5-20-2009

Capstar Radio Operating Co. v. Lawrence Respondent's Brief Dckt. 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	SUPREME COURT NO. 35120 RESPONDENT'S BRIEF

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai

Honorable John T. Mitchell, District Judge presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

Capstar Radio Operating Company ("Capstar") is the owner of a parcel of property located in the Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. Defendants Doug and Brenda Lawrence, husband and wife ("Lawrence"), are the owners of a parcel of property located in the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. At the time Lawrence acquired their parcel, there existed an unimproved road over, through and across the Lawrence parcel (R p. 011, paragraph V; R p. 021, paragraph 5.) Capstar filed a complaint November 7, 2002 seeking ingress and egress to their property under four alternative theories: express easement; implied easement; prescriptive easement; and/or an easement by necessity, and seeking an order of the trial court enjoining Lawrence from interfering with Capstar's or its tenant's right of use of the unimproved road for access to its parcel.

B. Course of the Proceedings

This matter has previously been on appeal before this Court in *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 709, 152 P.3d 575, 580 (2007) ("*Capstar I*") seeking reversal of the district court's grant of summary judgment finding an express easement across Lawrence's property. This court vacated the summary judgment and remanded the matter back to the district court for further proceedings. A remittitur was filed March 30, 2007.

Following remand, on May 14, 2007, Capstar renewed its summary judgment motion on its remaining easement theories. Supp R Vol. I, pp. 7-8.[1] On May 31, 2007, Lawrence filed for a motion for an enlargement of time to August 15, 2007 to respond to the motion for summary judgment because Lawrence required additional time to conduct discovery in response to the motion for summary judgment. Supp R Vol I, pp. 023-025.

On June 6, 2007, Lawrence's counsel filed a motion to disqualify the district court judge for cause and an application for an order shortening time to have the matter heard on the same date scheduled for the summary judgment hearing. Supp R Vol. I, p. 049-54. Capstar did not object to the request to shorten time and the court heard the motion to disqualify for cause on June 13, 2007. Because the motion to disqualify divested the trial court of jurisdiction to hear other motions, the motion for summary judgment did not proceed as scheduled. Supp Tr p. 4, p. 5. On June 25, 2007, the trial court issued a written decision denying the motion for disqualification for cause. Supp R Vol I, pp. 066-091. Amotion to reconsider was filed July 9, 2007, as well as motion for permission to appeal. Supp R Vol. I, p. 92-93. An order denying this motion was entered august 7, 2007. Supp R Vol. II, p 338-339.

On July 24, 2007, Lawrence filed another motion for enlargement of time to November 1, 2007 to respond to Capstar's motion for summary judgment, again indicating additional time was required to conduct discovery. Supp R Vol. I, pp. 127-129. The motion was heard August

[1] The Clerk's Record on Appeal in Docket No. 35120 was ordered prepared as a supplemental record. Although not designated as a supplemental record by the clerk, to avoid confusion with the Clerk's Record in Docket 32090, the record following remand and prepared for Docket No. 35120 will be referred to a Supp R in this brief.

7, 2007. The trial court granted the motion for enlargement of time and continued the summary judgment hearing.

On November 27, 2007, the trial court again heard Lawrence's renewed motion to appeal the trial court's denial of Lawrence's motion for an interlocutory appeal of the denial of the motion to disqualify the trial judge for cause. Supp Tr p. 133. The summary judgment was heard November 28, 2007. The trial court denied the motion to proceed with an interlocutory appeal on November 30, 2007. Supp R Vol. III, pp. 548-552.

On December 17, 2007, Lawrence filed a "Motion for Permissive Appeal" with this Court. The motion was denied by this Court January 17, 2008. Supp R Vol. II, p. 343-344; Vol. II, pp 553-554..

The District Court issued its Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment on February 6, 2008. This appeal followed.

C. Statement of Facts

In their statement of the facts, Lawrence discussed a conditional use permit granted to Nextel Communications. This conditional use permit is unrelated to Capstar or its parcel of property. Capstar submits that the relevant facts to the issues on appeal are those set forth hereafter.

In 1968, Pike and Agnes Reynolds sold Edward and Colleen Raden and Harold and Viola Marcoe several parcels of property, including the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho and the adjacent Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian,

located in Kootenai County, Idaho except for a one acre parcel which had previously been conveyed to General Telephone Company ("GTC"), subject to easements granted to GTC over and across the Southwest Quarter of Section 22 and the Southeast Quarter of Section 21. Appeal Exhibit Weeks Affidavit, exhibit "A".

In 1969, Harold and Marlene Funk ("Funk") entered into a purchase agreement with Edward and Colleen Raden and Harold and Viola Marcoe which included a sale of the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho (hereafter "Section 21") and the adjacent Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho except for the one acre parcel which had previously been conveyed to General Telephone Company in 1966 (hereafter "Section 22") and subject to the GTC access easement. Appeal Exhibit Weeks Affidavit, exhibit "B"; R p. 035. A subsequent 1974 warranty deed from Raden Raden and Marcoe to Funk conveyed the Section 21 and Section 22 property subject to easements of record. Appeal Exhibit Weeks Affidavit, exhibit "C". At the times Funks purchased the property in 1969, the GTC easement road was the only existing road providing access to the Funk's real property. R. p. 036.

When Pike and Agnes Reynolds granted GTC its parcel in 1966 in Section 22, they included in the deed an easement over and across the Southwest Quarter of Section 22 and the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho. Appeal Exhibit Weeks Affidavit, exhibits "V" and "FF" (Exhibit A to Wenker Affidavit). GTC also obtained an easement from Glen and Ethel Blossom, husband and wife

,over the Southwest Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho. Appeal Exhibit Weeks Affidavit, exhibits "V" and "FF" (Exhibit B to Wenker Affidavit). GTC also obtained an easement for ingress and egress to its parcel across the North Half of the Northeast Quarter of Section 28. Appeal Exhibit Weeks Affidavit, exhibit "X". Thus, GTC had recorded easements over the entire easement road to its parcel.

In 1972, Funk purchased an easement from Wilbur Mead to cross his property in the Southwest Quarter of Section 21. R Vol. II, pp. 367-368 (Tr p. 43, Ll. 22-25; p. 44; p. 45, p. 46, Ll.); Appeal Exhibit Lawrence Affidavit, exhibit "F" . There was a gate on Mead's property. The gate was locked. In 1992, GTE sent Funk a new key to the gate on the Mead property. R Vol. II, p. 363, Ll. 9-25).

