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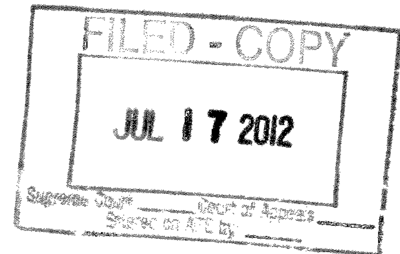
IN THE SUPREME COURT OF THE STATE OF IDAHO

GUIDO ARMAND, et al, Plaintiffs/Appellants, vs. OPPORTUNITY MANAGEMENT CO. INC., et al, Defendants/Respondents.	Supreme Court Docket No. 39445-2011



REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai
the Honorable Lansing Haynes Presiding

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I. STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, and Concise Statement of the Facts

The Nature of the Case, Course of the Proceedings, and Statements of Facts from the standpoint of each party are adequately set forth from each party's perspective in the Parties' respective briefs, and, as such, will not be re-iterated herein in the interest of brevity. Furthermore, Appellants herein will only directly address certain major issues discussed by the Respondents in their Brief, and will refer to, and incorporate by reference as though fully set forth herein, Appellants' Opening Brief with regard to the remainder of their argument.

However, Appellants would like to call this Court's attention to Respondents' representations that the Option Forfeiture (Exhibit W) was *recorded* in May of 1984. *See* Respondents' Brief at 3, 30, 33. In fact, although the document was *executed* on May 10, 1984, it was not *recorded* until ***June 15***, 1984. This fact is material, as the transfer of one of the parcels within BBTI to Appellants' predecessor in interest took place on May 25, 1984 (Exhibit 11.7), prior to the impartation of constructive notice of the Forfeiture to the parties to the latter transfer.[1]

II. ARGUMENT

A. The Law of the Case Doctrine.

Initially, Respondents argue that the Law of the Case Doctrine does not apply to this Court's prior determination that Appellants "have a valid interest in the areas that are expressly designated as common areas on the BBT plat." *Armand v. Opportunity Management*, 141 Idaho

1 This is particularly concerning, given that, in the appeal that led to the *Armand I* decision, the signatures on the BBTI Plat Map provided by Respondents were not visible when, in fact, the map *did* contain the signatures.

709, 714; 117 P.3d 123, 128 (2005) (*Armand I*); Respondent's Brief, 8–11. Astonishingly, Respondents, throughout their brief, attempt to resurrect the issue of the applicability of the validity of BBTI under Idaho Code § 50-1309 despite this Court's *legal* conclusion that 50-1309 was *inapplicable* to the instant case: "The plat in this case does not contain any public streets or rights-of-way and thus, it is difficult to see how this statute pertains here . . . . While Opportunity would like to have the BBT plat declared void so that the BBTII plat would take its place, *there is no support for that in § 50-1309.*" *Armand I,* 41 Idaho at 714; 117 P.3d at 128 (emphasis added). *See* Respondents' Brief at 12, 16–18. As will be discussed below, to accept Respondent's proposed interpretation and application of the Law of the Case Doctrine would, essentially, render the Doctrine meaningless in the State of Idaho.

The crux of Respondent's argument is that this Court's ruling with regard to the expressly labelled Common Areas was not necessary to the decision or issue presented. Respondent's Brief at 8. The elements of the Law of the Case Doctrine in Idaho are most clearly laid out in *Hall v. Blackman*, 9 Idaho 555, 75 P. 608 (1904): When (1) the "question was directly raised upon [the first] appeal;" (2) "was squarely before the court" and (3) "its determination was essential to a determination of that appeal," then "whatever the opinion of the court might be at [the time of second appeal] as to the correctness of the conclusions there reached, or the soundness of any legal principle there announced, its judgment cannot now be invoked to disturb such questions as have become a final adjudication in the case." *Id.* at 609. Furthermore, "under the 'law of the case' principle, on a second or subsequent appeal the courts generally will not consider errors which arose prior to the first appeal and which might have been raised as issues in the earlier

appeal." *Bouten Const. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 762, 992 P.2d 751, 757 (1999). The Headnote to *Hall* perhaps sums up the Law of the Case Doctrine most succinctly: "the appellate court is bound by its decision on a prior appeal in the same cause, whether right or wrong." *Hall*, 75 P. at 608.

