not so obvious are all the individual actions in the proceedings, findings, rulings, and conclusions that the appellants question and have not yet enumerated. Listed herewith, are a portion of those specific actions that causes the appellants to question the courts impartiality.

Initially in Capstar, the appellants were *Pro Se*. A hearing was held on Capstar's motion for summary judgment. The Lawrences moved the court to provide an enlargement of time because Capstar had not provided timely answers to defendants admissions, interrogatories, and

demand for production. Furthermore, the answers Capstar did provide were vague and questionable. Rather than grant an enlargement of time to allow the Lawrences ample time to dispute the facts, the court just ruled on the issue of express easement. The Lawrences presented good facts concerning the express easement which were summarily dismissed by the court with a total disregard to Lawrence's arguments regarding the express easement theory. The court granted summary judgment in favor of Capstar, in part by finding that the sales agreement and deed were unambiguous.

Facing a similar upcoming hearing on Tower's motion for summary judgment, the defendants retained John P. Whelan who represented them at hearing. Mr. Whelan explained to the court the doctrine of merger and presented good arguments against Tower's express easement theories. Lawrence's arguments were again, summarily overruled. The court granted summary judgment in favor of Tower, *this time* finding the deed to be ambiguous.

The defendants appealed both decisions and on appeal, the Idaho Supreme Court found in favor of the defendants, reversing the court's order and remanding it back for further proceedings. In a footnote in the Tower opinion, the Idaho Supreme Court even questions how the court could conclude the deed to be ambiguous in one case and unambiguous in another.

The court received the remitter on March 30, 2007 and reopened the case on April 20, 2007. On May 30, 2007 Capstar renewed their motion for summary judgment which was scheduled to be hear on June 13, 2007. On June 6, 2007, the Lawrences properly file a motion for disqualification for cause together with the affidavit of John P. Whelan and the motion was

heard on June 13, 2007. The affidavit and oral argument offered facts surrounding *Yovichin v. Bush*, CV-01-2116; a case involving both the court and the appellant's attorney John P. Whelan and in which the court disqualified himself for yet unexplained reasons. Also offered were facts surrounding *Sauls v. Luchi*, CV-04-1616; *Straub v. Smith,* CV-04-5437 (Supreme Court No. 31955); *Krivor v. Rogers,* CV-06-6252; and *Metropolitan Property & Causality v. Allen*, CV-06-6358; all cases in which the defendants believes demonstrates a particular bias the court has against Mr. Whelan.

Rather than determine the legal sufficiency of the motion for disqualification, the court simply withheld judgment and adjured "to take a closer look." On June 27, 2007, the court published a rather detailed written decision in which the court simply refutes each and every fact or charge. *A truly impartial court should be truly impartial as to its role as the trier of fact.* The fact that the court put so much energy into refuting the charges and defending itself is a clear indicator that the court is no longer impartial. *It clearly demonstrates that the court has a stake in the proceedings that it wishes to defend.*

The appellants also offer the fact that the attorney for both plaintiffs, Susan Weeks, is a partner of Leander James, a personal friend of the court as well as the current president of the Idaho Trial Lawyers Association; facts which the court affirms[92] even while denying the appellants motions for disqualification.

On October 31, 2007, a hearing was held in the present case. Capstar moved for a motion to shorten time and application of a sixth access. At hearing, many issues were raised by John

Whelan, specifically with regards to the motion including the lack of a supporting affidavit, failure to cite a rule, the lack of a bond posting, and in particular, the lack of a preliminary injunction order.[93] Mr. Whelan argued that there was no preliminary injunction outstanding. That the preliminary injunction was superseded by a permanent injunction when the court granted summary judgment and which also resulted in the bond being exonerated back to the plaintiff. Later, when the Idaho Supreme Court vacated the district courts summary judgment and remanded the case back, the permanent injunction was overturned because the order creating the judgment was overturned. *At no time* did Mr. Whelan say that the Supreme Court overturned the Preliminary Injunction. Prior to making a ruling, the court recessed to review the language of the Supreme Court opinion and upon its return, the court accused Mr. Whelan for not being truthful to the court[94] in making a claim that the preliminary injunction was reversed. The court totally misconstrued what Mr. Whelan presented and was in err in accusing Mr. Whelan of not being truthful to the court. The court's response to Mr. Whelan illustrates that the court just didn't disagree with Mr. Whelan's argument. The court has taken direct issue with Mr. Whelan's credibility and his truthfulness. It can be argued that this action on the part of the court is indicative of an underlying current of animosity and/or contempt either against the appellants or Mr. Whelan.