In 1975, Funk segregated and sold the Lawrence parcel to Human Synergistics, Inc. a Minnesota corporation. The sale was evidenced by a recorded Sale Agreement. This agreement indicated that the sale was subject to and including ingress egress easement over this and adjoining property in said sections 23 and 22 owned by Funk. Appeal Exhibit Weeks Affidavit, exhibit "E". In 1977, a Memorandum of Contract was recorded evidencing the sale of the Lawrence parcel to Don and Fern Johnston, husband and wife, and John and Mary Ann McHugh, husband and wife. Appeal Exhibit Weeks Affidavit, exhibit "F". In 1987, a Memorandum of Sale Agreement was recorded evidencing the sale of the Lawrence parcel to National Associated Properties, Inc. Appeal Exhibit Weeks Affidavit, exhibit "G". In June 1996, National Associated Properties, Inc. conveyed the Lawrence parcel to Arman and Mary Jane Farmanian, husband and wife. Appeal Exhibit Weeks Affidavit, exhibits J and K. A

Memorandum of Sale Agreement between Arman and Mary Jane Farmanian and Lawrence was recorded October 1, 1996. Appeal Exhibit Weeks Affidavit, exhibit "L". A warranty deed for this transfer was recorded August 27, 1998. Appeal Exhibit Weeks Affidavit, exhibit "P".

Doug Lawrence provided a depiction of the access road in a deposition taken in litigation with Verizon Northwest (GTC's successor in interest) which he testified further defined the easement that was granted to GTC in 1966, and was apparently a portrayal of the road prepared in 1967 by GTC as a detail of the access road to its parcel. Appeal Exhibit Weeks Affidavit, exhibit "Y" and Exhibit 15 attached to Exhibit "Y". Exhibit 15 portrayed the GTC road as commencing at a county road and passing in northeasterly direction through Section 21, then taking a sharp turn southeasterly into Section 28, then changing direction to the northeast again and entering Section 21 again for a short distance and continuing generally in a northeasterly direction through Section 22 to its terminus at a tower site. A recorded survey of a portion of the access as it existed over and across Section 28 and the Southeast Quarter of Section 21 was placed in the record which was consistent with the depiction of the GTC easement road offered by Lawrence in his deposition. Appeal Exhibit Weeks Affidavit, exhibit "Z". This road was depicted by GTC's successor in interest, Verizon Northwest, Inc., on a U.S. Geological Survey Map as commencing at the public road (identified on the U.S. Geological Survey map as "Ski Lodge Road") and traversing across the Southwest Quarter of Section 21, then traversing over and across into the East Half of the Northeast Quarter of Section 28; then passing through the Lawrence parcel; and terminating in the Southwest Quarter of Section 22 at an area identified on the U.S. Geological Survey map as "Radio

Tower" on Blossom Mountain. Appeal Exhibit Weeks Affidavit, exhibit "FF" (Exhibit C to Wenker Affidavit). This depiction was very similar to Lawrence's depiction of the road in course, direction and configuration of the road, and the sections over and across which it passed.

In 1989, Funk segregated and sold the Capstar parcel to Kootenai Broadcasting, Inc ("KBI"). John Rook was the president of KBI. Appeal Exhibit Weeks Affidavit, exhibits "Q" and "R", R p. 027. In October 1993, as part of a bankruptcy proceeding, a quit claim deed conveyed KBI's interest to Rook Broadcasting of Idaho, Inc. Appeal Exhibit Weeks Affidavit, exhibit "S". In November 1998, Rook Broadcasting conveyed the property to AGM-Nevada, L.L.C. Appeal Exhibit Weeks Affidavit, exhibit "T". In November 2000, AGM-Nevada, L.L.C. conveyed the property to Capstar. Appeal Exhibit Weeks Affidavit, exhibit "U".

In 1992, Funk sold his remaining Section 22 property to John Mack. Appeal Exhibit Weeks Affidavit, exhibit "II".

Arman and Mary Jane Farmanian executed the Memorandum of Sale Agreement with Lawrence on October 1, 1996. On September 20, 1996, immediately prior to signing the Lawrence sale agreement, Arman and Mary Jane Farmanian entered into a mutual agreement, grant of easement and quit claim deed with John Mack concerning their respective parcels. This agreement recited in relevant part that "AND WHEREAS, MACK and MACK'S predecessors in interest have used a preexisting private road traversing the most southeasterly portion of the FARMANIAN PROPERTY to gain access to the MACK PROPERTY. This private road is sometimes known as Blossom Mountain Road (hereinafter referred to as the

"ACCESS ROAD"). For illustrative purposes only, the approximate location of the ACCESS ROAD is depicted as a double dashed line on the Exhibit B, attached hereto and incorporated herein by reference. Exhibit A is an enlargement of the United States Geological Survey topographical map of the subject area." This agreement referred to the access road as the historic location of the access road in more than one location. Appeal Exhibit Weeks Affidavit, exhibit "EE". The attached exhibit "B" to the Farmanian/Mack agreement deed depicted the road using a similar U.S. Geological Survey map that Wynn Wenker (Verizon Northwest) utilized to portray the GTC road as it existed in the Southeast Quarter of Section 21 across the Lawrence parcel and into Section 22 to the radio tower site. Appeal Exhibit Weeks Affidavit, Exhibit "F" (exhibit C to Wenker Affidavit). Thus, Farmanian and Mack recognized the GTC easement road as the historical access road being used by Funk and his successor, Mack.

Harold Funk testified in his 2004 affidavit that when he purchased the property, the easement road that was used to access the property was the same road over which GTC had a recorded access easement. R p. 034-047. Consistent with his affidavit, Mr. Funk testified in his deposition in August 2007 that the access road he used when first looking at the property was the GTE (General Telephone and Electric) access road. R Vol. II, p. 36 (Tr p. 18, Ll. 10-13). There was one gate on the road. R Vol. II, p. 361 (Tr p. 18, Ll. 25; p. 19, Ll. 1-11). Mr. Funk and the realtor drove to the GTE facility using the access road. R Vol. II, p. 361 (Tr p. 19, Ll. 15-25; p. 20, Ll. 1-8.) When Mr. Funk passed over the property he didn't own he thought he a right to do so based upon the Mead easement he obtained. Supp R Vol. II, p. 370 (Tr p. 53, L.2 5; p. 54). In the six year period before selling the Lawrence parcel, Funk went to

the property 20-30 times himself to target practice and pick huckleberries. Supp R Vol. II, p. 363 (Tr. p. 25, Ll. 11-25; p. 26, Ll. 1-5). Funk bought the property for investment purposes. Supp R Vol. II, p. 359 (Tr p. 12, Ll. 15-17).