In this case, Appellants' interest in the expressly labelled common areas meets all of the requirements of the Law of the Case Doctrine as set forth in the authorities above: The basis of the District Court's initial determination that the BBTI Plat was not valid was based upon the applicability of Idaho Code § 50-1309. Respondents chose not to raise the issue of title to the Section 7 lands when they moved for Summary Judgment prior to *Armand I*. Whatever their reasons for choosing to put all of their "eggs" in the § 50-1309 "basket," it was Respondent's decision not to raise the issue when they had a clear opportunity to do so. As such, in light of this Court's determination that § 50-1309 did not apply, a correct application of *Smylie v. Pearsall*, 93 Idaho 188, 457 P.2d 427 (1969) dictated that Appellant's received an interest therein. *Smylie* held that "[w]hen an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished. This dedication is irrevocable except by statutory process. The original owner is estopped to deny the dedication of public areas indicated on the plat." *Id.* at 191, 457 P.2d at 430. And that common areas delineated on the plat become a "part of the deeds" and become "appurtenances to the lots." *Id.* at 192, 457 P.2d at 431.

The Idaho authorities cited by Respondents merely re-state the rule that the issue must be necessary to the determination of the prior appeal in order to comprise the Law of the Case, or

provide specific examples of its application. The decision in *Beymer v. Monarch,* 23 Idaho 292, 129 P. 919 (1913) does not *require* that the matter be re-tried before the Law of the Case Doctrine takes effect; rather, *Beymer* simply held that, following re-trial, the issues on appeal were, essentially, identical to those raised in the initial appeal, and that. pursuant to the law of the case doctrine, their conclusions remained the same. *Id.* While other jurisdictions may take a less rigid view of the Law of the Case Doctrine, this Court, for well over a century, has chosen to be rather strict in its application. Judicial economy and sound policy certainly justify a strict application of the Doctrine – given the ever-changing nature of modern case law; lessened reliance on the doctrine of *stare decisis* in modern jurisprudence; as well as the possibility of changes in Appellate Court personnel during the course of complex cases such as the instant case, to allow trial courts on remand, or Appellate Courts on subsequent appeal, to re-visit matters raised and decided in prior appeals would result in endless litigation, appeals *ad nauseum*, and delays in the final resolution of cases of Dickensian proportions. In other words, the scope of litigation and consideration should narrow, rather than broaden, throughout the course of litigation, repeal, and remand. To the extent that Respondents argue that the initial appeal involved a "limited and undeveloped factual record," it was *Respondents* who had sought Summary Judgment at that stage and who had *provided* the "factual record" in support thereof, and they must now live with the consequences of their decision.

As such, the Law of the Case Doctrine mandates that this Court follow its conclusion in *Armand I* that Appellants possess a valid interest in the expressly labelled Common Ares, and that Idaho Code § 50-1309 is inapplicable to the plat at issue herein.

B. Dedication of Expressly Labelled Common Areas in Section 7.

Even in the event that this Court chooses to re-visit the expressly labelled common areas, it remains that the dedication thereof was valid, and any alleged lack of interest that the Grantor may have had in a portion of the platted property does *not* result in a failure of the dedication of the common areas located within the property to which he *did*, unquestionably, hold title.

With regard to the Section 7 property, the case law with regard to mortgagees to which Appellants analogize in their Opening Brief is directly instructive for three reasons: The first is that, like the Respondents herein, the main issue raised therein in opposition to the mortgagor's ability to dedicate was the principle of *"nemo dat quod non habet"* ("one cannot give what one does not have"). The second is the principle that "equity is not solicitous for those who sleep on their rights." *Farmers National Bank v. Wickham Pipeline Constr.*, 114 Idaho 565, 569, 759 P.2d 71, 75 (1988). And the third is that property rights as a whole, whether it be an option, a mortgage, or fee simple ownership, is a "bundle of sticks" that can be distributed as the holder of the "sticks" sees fit. As such, the Optionors and their successors in interest, like the Mortgagee in the case of *Weills v. City of Vero Beach*, 96 Fla. 818, 321, 119 So. 330, 331 (1928), having stood idly by while Smith sold one of the lots to Knute Eie (Ex. 11.7), and then later recorded the BBTI Plat, may not now challenge the validity of the Plat. Idaho Code § 55-811 imputes constructive notice to Klages and Petersens (the Optionors) of the sale to Eie, and subsequent recordation of the BBTI plat, therefore Respondent's argument that they were unaware of Smith's activities must fail as a matter of law. Moreover, the BBT II Plat states, on its face, that it is re-plat of a portion of BBT I. (Ex. 75.6).