The appellants also raise for consideration the trial court's misinterpretation of the earlier Idaho Supreme Courts opinion regarding the Halls access rights across the Lawrence parcel in *Tower Asset Sub, Inc. v. Lawrence,* CV03-4621. In Tower, the trial court rendered judgment in

favor of Tower based on the argument that the Idaho Supreme Court had established the fact that Hall, Tower's landlord, has easement rights across Blossom Mountain Road. Suffice it to say, this is one reason why the appellants question the courts impartiality and have come to the conclusion that the court is just a tool of these corporations.

Later in this brief, the Lawrences are asking the Idaho Supreme Court to review the trial court's acceptance and review of evidence. More specifically, the court's *whole-hearted* acceptance of the plaintiffs affidavits in their entirety over the defendant's objections and the striking of whole paragraphs from the defendants affidavits. Furthermore, the courts written decision is fundamentally silent of the evidence submitted by the defendants. The court doesn't even attempt to reconcile the contradictory facts offered by Capstar's own witnesses, Harold Funk and John Rook. Rather, the court remains silent as if the evidence doesn't exist. The Lawrences put in a significant cost and effort in taking Mr. Funk's testimony to resolve questions raised by Mr. Funk's affidavit and to get Mr. Funk's recollection of events. However, Mr. Funk's deposition testimony does not provide much to support Capstar's causes of action and the court is relatively silent on the facts established by the deposition. Rather, the court predominantly cites the 2004 affidavit of Harold Funk in its decision in favor of the plaintiff. The same is true in regard to the John Rook deposition. While Mr. Rook's deposition has less to add, still in the final decision, the court doesn't even mention the Rook deposition.

The appellants were sued by both Tower and Capstar over *each and every* easement theory available and over the course of these proceedings, the trial court had determined that

both Tower (or Tower's landlord) and Capstar had express easements, implied easements by prior use, easements by necessity, and prescriptive easements across the appellants land. How is this possible? If one has an easement by necessity or implied by prior use that is established at conveyance, then how does one's use of a property ripen into prescription too? And, how is it possible for one's use of their own property ripen into a prescriptive use?

Much of the court's analysis regarding the various easement theories don't make any sense at all. The court continues to find, among other things, that the Funk did reserve for themselves an easement across the now Lawrence parcel. *"Funks actually did take great care to reserve an easement across the parcel he sold to Human Synergistics in 1975; however, they errantly put that language in the sales agreement. That is why there is no express easement."* [95] This statement certainly fails to reflect the true opinion of the Idaho Supreme Court.

The trial court also argues that the appellants assertions *(in Tower)* that Tower lacks standing to pursue easement theories of implication or necessity is without merit. Evidently, the court did not read the earlier Idaho Supreme Court decision on Tower as the appellants were only restating the ruling made by the Idaho Supreme Court. If the trial court is not going to honor the decisions and directives of the Idaho Supreme Court on remand, then the Lawrences cannot possibly receive a fair and just trial.

The appellants have correctly raised issues where the court impartiality might reasonably be questioned and the court should have disqualified itself from these cases. The trial court abused its discretion by refusing to disqualify itself for cause.

VII. The trial court abused its discretion by conducting an independent investigation into the defendant's motion for disqualification.

The commentary to Canon 3 of the Idaho Code of Judicial Conduct states: *"A judge must not independently investigate facts in a case and must consider only the evidence presented."*

Mr. Whelan set before the court, facts involving six cases where the court's impartiality might reasonably be questioned in this case: *Yovichin v. Bush*, *Sauls v. Luchi*, *Straub v. Smith*, *Capstar v. Lawrence*, *Tower Asset Sub Inc. v. Lawrence*, and *Krivor v. Rogers*. The facts surrounding the *Yovichin v. Bush*, CV01 2116, raises questions surrounding Judge Mitchell's voluntary disqualification then, and whether the reasons he voluntarily disqualified himself from that case, still exist today.