When Funk visited the property, he used the GTE road and went to the GTE tower site. R Vol. II, p. 370 (Tr. p. 53, Ll. 1-24). Mr. Funk considered opening a road to the east, but someone told him he couldn't do it. R Vol. II, p. 371 (Tr. p. 58, Ll. 11-25; p. 59, Ll. 1-2).

John Rook, the president of Kootenai Broadcasting, Inc ("KBI"), testified in his 2004 affidavit that KBI purchased the Capstar parcel from Funk to operate a wireless radio tower. Mr. Rook indicated that further east of the parcel were other tower parcels, including GTC. Rook testified that when KBI purchased the property, it used the same easement road that connected from the public road, Signal Point Road (identified on the map as "Ski Lodge Road"), to the GTC parcel. R pp. 026-033.

In his deposition taken August 2007, Mr. Rook indicated that he wanted to purchase a site at the top of Blossom Mountain to upgrade a radio station identified as KCDA. Supp R Vol. II, p. 402 (Tr p. 9, ll. 11-24). Mr. Rook testified the purchase was in 1988 or 1989. Supp R Vol. II, p. 403 (Tr p. 10, Ll. 19-25; p. 11, Ll. 1-22). When Mr. Rook looked at the property, there was only one road to the top of Blossom Mountain, which was being used by GTE to acces its parcel. Supp R Vol. II, p. 404 (Tr p. 15, Ll. 18-23; p. 16, L. 25; p. 17, Ll. 1-21). Mr. Rook recollected that there was one chain link gate on the road and another gate position approximately one-half mile away, in the proximity of a sturdy fence, where a gate had once been in place. Supp R Vol. II, p. 406 (Tr p. 22, Ll. 17-25; p. 23, Ll. 1-9; p. 24, Ll. 15-17).

There were no signs on the access road identifying it. Mr. Rook referred to this road as the "main road" and the GTE site was at the end of the access road. Supp R Vol. II, p. 412 (Tr p. 48, Ll. 19-25; p. 49, Ll. -1-19). Travelers on the road were monitored by Wilbur Mead. Supp R Vol. II, p. 406 (Tr p. 25, Ll. 24-25; p. 26; p. 27, Ll. 1-4). Although Mr. Rook could not identify the sections through which the road passed, he confirmed that Exhibit C to his affidavit looked like the configuration of the road as he recalled it. Supp R Vol. II, p. 417 (Tr p. 67, Ll. 17-25; p. 68, Ll. 1-13) p. 418 (Tr p. 70, Ll. 13-25).

In Mr. Rook's deposition, Lawrence's counsel suggested there was another entry into the GTE site which was Mellick Road. In response, Mr. Rook rejected this proposition, noting that he had once heard there was a goat's trail that was unbelievably steep coming up the Post Falls side of the mountain that couldn't provide access even in good weather. He never knew of any other road even though he looked around for other access roads to the site because the access road they were using was terribly bumpy. Supp R Vol. II, p. 413 (Tr p. 50, Ll. 12-25; p. 51-52; p. 53, Ll. 1-8;) p. 415 (Tr p. 60, Ll. 7-23). GTE took KCDA's engineer up on their Snow Cat using the same GTC access road during major snow storms. Supp R Vol. II p. 414 (Tr p. 54, Ll. 9-22).

During the ten years that KCDA used the road, they regularly bumped into other people from the neighboring tower sites on the road and no one ever mentioned an alternative access. Supp R Vol. II, p. 416 (Tr p. 62, Ll. 26-25; p 63, Ll. 1-18). Mr. Rook indicated that he had recently been to Spokane and looked up the side of Blossom Mountain, and there were now

roads on the mountain, but they were not there during his ownership of the Capstar parcel. Supp R Vol. II, p. 50 (Tr . 50, Ll. 12-25; p. 51, Ll. 1-5).

KCDA received approval in 1991 or 1992 to broadcast from the Capstar parcel. Supp R Vol. II, p. 409 (Tr p. 35, Ll. 7-11). There was an engineer who went up to the site at least every two to three weeks to do maintenance and sometimes every week. Supp R Vol. II, p. 408 (Tr p. 32, Ll. 4-17; p. 38, Ll. 23-25; p. 39, Ll. 1-2). KCDA continued to broadcast until Mr. Rook (Rook Broadcasting) sold the tower in 1998 or 1998. Supp R Vol. II, p. 410 (Tr p. 41, Ll. 10-22). Mr. Rook testified that the companies that he owned (KBI and Rook Broadcasting) used the GTC road for the ten years they owned KCDA. Supp R Vol. II, p. 416 (Tr p. 62, Ll. 11-25). Mr. Rook also leased tower space to Trinity Broadcasting the last five to seven years that his company owned the tower site. Supp R Vol. II, p. 416 (Tr p. 63, Ll. 19-25; p. 65, Ll. 4-8; Ll. 18-23). KCDA operated concurrently with Trinity Broadcasting. Supp R Vol. II, p. 416 (Tr p. 65, Ll. 18-23).

Mr. Rook also testified that during the years he owned the tower, "we used to pass people all the time on that road, somebody coming in or going out, they were working on this or that." Supp R Vol. II, p. 418 (Tr p. 72, Ll. 18-20). Mr. Rook testified that they would pass someone else on the road "fairly frequently", some of whom were with GTE . Supp R Vol. II, p. 418 (Tr p. 73, Ll. 24-25) p. 419 (Tr p. 74, Ll. 1-16).

On the north face of Blossom Mountain (which is south of Post Falls, Idaho), there is a public road known as Mellick Road which was laid out by Viewer's Report in 1907. Appeal Exhibit Lawrence Affidavit, exhibit C. This road as laid out terminated in the Northeast

Quarter of Section 21. The Mellick Road right of way is within the jurisdiction of Post Falls Highway District and been maintained for a short distance into Section 15. Brownsberger Affidavit (augmented on appeal).