Respondents also refer to Idaho Code § 50-1309 in support of their argument against the BBTI dedications. Respondents' Brief at 12. Even if this Court accepts Respondents' argument its prior decision stating that Appellant's possess an interest in Common Areas was simply "dicta," *at an absolute minimum* the decision in *Armand I did* hold § 50-1309 and its requirements inapplicable *as a matter of law*, which comprised the *entire basis* of the grant of Summary Judgment that was reversed therein. Thus, the Law of the Case Doctrine, *at the very least* mandates that this Court abide by this prior determination in this Appeal, and hold that the District Court was in error in not doing so following remand.

C. Dedication of Expressly Labelled Common Areas in Section 18/Lot 35 Wright's Park (hereinafter "Section 18")[2].

Respondents next argue that, essentially, issues surrounding the title to the land located in Section 7 operate to invalidate the entire plat, including the portion located within Section 18, using a mixture of this Court's holding in the case of *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho 747, 751, 203 P.3d 677, 681 (2009) (holding that all owners must sign a dedication) and an argument that Smith's offer for dedication was somehow "equivocal." Respondents' Brief at 15. The issue of whether or not the offer for dedication was "clear and unequivocal" is easily addressed. Smith prepared and recorded a plat, with clearly labelled "common areas" delineated thereon, with a statement on the very face of the plat stating that each owner in the subdivision is to receive a fractional interest in said common areas (Ex. 79.2).

2 While "Lot 35" is a more accurate descriptor of the property located in the lower portion of BBTI, Appellants will refer to the property as "Section 18," so as to avoid confusion with references to different lots located within the competing plats.

By preparing (no doubt at significant expense) a plat map, expressly setting forth delineated "common areas", with express language granting a fractional ownership interest in said common areas, going through the approval process for the plat, and recording the plat, it is difficult, if not impossible, to contemplate how a grantor could be any more "clear and unequivocal" in his offer. Thus, this argument lacks merit.

On the issue of the validity in light of the lack of signed consent from Klages and Petersons, the only authority Respondents cite is *Saddlehorn Ranch*, and its antecedents, for the proposition that all owners must sign, or ratify, a dedication. However, *Saddlehorn Ranch* involved co-owners of *all* of the disputed lots within the subdivision, *Saddlehorn Ranch Landowner's, Inc.*, 146 Idaho at 751, 203 P.3d at 681, whereas this case involves different owners of record of *different portions* of the subdivision. Even accepting Respondent's argument with regard to the Section 7 property in its *entirety*, Respondents, *at best*, have potentially defeated Appellants' claim to the Common Areas located within *Section 7*. There is no dispute that the Smiths owned full, legal, fee simple, title in the Section 18 Property, or that they were free to subdivide, plat, sell, dedicate or otherwise alienate said property as they pleased, in whole or in part. They were the "owners" of Lot 35/Section 18 in all respects of the word. Ergo, a lack of consent from "strangers to the title" to the Lot 35/Section 18 portion of BBTI is of *no* effect with regard to said lands.

D. Prior Use.

Respondents next argue that the District Court's findings with regard to the prior use of the property were supported by substantial evidence. However, they discount Appellants'

evidence to the contrary, which substantially outweighs that to which they cite. To re-cap: Mark Schafhausen testified that he used the common areas "all the time" and "on a regular basis," (Tr. at 352–54), and Appellant Robert Siegwarth testified extensively as to his and his family's use of the common areas (Tr. at 452–58, 506–08). Respondents' on the other hand, testified that, while they did not see Appellants use the property, they had only a limited opportunity to do so. (Tr. at 809, 945). Further, they testified they did not see Appellants build trails, but acknowledge the appearance of trails that Respondents did not construct. (Tr. at 845, 863, 919). Further, Stan Brazington testified that there were no trees on the lake frontage, while others testified it was heavily treed and brushed. Some Respondents testified that they had to "machete" through it, while others say they walked right down. (Tr. at 781, 793, 794, 866). This clearly demonstrates that the District Court's finding is not substantiated by the evidence in this case, and, thus, the District Court's determination should be vacated and remanded.