In the court's June 25, 2007 decision, the court speculates that a more likely reason the court voluntarily disqualified itself in *Yovichin*, may have dealt with the facts surrounding the *Matter of the Estate of Dianne Rothe*, Kootenai County Case No. SP 675. The court acknowledges that it reviewed the court file in that case.[96]

The Matter of the Estate of Dianne Rothe was not part of the appellant's briefing, testimony, or oral argument. There was no evidence before the court relating to the Estate of Dianne Rothe. Rather, the court conducted an independent investigation of the motion before the court, produced findings regarding that investigation, and rendered those findings in support of the courts decision to deny appellants motion.

In the appellants renewed motion for disqualification (heard August 6, 2007), the appellants argued that it was improper for the court to conduct an independent investigation into any issue pertaining to any pending litigation. The court did not write on the issue. Neither did the court provide any authority relating to the issue of the court's investigation into the Rothe case. In concluding remarks, the court offers that it has not researched the easement issue; suggesting that the disqualification issue isn't relevant to the pending litigation or encompassed by the Idaho Code of Judicial Conduct.

VIII. The trail court erred in determining there was no merit to the appellants defense of latches and statute of limitations.

On September 10, 2007, the appellants amended their answer to include the additional defenses of latches and statue of limitation. Capstar's complaint makes no reference to its predecessor's interest. Yet, Capstar seemingly alleges that its predecessors in interest acquired rights to use the Lawrence parcel and that those rights somehow inure to to the benefit of Capstar. Yet, Capstar has offered no evidence on the subject. If Capstar's predecessors had any rights to use the road, those claims are now stale and barred by the statue of limitations.

Whether or not a party is guilty of latches is ordinarily a question of fact. *Osterloh v. State of Idaho*, 100 Idaho 702, 604 P.2d 716. It is beyond question that the Lawrences have been prejudiced by the alleged stale claims which Capstar now seeks to enforce. If Capstar's predecessors truly enjoyed easements by implication, necessity, and/or prescriptive use, those claims by Capstar's predecessor should have been perfected through litigation, especially where

they relate to implied easements and easements by necessity. The failure to pursue claims by plaintiff's predecessor has clearly prejudiced the ability of the Lawrences (and Lawrence's predecessors) to defend against the claims. In the present action, the Lawrence parcel was created in 1975, some 34 years ago. Claims of implied easement and easement by necessity should have been perfected years ago.

IX. The trial court abused its discretion by admitting Plaintiff's affidavits in their entirety over defendant's objections while striking whole paragraphs from the defendant's affidavits.

The courts rulings on admissible portions of affidavits appears to be inconsistent and biased in favor of the plaintiff. On August 7, 2007, the court heard several motions to strike portions of affidavits submitted by both Capstar and Lawrence. The Lawrences sought to strike objectionable portions of the affidavits of Susan Weeks, Harold Funk, John Rook, and Robert Hall and Capstar sought to strike portions of Lawrence's July 24, 2007 affidavit.

Lawrence's motion to strike identified nine items in the Funk affidavit, eight items in the Rook affidavit, eight items in the Hall affidavit, and ten items in the Weeks affidavit. The motion itself specified the objectionable items and stated the grounds for each objection.

At hearing, each and every objection the Lawrences raised to the affidavits of Funk, Rook, Hall, and Weeks were summarily rejected by the court and the affidavits were admitted by the court in their entirety.

This is in stark contrast to the July 24, 2007 affidavit of Douglas Lawrence in which whole paragraphs were deemed inadmissible. Rather than point to or identify the objectionable

portions of the paragraph, the plaintiff just moved the court to strike entire paragraphs as being inadmissible. Those include paragraphs 8, 23, 24, 49, 51, 52, 54, 61, 67, 68, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87. Other paragraphs in which *the relevant* portions of the paragraph were stricken include: 9, 11, 18, 19, 20, 44, 57, 58, and 59. The Lawrences also submitted additional affidavits which the trail court appears to have either summarily rejected or summarily ignored.