On March 24, 2004, John Mack prepared an affidavit in this matter which was submitted as an exhibit to Lawrence's affidavit in opposition to the original motion for summary judgment in 2004. Appeal Exhibit Lawrence Affidavit, exhibit "L". Mr. Mack testified that in 1992 he purchased property in Section 22 from Funk. Mr. Mack testified that at the time he purchased the property, he inquired about access and the realtor told him he knew the way. Mr. Mack testified in the Spring of 1994, he was stopped by Idaho Forest Industries ("IFI") and informed he did not have legal access across Section 28, and IFI demanded he cease traveling across Section 28. Mr. Mack testified his Section 22 property was landlocked as a result of this circumstance because there was no other access road to the Section 22 property. Mr. Mack indicated that as late as 1996, he was attempting to obtain easements to access the Funk property. Mr. Mack testified that in 2002, he purchased property from Fred Zuber in the East half of the Northwest ¼ of Section 22 (property never owned by Funk) to develop an access to the north of the Section 22 property.

II. ARGUMENT

A. Standard of Review

The Court of Appeal recently reiterated the standard of review in a case to be tried to the court. In *Johnson v. McPhee,* ___ Idaho ___, ___ P.3d ___ (Ct. App. 2009), the court stated:

> On review of an order granting summary judgment, this court uses the same legal standard as that used by the trial court. *Friel v. Boise City House. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Washington Fed. Sav. & Loan Ass'n v. Lash*, 121 Idaho 128, 130, 823 P.2d 162, 164 (1992). Summary judgment may be entered only if "the pleadings, deposition, 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 Rule of Civil Procedure 56(c). *See also Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995). When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party may not rest upon the mere allegations or denials of that party's pleadings, but by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). *See also Gardner v. Evans*, 110 Idaho 925, 929, 719 P.2d 1185, 1189 (1986). In order to survive a motion for summary judgment the plaintiff need not prove that an issue will be decided in its favor at trial; rather, it must simply show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969).
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> When a court considers a motion for summary judgment in a case that would be tried to a jury, all facts are to be liberally construed, and all reasonable inferences must be drawn in favor of the party resisting the motion. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). The rule is different however when, as here, a jury trial has not been requested. In that event, because the court would be the fact-finder at trial, on a summary judgment motion the court is entitled to draw the most probable inferences from the undisputed evidence properly before it, and may grant the summary judgment despite the possibility of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); *Intermountain*

Forest Mgmt., Inc. v. Louisiana Pacific Corp., 136 Idaho 233, 235, 31 P.3d 921, 923 (2001); *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). Inferences thus drawn by a trial court will not be disturbed on appeal if the record reasonably supports them. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004); *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 236, 31 P.3d at 924.

B. The District Court did not Err in Finding there was an Implied Easement

In *Akers v. D.L. White Const., Inc.,* 142 Idaho 293, 127 P.3d 196 (2005), this Court held:

> A party seeking to establish an implied easement from prior use "must demonstrate three essential elements: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate." *Davis*, 133 Idaho at 642, 991 P.2d at 367.

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). Easements by implication rest on the view that land should not be rendered unfit for use due to a lack of access. *Id.*

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. In *Davis v. Peacock,* 133 Idaho 637, 641-42, 991 P.2d 362, 366-67 (1999), this Court held that successors in interest to the original grantors of property could assert easement rights by implied or prior use.

Strict necessity is not required for the creation of an implied easement by prior use. All that is required is reasonable necessity. *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999); *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392 (2006). Reasonable necessity is something less than the great present necessity required for an easement implied by necessity. *Davis,* 133 Idaho at 642. Furthermore, the easement by implication is not extinguished if the easement no longer exists or is no longer reasonably necessary. *Id.* at 643. This Court noted in *Davis*:

> This long standing rule is based on the theory that when someone conveys property, they also intend to convey whatever is required for the beneficial use and enjoyment of that property, and intends to retain all that is required for the use and enjoyment of the land retained. Consequently, an easement implied by prior use is a true easement of a permanent duration, rather than a temporary easement which exists only as long as the necessity continues. *See, e.g., Norken v. McGahan,* 823 P.2d 622, 631 (Alaska 1991); *Thompson v. Schuh,* 286 Or. 201, 593 P.2d 1138, 1145 (1979); *Story v. Hefner,* 540 P.2d 562, 566 (Okla.1975). Additionally, an implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the dominant and servient estates. *See Hughes v. State,* 80 Idaho 286, 328 P.2d 397 (1958); I.C. § 55-603 (stating that a transfer of real property also includes all easements attached to the property).

1) Unity of Title

Lawrence contends that the GTC road passed through Section 28, and since Funk never had title to Section 28, Capstar can not establish the unity of title necessary for an implied easement. Capstar does not seek to establish in this suit an implied easement over Section 28. This argument is not relevant to the issues before the trial court.

Lawrence also contends the district court erred in finding that Capstar had an implied easement because Capstar's parcel was still a part of Funk's Section 22 parcel at the time of separation of the Lawrence parcel. However, a transfer of real property includes all easements appurtenant, including implied easements. *Davis v. Peacock*, 133 Idaho 637, 643, 991 P.2d 362 (1999), I.C. § 55-603. Thus, the trial court did not err when it held Cpastar had an implied easement arising from the 1975 severance.

2) Apparent Continuous Use

Lawrence contends on appeal that the trial court erred when it found that the facts presented at summary judgment established apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent. Lawrence argues on appeal that Funks deposition testimony established that Funk only used a portion of Blossom Mountain Road to access land owned by Funk lying in the Southwest Quarter of the Southeast Quarter of Section 21.