E. Idaho Code § 50-1309.

In a clear disregard of even the most narrow interpretation of the Law of the Case Doctrine, the District Court applied, and the Respondents urge this Court to apply, Idaho Code § 50-1309, in spite of the fact that, in *Armand I*, this Court specifically held § 50-1309 inapplicable when the dedication does not involve public streets or rights of way.

In any event, this Court's interpretation of the statute in *Armand I* remains correct, for the reasons set forth therein. Even if the statute were applicable, the Smiths *were* the owners of the Section 18 property, which renders their certification effective with regard to the same. However, if the Statute is applicable, the failure of *Appellants*, or their predecessors in interest, as

owners of a fractional share of the expressly labelled common areas (at a minimum the portions located in Section 18) to sign or consent to the BBTII Plat calls the validity of the *latter* into question (again, at a minimum, to the extent that it overlaps with said common areas). The failure of the District Court even to address this potential effect constitutes reversible error, even if this Court should hold that it was correct in considering and revisiting the issue.

F. Objection to the BBTI Plat.

The next issue is whether the statutory time limits on challenging the BBTI plat is applicable to the instant case. Here, Respondents do not even allege that their predecessors in interest did not receive notice of the proceedings conducted by the City of Hayden Lake in the process of approving the BBTI plat, nor do they attempt to excuse, or even explain, their predecessors' failure to object, appeal, or otherwise avail themselves of the remedies contained in chapter 65, title 67, Idaho Code. "Equity is not solicitous for those who sleep on their rights." *Farmers National Bank*, 114 Idaho at 569, 759 P.2d at 75. Rather, they simply re-iterate their arguments regarding the ownership of the Section 7 portion of the Property. Respondent's Brief at 18. But, it remains that Respondent's predecessors in interest had the opportunity to object to the approval of the BBTI plat (and, if Respondents are correct regarding the Section 7 ownership issue, that would arguably be grounds to do so), but failed to do so. Therefore, this Court should not allow Respondents to conduct an "end run" around the statutory time limits for objection to a plat via a collateral attack with regard to title, more than two decades later. To do so would frustrate the intent of the time limits contained chapter 65, title 67, Idaho Code.

G. The Site Visit.

Respondents next attack Appellants assignment of error with regard to the site visit conducted by the District Court, and, essentially, make conclusory statements that it was proper, and attempt to dispatch the issue as "waived." Respondent's Brief at 19. However, Appellants have cited to the portions in the record where the District Court referred to the conclusions that it reached based upon the visit to the site, and make specific reference to those portions where they believe it improperly "considered as evidence or [had] the effect of supplying evidence independent of, or in addition to, that taken in the course of the trial, or supplanted evidence adduced," via the visit. *Lobdell v. State Board of Highway Directors*, 89 Idaho 559, 567–68, 407 P.2d 135, 140 (1969). Appellant's Brief at 31. As such, the matter has been properly raised and submitted to this Court for its consideration on appeal.

H. Ownership Interest in Lot 10.

There is no question that the grant contained in the Schafhausen Deed (Ex. 79.3) is ambiguous. In construing an ambiguous conveyance of a property right, the intent of the Grantor *controls*. *Porter v. Bassett*, 146 Idaho 399, 404, 195 P.3d 1212, 1217 (2008) ("In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties."). Here the language upon the Schafhausen Deed, further supported by, *inter alia*, the testimony of the Grantor, (Tr. at 265, 273-74, 275-77, 279, 280)), makes it clear the intent of the grantor was to dedicate Lot 10 for the use of all of the lot owners of the (then proposed) BBT I plat. While Respondents argue that a subsequent, entirely unrelated, criminal conviction somehow "impeaches" Michael Smith's testimony, there is no showing that Smith's testimony in *this* case is somehow suspect. Smith had nothing to gain from being untruthful in this case, and

there is no evidence whatsoever on the record which would serve to lead to the conclusion that he could have even *potentially* profited from being untruthful in this case. As such, Smith's subsequent problems, years later, are little more than a "red herring" to distract from the value that his testimony, as the grantor, holds to the determination of this case.