CONCLUSION

This complaint has now entered its seventh year in the courts and words cannot describe the humiliation, frustration, anger, and disappointment the Lawrences feel as the district court legitimizes the theft of their property and judicial rights. The Lawrences bought the property on Blossom Mountain with the dream, the hope, and the expectation of building a home and raising their young children in the country. Capstar (and Tower) have completely robbed the Lawrences of this dream as the children are now grown and the dream can never be realized. Rather than building the dream, the defendants have had to use their time, savings, earnings, and energy fighting the greed of big wall street corporations who only want to bully the little guy into submission. The Lawrences now indulge the Idaho Supreme Court to make a final disposition of this complaint by dismissing all of Capstar's claims and awarding attorney fees to the Lawrences. We also ask for an award of all fees, penalties, damages, sanctions, and fines that the Idaho Supreme Court deems to be just, equitable, and within the law and jurisdiction of the Idaho Supreme Court to grant, which may include:

Sanctions be assessed against Capstar for pursuing the motion for application of sixth access frivolously and an award of $60,000 in fines, penalties, and damages for the Lawrences being wrongfully enjoined and restrained.

Since Capstar's tenant, Great Northern Broadcasting, broke their access license agreement with the Lawrences, the Lawrences believe that Capstar is responsible for their lost revenues from this access license agreement. The Lawrence's estimate their lost revenue to be $120,492.32 in principle and interest.

The Lawrences are also asking for trespass damages in the amount $33.33/day for every day since the filing of this litigation on November 7, 2002. This amount represents an amount that is equal to the license fee agreed to by Great Northern Broadcasting.

Lastly, an award equal to the total compensation package of the CEO of Capstar since November 2002, or $5,500,000, whichever is largest, for actual and punitive damages sustained by the Lawrences in defending this frivolous complaint. Capstar should be made to realize that big corporations have moral and ethical boundaries. And, there are significant consequences for stepping over those boundaries.

Respectfully submitted,

Douglas P. Lawrence Dated: 3/5/09

Brenda J. Lawrence Dated: 3/5/09

CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of March, 2009, I caused to be served two (2) true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
Attorneys at Law
1626 Lincoln Way
Coeur d'Alene, Idaho 83814

Via: X US Mail, postage prepaid

_____ Facsmile: (208) 664-1684

_____ Personally served

Douglas P. Lawrence

[1] Appellants never received clarification as to what effect consolidating would have on their jury trail.

[2] Nextel Access License Agreement (R Vol. 2 p. 247-254). *Nextel and its successor in interest in the Access License Agreement are currently in breach of the terms of the license agreement.*

[3] Great Northern Broadcasting, Inc. Access License Agreement (R Vol. 2 p. 263-268). *Great Northern Broadcasting is currently in breach of the terms of the Access License Agreement.*

[4] The Lawrences have been sued by North American Cellular (later AT&T), Kootenai Electric, and Verizon previously over this road and all were settled prior to going to trial. See Affidavit of Douglas Lawrence. (R Vol. 3 p. 442 ¶ 3)

[5] Radens/Marcoes to Funk Real Estate Contract, Exhibit B, 17 August 2004, Affidavit of Susan Weeks in Support for Motion for Summary Judgment.

[6] Attached to Funk's deposition (herein referred to as FD) as Exhibits 1 and 2 (R Vol. 2, p. 388-389) are photocopies of the relevant portion of a Metsker Map dated March 1959. Exhibit 1 has the Funk Estate highlighted with a yellow highlighter. Exhibit 2 has the Funk Estate denoted with a pen-line drawn around the boundary of the parcel. During Mr. Funk's deposition, Mr. Funk was presented with Exhibit 1 and validates the highlighted area as correctly denoting the properties they purchased (FD 11:21-12:3 R. Vol. 2, p. 359 and FD 23:18-24:4 R Vol. 2, p. 362). For clarification, the highlight in Exhibit 1 and the pen-line in Exhibit 2, encompasses the SE ¼ of Section 21, the SW ¼ of Section 22, the SW ¼ of the NW ¼ of Section 22, Govt. Lot 4 in Section 22, and Govt. Lot 3 of Section 15 which abuts

Govt. Lot 4 to the north.

[7] See endnotes 5 & 6.