In actuality, Funk's affidavit and deposition testimony were clear that Funk used the existing GTC road to access his property in Section 22 and that he drove to GTE's tower site in Section 22 when he used the road to access his property, including passing through Section 28

to get to the top of Blossom Mountain. R Vol. II, p. 369 (Tr p 52); p. 370 (Tr p. 53). However, there was a discrepancy at Mr. Funk's deposition regarding the location of Blossom Mountain as compared to the map exhibits being provided Mr. Funk during his deposition. Mr. Funk indicated to Lawrence's counsel that the map he was being shown (Exhibit 1) was different than his recollection of the road and it wasn't drawn right, and that the mountain (Blossom Mountain) was "up here" and had the tower site. Lawrence's counsel response to this concern about the top of the mountain being "up here" was, "Yeah, you owned some land in 22, sure. Yeah, okay." Supp R Vol. II, p. 368 (Tr p. 45, Ll. 7-25; p. 46, Ll. 1-14). Later, Lawrence's counsel presented an enlarged portion of the map that Mr. Funk had indicated was not drawn right. In asking questions about the road, Lawrence's counsel prefaced his statements with a representation that Blossom Mountain was in Section 21. Supp R Vol. II, p. 369 (Tr p. 49, Ll. 18-15, p. 50, Ll. 1-4). Nonetheless, Mr. Funk's deposition testimony was clear and consistent that he used the GTC road to drive to GTE's tower site to access his property in Section 22.

This matter was to be tried to the trial court. As such, the trial court was allowed to draw probable inferences from the undisputed facts before it. Lawrence submits that the trial court erred in drawing the probable inference that Mr. Funk used the GTC road to access his Section 22 property. The undisputed fact before the trial court was that Mr. Funk used the GTC road and traveled it to its terminus at GTE's tower site on several occasions to access his property in Section 22. The probable inference given Mr. Funk's comments at deposition regarding the inaccuracy of the maps and adoption of two different maps as accurately depicting the road he used, in combination with his unwaivering testimony that he used the

GTC road to travel to the GTE site was he used the GTC road for access to his property in Section 22. Thus, the trial court's ruling that there was continuous use prior to separation was supported by substantial evidence, including the probable inference the trial court drew from the evidence provided by Mr. Funk.

Finally, Lawrence argues the trial court committed error because it did not find the probable inference draw an inference in their favor from the evidence presented that Funk's use was hardly enough for anyone to notice. In support of this claim, Lawrence directs this Court to a statement from Wilbur Mead that to his knowledge, Funk did not use the gate on the road as it crossed his property in the Southwest Quarter of Section 21 between 1966 and 1972. Additionally, Lawrence argues Funk sold to a Minnesota corporation that would hardly have knowledge of Funk's use. Lawrence also contends that the fact that after the sale to Human Synergistics, Funk relocated to Aberdeen and didn't use the road after 1981 is significant.

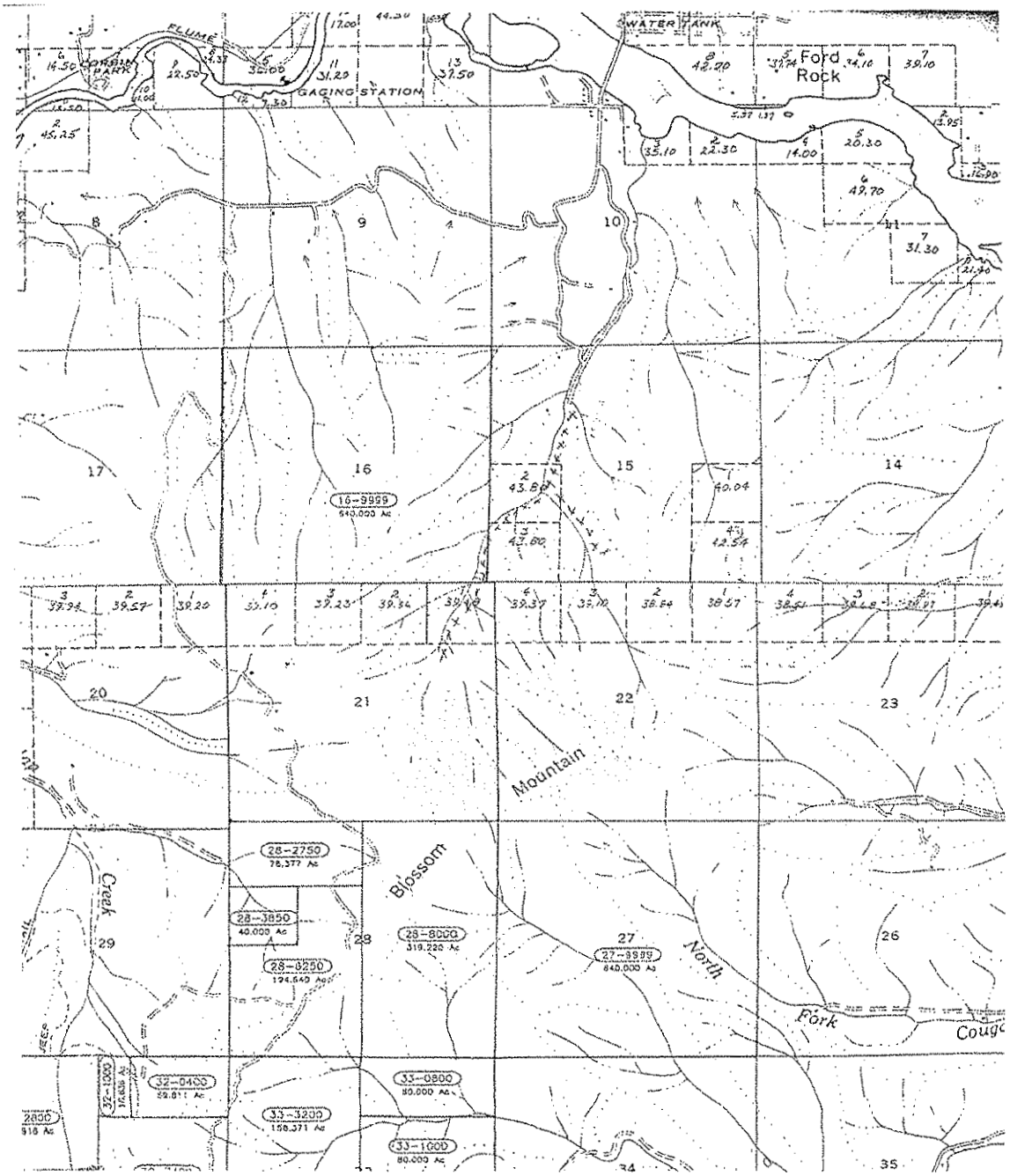
The events that occurred after the sale to Human Synergistic were immaterial to the trial court's inquiry regarding the use of the access prior to the severance. The only fact that was relevant was Mr. Mead's statement that *to his knowledge* Funk did not use the gate on his property. However, this fact does not directly contradict Funk's testimony that he did use it. It was merely a scintilla of evidence that neither contradicted nor directly disputed Funk's testimony. Thus, the trial court did not err in finding that the undisputed facts it had before, including Funk's testimony; the Farmanian grant of easement to Mack in 1996 recognizing the access road as the historical access to the site; the Human Synergistics Sales Agreement (Lawrence's predecessor) which indicated that the existing ingress/egress road was the access

to the Section 22 property retained by Funk; and the use of the road which was consistent with the use and location of the property, established apparent continuous use. Supp R Vol. III, pp. 561-565.