[8] See endnotes 5 & 6.

[9] See endnotes 5 & 6.

[10] Radens/Marcoes to Funk Warranty Deed, Exhibit C, 17 August 2004, Affidavit of Susan Weeks in Support for Motion for Summary Judgment.

[11] FD 11:25-12:7 (R Vol. 2 p. 359)

[12] FD 12:8-12:17 (R Vol. 2 p. 359)

[13] See prior endnote.

[14] Court's Finding (R Vol. 3 p. 575 L. 20-21) "This isn't the type of property of which one would expect daily use. The property is on top of a mountain."

[15] At issue in the instant action is whether or not Mellick Road provided access to the Funk's land. Mellick Road was made a county (public) road by action of the Board of County Commissioners for Kootenai County on or about October 8, 1907. See Viewers Report and Plat of Survey, Book 288 Page 586, records of Kootenai County (R Vol. 2, p. 174-187). The survey of Mellick Road was performed by the County Surveyor, W.H. Edelblute and completed Aug. 19, 1907 (R Vol. 2, p.181) The Plat of Survey (R Vol. 2, p.183) clearly establishes Mellick Road as extending into and through the SW ¼ of Section 15 and more particularly, through the SW ¼ of the SW ¼ (Government Lot 3) of said Section 15. On April 13, 1987, District Judge Gary M. Haman, in ruling on a motion for summary judgment in Loudin v. Stokes, Case No. 65077 (R Vol. 2, p.192, L.18-25) issues the following:

"IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Mellick Road, as described in the Survey of Mellick Road, and Branch of Mellick Road; Survey and Notes by Col. W. H. Edelblute, April 1910, notes recorded in Book 288 of Deeds, Page 568, Instrument No. 765281, records of Kootenai County, is, and it is hereby declared to have at all times been a public road in general..."

In reading the court's decision for summary judgment *Id. 191*, the court based its decision on the affidavit of James P. Meckel, a professional engineer, who used data obtained from the original 1910 centerline survey and a computer to generate a scale drawing of what the dedicated Mellick Road should look like, then compared that to an aerial photograph of the actual roadway, after which he opinioned with "reasonable engineering certainty" that the Mellick Road as surveyed by Edelblute is identical with the existing road on the Loudin property. (R Vol. 2, p. 189 L.10-17). On June 28, 2007, Bruce Anderson, the Kootenai County Surveyor, in affidavit, provides his opinion, that Mellick Road did extend into the land owned by the Funks and would have provided them with a legal ingress and egress (R Vol.2 p.194-196). All the above testimony is consistent with and collaborates the relevant portions of the March 1959 Metsker Map (Exhibits 1 and 2, Funk Deposition) illustrating Mellick Road as it extends into Funks land. At deposition, Funk identifies the road as a logging road FD 58:1-14 (R Vol.2, p. 371) and establishes that the road passes through Government Lot 3 FD 59:7-9 (R. Vol. 2, p. 371). Funk also establishes that the road was there when he purchased the property FD 15:24-16:4 (R Vol.2, p. 360) and that it was in fact a road FD 15:11-17 (R Vol. 2 p. 360).

[16] Commonly known as Blossom Mountain Road and sometimes referred to as the GTC or GTE road. See FD 14:4-14:5 (R Vol. 2 p.360) This private easement road was in use at the time by

the General Telephone Company to access their one acre parcel laying in the Southwest Quarter of Section 22. The record includes a deed where in a predecessor in interest of the Funks granted an easement over the portion of Blossom Mountain traversing the Lawrence property to the General Telephone Company of the Northwest. That deed, dated October 16, 1996, benefited the property owned by General Telephone in the Southwest Quarter of Section 22, but not the Capstar Property. (*Capstar v. Lawrence*, 143 Idaho 704, 152 P.3d 581 (2007))

[17] Funk to Human Synergistics Sale Agreement, Exhibit E, 17 August 2004, Affidavit of Susan Weeks in Support for Motion for Summary Judgment.

[18] Funk to Human Synergistics Warranty Deed, Exhibit I, 17 August 2004, Affidavit of Susan Weeks in Support for Motion for Summary Judgment.

[19] FD 25:11-18 (R Vol. 2 p. 363)

[20] FD 50:13-51:7 & 51:19-25 (R Vol. 2 p. 369) & FD 56:8-57:5 (R Vol. 2 p. 370-371) together with Exhibit 2, Id. 389.

[21] See prior endnote.

[22] FD 25:11-25:23 (R Vol. 2 p. 363)

[23] See prior endnote.

[24] Court's Finding. (R Vol. 3 p. 556 L. 19-23) together with FD Exhibit 2 (R Vol. 2 p. 389)

[25] See prior endnote. While this portion of Blossom Mountain Road has never been surveyed, it is undisputed that Blossom Mountain Road crosses the Northeast Quarter of Section 28 prior to entering the Southeast Quarter of Section 21.

[26] See endnote 24.

[27] See September 10, 2007 Affidavit of Douglas Lawrence in support of Opposition to Renewed Motion for Summary Judgment, Exhibit 1, Image #1 (R Vol. 3 p. 450) at place-mark #13. A photograph of this division is attached as photo #13, *Id.* 464.

[28] FD 58:1-59:10 (R Vol. 2 p. 371) together with Exhibit 2, Id. 389. September 10, 2007 Affidavit of Douglas Lawrence in support of Opposition to Renewed Motion for Summary Judgment, ¶ 16 (R Vol. 3 p. 445) The areas depicted in the photographs labeled 1A through 22 are identified by the place-marks in Images 1 through 8 and clearly illustrate travel from Mellick Road all the way to Signal Point Road. In 1975, this portion of the road appears to have been overgrown FD 15:8-23 (R Vol. 2 p. 360) and Funk just chose not to use it. FD 16:2-9 (R Vol. 2 p. 360). Funk was going to open up the road, but never did. FD 58:11-59:2 (R Vol. 2 p. 371)

[29] See September 10, 2007 Affidavit of Douglas Lawrence in support of Opposition to Renewed Motion for Summary Judgment, Exhibit 1, Image #1 (R Vol. 3 p. 450) road ending at place-mark labeled Nextel Site.

[30] See endnote #25. In regards to the Northeast Quarter of Section 28, see FD 55:3-55:5 (R Vol. 2 p. 370). Plaintiff has shown no unity of title in regard to the Southwest Quarter of Section 21, therefore the inference would be correct.

[31] FD 18:10-19:14 (R Vol. 2 p. 361)

[32] Affidavit of Wilber Mead (R Vol. 2 p. 273 ¶ 3)

[33] FD 18:1-19:8 (R Vol. 2 p. 361) See prior endnote.

[34] FD 26:2-27:25 (R Vol. 2 p. 363)

[35] Affidavit of Wilber Mead (R Vol. 2 p. 273 ¶ 3)

[36] Affidavit of Wilber Mead (R Vol. 2 p. 273 ¶4)

[37] Affidavit of Wilber Mead (R Vol. 2 p. 273 ¶5)

[38] FD 52:16-52:18 (R Vol. 2 p. 369)

[39] FD 54:1-54:13 (R Vol. 2 p. 370)

[40] FD 56:17-23 (R Vol. 2 p. 370)

[41] FD 55:6-57:12 (R Vol. 2 p. 370) together with exhibit 2 (R Vol. 2 p.389)

[42] Capstar has not produced any evidence that they have such rights. If the Funks had access rights, the Johnstons and McHughs would not have to acquire an easement from Idaho Forest Industries.

[43] See endnote #42.

[44] See Exhibits F, H, G, and I to Affidavit of Susan Weeks filed March 9, 2004.

[45] As recorded as Instrument No. 773361 (R Vol. 2 p. 439) Exhibit C to Affidavit of John P. Whelan in Support of Defendant's Opposition to Plaintiff's Renewed Motion for Summary Judgment and in Support of Defendants' Motion for Leave to Amend Answer.