3) Reasonable Necessity

Lawrence argues that the district court erred in finding there was reasonable necessity for the easement at the time of severance of their parcel. Lawrence maintains that the undisputed facts in the record demonstrate that Mellick Road extended to the Funk property in Section 15. In footnote 15, Lawrence contends that Funk identified a logging road from Section 22 to Mellick Road in Section 15. Thus, Lawrence concludes that there was access to the Section 22 property at the time Funk purchase Section 22 by connecting the logging road from Section 22 into Section 15.

The following is an illustrative depiction of the properties in question utilizing a Kootenai County public road map from the Brownsberger affidavit.. The properties Funks originally acquired are highlighted in yellow. The red x's on the map illustrate the approximate location of Mellick Road (along the creek) as laid out by the Viewer's Report for Mellick Road.



In his deposition, Mr. Funk testified that there was a logging road in poor shape on the east side of Blossom Mountain. Contrary to the claims of Lawrence to the contrary, the facts

in the record show that the logging road was not open all the way to Mellick Road at the time Funk purchased Section 22, and crossed property not owned by Funk. Supp R Vol. II, p. **371** (Tr 61, Ll. 8-25; p. 62; p. 63, Ll. 1-15). The Exhibit provided Mr. Funk during his deposition portrayed a road going through the Southwest Quarter of Section 22, into the Northwest Quarter of Section of 22, and crossing over into the Northeast Quarter of Section 21 (in areas not encompassed in the Viewer's Report of the Mellick Road public right of way) and back into Section 15. Therefore, the portion of the road depicted in Exhibit 1 to Funk's deposition laying in the Southeast Quarter of the Northeast Quarter of Section 21 was not on property owned by Funk. Mr. Funk further testified that this road was in poor shape. Supp R Vol. II, p. 360 (Tr p. 15, Ll. 6-25; p. 16, Ll. 1-6). Mr. Funk testified contemplated taking a bulldozer and opening up the logging road but did not pursue this idea because another property owner told him he couldn't do that. Supp R Vol. II, p. 371 (Tr p. 58, Ll. 11-25; p. 59, Ll. 1-6).

Further, the trial court's finding that Mellick Road did not provide access in 1975 was corroborated by John Mack's testimony (provided by Lawrence) that there was no alternate access road existing at the time of his purchase of the Funk Section property in 1992. The trial court did not err when it found from these undisputed facts that the use of the access road was reasonably necessary at the time Funk severed the Lawrence parcel.

Mr. Funk testified the GTC road was the only road that provided access to Section 22. Mellick Road as laid out on the Viewer's report terminated in the Northeast Quarter of the Northeast Quarter (approximately) of Section 21. Thus, the undisputed facts before the trial court were that Mellick Road did not provide access to Funk's Section 22 property at the time

he purchased; nor did the logging road provide access, nor did Funk have the right to extend the logging road to connect to the public right of way across property he did not own. To reach the conclusion Lawrences urge, Funk would had to have bulldozed the road to open it; crossed property that wasn't owned by Funk and over which Funk had been told he better not do it.

Lawrence included an argument on appeal that Funk never showed the Capstar parcel to Mr. Rook in 1981and that Mr. Rook could not identify whose land the road crossed. These arguments are irrelevant to the issue of reasonable necessity at the time of severance of the Lawrence parcel in 1975.

Further, the trial court's finding that Mellick Road did not provide access in 1975 was supported by John Mack's testimony that there was no alternate access existing at the time of his purchase of the Funk Section property in 1992. The trial court did not err when it found from these undisputed facts that use of the access road was reasonably necessary at the time Funk severed the Lawrence parcel.

C. The Trial Court did not err in Finding an Easement by Necessity

An easement by necessity has some similar elements to an easement by prior use. The Court in *B&J Development & Inv., Inc. v. Parsons*, 126 Idaho 504, 887 P.2d 49 (Ct.App. 1994) noted:

> To establish an easement by necessity, the claimant must prove the following elements: (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. *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct.App. 1987) (emphasis added). An easement by necessity is a creature of public policy. *Bob Daniels & Sons v.*

Weaver, 106 Idaho 535, 543, 681 P.2d 1010,1018 (CtApp. 1984). Therefore, the easement does not depend on an express mutual agreement. Rather, it arises, and will be recognized, when the three required elements have been established. Establishment of an easement by necessity is not defeated by a contrary expectation harbored by one of the parties. *MacCaskill*, 112 Idaho at 1119, 739 P.2d at 418. It is a question of law. An owner of property, however, cannot create the necessity by his or her own actions. *Cardwell v. Smith*, 105 Idaho 71, 80, 665 P.2d 1081, 1090 (Ct.App. 1983).

Lawrence argues the trial court erred in determining that there was an easement by necessity. Lawrence concludes Funk argues because Funk did not have a recorded easement across Section 28 that they had no legal access to the county road, and therefore the trial court could not grant an easement by necessity.

In *Hughes v. Fisher,* 142 Idaho 474, 129 P.3d 1223, 1231-1232 (2006) it was stated:

> This Court has quoted with approval the following analysis of the theory behind easements by necessity:
>
> A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation.... It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. *Burley Brick and Sand Co. v. Cofer, 102 Idaho 333, 335, 629 P.2d 1166, 1168 (1981) (quoting 17A Am.Jur. Easements § 58 (1957)); see 25 Am.Jur.2d Easements and Licenses §§ 30-31 (2005).*
>
> One who claims an easement by necessity across another's land must prove "(1) unity of title and subsequent separation of the dominant and servient estates; (2) necessity of the easement at the time of severance; and (3) great present necessity for the easement." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 725, 874 P.2d 528, 536 (1994).

The fact that there is a third party (the Section 28 owner) between Capstar and the public highway is of no significance to Capstar's right to seek an easement by necessity.

Lawrence also contends that Funk created his own necessity by failing to recognize, develop and utilize Mellick Road during the time he owned Section 22 prior to transferring it to Capstar's predecessor. This argument is the same argument Lawrence made regarding the reasonable necessity element for an easement by implication. Again, there was no evidence in the record that Mellick Road provided access to Funk's Section 22 parcel or that Funk had a right to open a road across property he did not own. Thus, the necessity for the easement claimed over the Lawrence parcel existed at the time of the severance.

As to great present necessity, Lawrence does not contend that there is a material dispute of fact regarding this element, or that the trial court drew an improbable inference. Rather, they argue that the trial court erred as a matter of law in failing to recognize that Capstar created its own necessity for an easement through the actions of its predecessor. Lawrence claims that Funk chose not to develop an access route down to Mellick Road (across property he did not own) that Capstar can't claim a great present necessity. This is yet another argument that the necessity did not exist at the time of severance. It does not present this Court with any facts that there is not great present necessity for the road. In fact, Lawrence presented the trial court evidence to the contrary in Mr. Mack's affidavit. That affidavit acknowledged when he purchased in 1996 there was no access, and to obtain access to Mellick road, he had to purchase it and develop it through a neighboring property in Section 22. Capstar has no legal right to travel over Mack's private road. Thus, it has great present necessity for the easement.

D. The Trial Court did not Err in Determining there was an Easement by Prescription

The standards for establishment of a prescriptive easement were reiterated in *Akers, supra* at 206, as follows:

> A party seeking to establish the existence of an easement by prescription "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." *Hodgins*, 139 Idaho at 229, 76 P.3d at 973. The statutory period in question is five years. I.C. § 5-203; Weaver, 134 Idaho at 698, 8 P.3d at 1241. A claimant may rely on his own use, or he "may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use." *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. *Wood v. Hoglund*, 131 Idaho 700, 702-03, 963 P.2d 383, 385-86 (1998); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. *Wood*, 131 Idaho at 703, 963 P.2d at 386; *Marshall*, 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if "it runs contrary to the servient owner's claims to the property." *Hodgins*, 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use. Id. at 231-32, 76 P.3d at 975-76.

Lawrence correctly notes that the trial court made an error in its ruling regarding the prescriptive period as applied to Funk. The trial court correctly noted that in looking at the prescriptive period it was required to examine the six year period following Funk's sale of the Lawrence parcel to Human Synergistics. Funk owned the entire parcel for a six year period from 1969 to 1975. After selling the Lawrence parcel, he personally used the road from 1975

to 1981, another six year period. The trial court discussed the six year prescriptive period as being from 1969 to 1975. It is clear the trial court became confused regarding the years encompassed in the six year prescriptive use period. The evidence in the record before the trial court was that after moving to Aberdeen in 1975, Funk only visited the property two or three times and stopped visiting after 1981 or 1982 when he was diagnosed with cancer.

However, this defect in the Court's analysis regarding the time period of Funk's use does not invalidate the trial court's finding that there was a prescriptive easement established over the property. The trial court held the undisputed facts established that Funk's successors used the road openly, continuously, without interruption, under a claim of right much longer than the statutory period required. Supp R Vol. III, p. 576.

Lawrence argued to the trial court that the undisputed facts established that Capstar's use of the access road was based upon permission they granted. Supp R Vol. III, p. 571. Relying on *Akers v. D. L. White, supra,* the trial court also correctly held that the only period of time for which Lawrence could give permission was the period of time during their ownership, which commenced in 1996. The Court rejected this argument, noting that Lawrence submitted an affidavit that since taking title to the land, he maintained a locked gate on his property, stopped and turned back people whom he deemed could not demonstrate a legal right to use the road, and actively attempted to engage the sheriff office to get their support in limiting use of the road. Supp R Vol. III, p. 572.[2] Lawrence argues that the trial court erred as a matter of law in finding that Funk and its successors use of the road was not permissive. Lawrence raises two

[2] The affidavit referenced by the trial court is in the record at Supp R Vol. I, pp. 146-293.

theories in support of this contention. Lawrence contends the trial court should have determined that the use was permissive based upon the fact that there was common use with the owner of the servient estate and based upon the fact that Lawrence's parcel was wild, unenclosed or unimproved. Lawrence did not raise the wild, unenclosed or unimproved theory below, and should not be allowed to raise it on appeal. Further, Lawrence cites to no facts in the record to support this contention.

Lawrence argues on appeal that the trial court erred by failing to rule it was entitled to a presumption that Capstar's use was permissive based upon public use. In support of this argument, Lawrence cites to *Marshall v. Blair,* 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). The *Marshall* court held that when the origin of use of an easement is unknown, there is a presumption of adverse use. The servient estate can rebut this presumption by presenting evidence of general public use.

The origin of the use of this easement is known. It commenced on purchase of the Funk property and continued after severance. Even if Lawrence were correct, the trial court held that the undisputed facts established Funk's use was not permissive. The trial court correctly noted that after Funk sold the property to Human Synergistics in 1975, he recorded the sales agreement which contained the clause that the parcel was subject to an ingress/egress easement for the benefit of Section 22. Even though this language did not reserve an express easement, it evidenced a claim of right for Funk and their successors to use the road for ingress and egress to Section 22, and was recorded in the real property records. The trial court concluded that this

document established that the use of the easement by Funk and his successors was under a claim of right.

Even if these facts allowed rebuttal of the of the evidence, the record is devoid of any facts presented by Lawrence that the easement is used by the general public. To the contrary, Mr. Lawrence's affidavit testimony was that he locked the gate on the road on his property and did not allow the public to use it. It was also undisputed that the access road was gated and locked as it crossed Wilbur Mead's property and keys were given to Funk and Rook to use the road. These undisputed facts show the road was not used by the general public.

Lawrence asserts that the trial court committed error when it did not draw an inference of permissive use from the fact that Wilbur Mead's gate in the Southwest Quarter of Section 21 was locked and keys were provided to Funk and Rook. Funk had an easement across Mead's property. Mead did not impede this right, even though he used a gate and lock to impede others from using the access road. A legal right is not a permissive right. The trial court did not err when it did not draw an inference that a legal right was a permissive right.