[46] FD 29:21 (R Vol. 2 p. 364)

[47] FD 29:22-29:24 (R Vol. 2 p. 364)

[48] FD 30:2-30:15 (R Vol. 2 p. 364)

[49] FD 31:8-31:17 (R Vol. 2 p. 364)

[50] February 6, 2008, Memorandum Decision and Order Granting Plaintiffs Motion for Summary Judgment, and Order Granting Plaintiffs Motion to Substitute Real Party in Interest (R Vol. 3 p. 557-558)

[51] *Id.* 558-559

[52] FD 42:8-16 (R Vol. 2 p. 367) Rook Deposition (herein referred to as RD) 8:19-19:10 (R Vol. 2 p. 402) It is unclear whether or not John Rook was acting on behalf of Idaho Broadcasting or Kootenai Broadcasting.

[53] RD 17:16 (R Vol. 2 p. 404)

[54] RD 22:17-21 (R Vol. 2 p. 406)

[55] RD 23:11-21 (R Vol. 2 p. 406)

[56] RD 25:24-26:24 (R Vol. 2 p. 406-407)

[57] RD 26:2 (R Vol. 2 p. 407)

[58] RD 28:10-17 (R Vol. 2 p. 407)

[59] RD 53:5-19 (R Vol. 2 p. 413)

[60] RD 53:20-21 & RD 54:6-22 (R Vol. 2 p. 413-414)

[61] RD 51:10-52:6 (R Vol. 2 p. 413)

[62] RD 72:6-18 (R Vol. 2 p. 418)

[63] Funks never visited his property after 1981 (See Endnote #49) Rook took title in Oct. 1989.

[64] RD 52:12-53:3 (R Vol. 2 p. 413)

[65] FD 42:17-22 (R Vol. 2 p. 367)

[66] RD 16:10-20 (R Vol. 2 p.404)

[67] RD 47:20-48:9 (R Vol. 2 p. 412)

[68] RD 56:9-11 (R Vol. 2 p. 414)

[69] RD 55:12-56:17 and 58:11-59:4 and (R Vol. 2 p. 414, 415)

[70] RD 56:6-8 (R Vol. 2 p. 414)

[71] RD 56:4 (R Vol. 2 p. 414)

[72] RD 59:25-60:1 (R Vol. 2 p. 415)

[73] Court's finding (R Vol. 3 p. 559 ¶ 3)

[74] Court's finding (R Vol. 3 p. 559 ¶ 4)

[75] Affidavit of Wilber Mead (R Vol. 2 p.273 ¶ 3)

[76] See Plaintiff's Response to Defendant's Request for Admissions #83 (R Vol. 2 p. 258)

[77] July 24, 2007 Affidavit of Douglas Lawrence in support of Opposition to Summary Judgment, Exhibit Q, Access License Agreement (R Vol. 2 p. 263-268)

[78] See Plaintiff's Response to Defendant's Request for Admissions #150 (R Vol. 1 p. 261)

[79] July 24, 2007 Affidavit of Douglas Lawrence ¶ 56 (R Vol. 2 p. 161)

[80] See prior endnote.

[81] See Plaintiff's Response to Defendant's Request for Admissions #85 (R Vol. 1 p. 258)

[82] RD 21:18 (R Vol. 2 p. 405) Rook calls AGM a scavenger company and later claims that AGM is essentially operated by Clear Channel.

[83] RD 20:20-24 (R Vol. 2 p. 405)

[84] The portion of Blossom Mountain Road laying in the Southwest Quarter of Section 21 as granted by the Mead Easement.

[85] FD 55:6-57:12 (R Vol. 2 p. 370) together with exhibit 2 (R Vol. 2 p.389)

[86] TR p. 121 L. 7-12

[87] Defendants had less than 3 days notice on the motion and did not have time to file a response brief. However, the defendants position was clearly articulated at hearing. See TR p. 123 L. 12 – 125 L. 6

[88] R Vol. 2 p. 356-399

[89] R Vol. 2 p. 400-430

[90] Nextel assigned the Access License Agreement to Capstar (R Vol. 3 p. 573 L. 25) and that Funks used the property for the six years from the time Funk sold to Human Synergistics till he left the area. (R Vol. 3 p. 575 last ¶)

[91] Commentary to Cannon 3

[92] R Vol. 1 p.078 L. 5

[93] TR 123:2-125:6

[94] TR p. 129 L. 23-25

[95] R Vol. 3 p. 569 L. 11-13

[96] R Vol. 1 p. 072 L. 12-16