Lawrence cite to *Hughes v. Fisher*, 124 Idaho 474, 129 P.3d 1223 (2006) for the proposition that there is no prescriptive use in the present case. In *Hughes v. Fisher*, the court reiterated the general rule that the regular crossing of another's property was presumed to be adverse with the exception where a landowner constructed a way over the land for his own use and convenience, the mere use of it by others that doesn't interfere with his use will be presumed permissive.

In this case, there is no evidence that Lawrence or his predecessor constructed the road. In the present case, there is evidence that the road existed at least around 1967 when GTE prepared a road profile of it. It certainly existed when Funk started using it, and it existed when Rook started using it. Thus, the trial court had no basis to presume that the use by Funks and others has been permissive. Lawrence did not present evidence in support of its laches claim sufficient to prevent entry of summary judgment.

E. The Trial Court did not Err in Rejecting Defendants' Laches and Statute of Limitation Claims

Defendant argues on appeal that Capstar was required in its complaint to allege that it would be relying upon easement rights established by its predecessors in interest in order to proceed with its suit. Lawrence presents no case law or argument why this statement supports a claim of laches. Further, as pointed out by the trial court, Capstar's complaint did allege Capstar and its predecessors in title had used Blossom Mountain Road as it crossed the Defendants' real property for access to Capstar's real properly openly, notoriously, continuously, adversely and under claim of right for a period exceeding five (5) years. Supp R Vol. III, p. 578.

Lawrence also challenges the trial court's finding that there was no evidence in the record that the doctrine of laches should not apply. On appeal, Lawrence claims they were prejudiced because the severance occurred nearly 33 years ago without any further explanation or argument. This argument was not presented to the trial court. Further, the facts on appeal show that Lawrence had an opportunity to depose both Funk and Rook. It is difficult to

ascertain the prejudice Lawrence claims to have suffered. Further, Lawrence acknowledges in its brief on appeal that the catalyst for the present suit occurred when Lawrence began blocking the road. Thus, Capstar had no need to defend its legal rights until Lawrence blocked its use of the access road.

Although contained in its caption, Lawrence did not present argument on the statute of limitation defense. This Court has consistently indicated it will not consider assignments of error not supported by argument and authority in the opening brief. *Jorgenson v. Coppedge,* ___ Idaho ___, 181 P.3d 450 (2008).

F. The Trial Court did not Err in Striking Portions of Lawrence's Affidavits

Lawrence contends the trial court erred in striking portions of their affidavits while leaving intact those affidavits submitted by Capstar. This allegation is not correct. The trial court did strike portions of Capstar's affidavit. Supp R Vol. III, p. 349-351.

Despite this general complaint regarding the amount of material submitted and stricken, Lawrence presents no case law or argument why the trial court abused its discretion. Again, this Court should not consider this issue on appeal absent being presented argument and legal authority.

G. The Trial Court did not Commit Error in Granting a Sixth Access to its Parcel

Pursuant to a previously entered order, the trial court entered an order allowing Capstar a sixth access to its parcel. In a preliminary injunction order entered at the outset of this case in 2002, the trial court granted Capstar four accesses to its property, and required all future

accesses be approved through application to the court. On October 29, 2007, Capstar filed an application for a sixth access pursuant to the Court's previously entered order.

Lawrence claims it was error for the court to allow the sixth access pursuant to the previously entered order. Without any cite to law, Lawrence argues that because a permanent injunction was entered at the conclusions of the first summary judgment on express easement, it nullified the preliminary injunction order. There simply is no case aw presented in support of this argument.

Lawrence claims the court should have required a bond. In *Miller v. Board of Trustees,* 132 Idaho 244, 247-48, 970 P.2d 512, 515-16 (1998), this Court held that a bond is required unless the trial court makes a specific finding based upon competent evidence that no such costs, damages or attorney fees will result to the restrained party as a result of a wrongful issuing of the injunction or restraining order. The trial court made such an order based upon the facts of the case. Supp Tr pp. 153, L. 25; 154-155; 156, L. 1-23.

H. The Trial Court Properly Considered and Ruled Upon Lawrence's Motion to Disqualify for Cause

Lawrence devotes a large portion of his brief to the argument that the district judge should have disqualified himself. Lawrence claims the trial court's impari8tality could reasonably be questioned.

In support of this argument, Lawrence claims that over the course of the litigation, they perceive the judge disregarded meritorious arguments made by them. They also cite to the fact

that the judge disqualified himself without cause in a former case involving their legal counsel at the time (John Whelan).

Lawrence also argues that the fact that the court took the motion under advisement and then issued a written opinion was a clear indicator that the court was no longer impartial and had a stake in the proceedings.

Lawrence also takes umbrage with rulings with which it disagrees in this case and the case with Tower Asset. Lawrence claims that rulings favorable to Capstar demonstrate that the district judge is "just a tool of these corporations."

Finally, Lawrence claims that the evidentiary rulings made on motions to strike display the district judge's prejudice against them. However, as noted above, Lawrence cite to no evidentiary rule of case in support of the claim that the trial court committed error in striking portions of their submitted affidavits. On summary judgment, a trial court is only allowed to consider admissible evidence. *Posey v. Ford Motor Credit Co.*, 111 P.3d 162 (Idaho Ct.App. 2005).

The trial court issued a thorough opinion that enunciated its reasons for denying Lawrence's motion for disqualification for cause. Supp R Vol. II, p. 66-91. This memorandum sets forth the reasons the trial court refused the motion and clearly addresses the concerns raised by Lawrence on appeal. Lawrence has raised nothing on appeal that was not addressed in the trial court's decision except for the evidentiary rulings. Further, the evidentiary rulings made by the trial court were supported by the rules of evidence.

III. ATTORNEY FEES ON APPEAL

Lawrence requests attorney fees on appeal because they perceive Capstar to be part of a large corporate conglomerate. This request does not comport with I.A.R. 41. Lawrence does state that Capstar was not justified in pursuing summary judgment. To the extent that this could be deemed a claim for attorney fees pursuant to I.C. 12-121, Capstar has not pursued tits defense of this appeal frivolously.

IV. CONCLUSION

SUBMITTED this 5th day of May, 2009.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

SUSAN P. WEEKS
Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Douglas and Brenda Lawrence
4925 N. Webster Street
Coeur d'Alene, ID 83815

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)

Susan A. Weeks