In *Latham v. Garner*, 105 Idaho 854, 673 P.2d 1048 (1983) several authorities are discussed which hold that, in the case of the grant of a purported easement interest in which the Grantor retains no rights to continued use of the servient estate, i.e., for the exclusive use for the Grantees, the nature of the title conveyed is that of fee simple. *Id.* at 856, 673 P.2d 1050. *See also Butler v. Haley Greystone Corp.*, 352 Mass. 252, 257–58, 224 N.E.2d 683, 687–88 (1967) (holding that, when the intention of the grantor of a beach easement, similar to Lot 10, is that it be exclusively a part of a development scheme and for the benefit of only the lots in said development, title may be quieted in the lot owners, and the developer may *not* grant interests in favor of lot owners in a second development).

The evidence remains clear that Smith intended for Lot 10 to be exclusively part of the BBT I development scheme, and for the benefit of only the lots in BBT I. There was *no* intent on the part of Smith to retain an interest in the Lot. Therefore, as in *Latham* and *Butler*, this Court should give effect to the intent of the grantor, and hold that the conveyance of Lot 10 via the Schafhauen Deed grants a fee simple interest to the lot owners in BBT I.

I. Breadth of "Lake Access" Easement.

Respondents now, briefly, address the "Cross-Appeal" portion of their Brief, and argue that the "Lake Access" easement was, in fact, too broad. While utterly dismissing the testimony

of the Grantor himself as to what he intended, Respondents engage in what amounts to an exercise in rank speculation as to what they believe was the intent of the Grantor with regard to Lot 10. Respondents' Brief at 22. However, the plat itself *does* support the proposition that Lot 10, in its entirety, was intended for broad, recreational use incident to access to the Lake: It is not disputed that Lot 10 is clearly unbuildable. The ten-foot wide corridor connects the upper lots (which are not adjacent to Lot 10) to Lot 10. There is no logical reason whatsoever why Smith would intend for access to the Lake to be "around," rather than "over" Lot 10. These factors support and complement, rather than contradict, Smith's testimony as to his intentions with regard to the Lot. "Dedication . . . contemplates the *most onerous and injurious mode* to which [the property] can be devoted." *Foster's Inc. v. Boise City*, 63 Idaho 201, 213, 118 P.2d 721, 726 (1941) (emphasis added). Therefore, the District Court's determination as to the scope of the easement was overly *narrow*, rather than "overly broad," to the extent that it was erroneous.

J. Scope of "Lake Access" Easement.

Having held that Appellants have an easement across Lot 10 for "Lake Access," it became incumbent upon the District Court to define and determine "Lake Access," pursuant to Idaho Rule of Civil Procedure 52(a) (which requires that the District Court make findings of fact and conclusions of law following a court trial). However, the District Court failed to do so in its Supplemental Memorandum Decision. When Appellants attempted to present evidence regarding whether a specific activity (placing a dock) fell within the scope of the easement, the District Court refused to accept it. (Tr. at 1199–1200). Such an omission from what is,

otherwise, a lengthy Supplemental Memorandum Decision fails to meet the requirements of Rule 52(a), and the failure to accept evidence relevant to the issue is not supported by the Idaho Rules of Evidence. Thus, the District Court likewise erred in this regard.

K. Scope of "Lake Access" Easement.

Respondents again attempt to disregard Smith's testimony based solely upon an entirely unrelated criminal conviction, then, after citing a case holding that parol evidence as to the intent of the grantor is admissible in the case of an ambiguous dedication (*Kepler-Fleenor v. Fremont County*, 268 P.3d 1159, 1163 (2012)), look only to the face of the documents executed by Smith, then, in relying on cases applying to *public* dedication (*State ex rel. Haman v. Fox*, 100 Idaho 140, 147, 594 P.2d 1093, 1100 (1979)), conclude that the dedicate fails because it is ambiguous. Respondents' Brief at 25–26.

While we may never know why Smith did not specifically label Lot 10 as a common area, and it would have very likely spared the parties hereto many thousands of dollars in litigation had he done so, it remains that the overwhelming weight of the evidence on the record shows that dedication was, in fact, his intent. Therefore, the District Court's finding as to a lack of intent on the part of Smith is clearly in error.

L. Quitclaim Deeds.

The issue of the quitclaim deeds logically follows from Appellants' arguments set forth above with regard to the ownership interests of Appellants' predecessors in interest in the Common Areas and Lot 10. Namely that, given (for the reasons set forth above) Appellants, through their predecessors in interest, had already obtained ownership interest in the Common

Areas and/or Lot 10, the transfer from Smith to Petersons and Klages failed with regard to said property. Therefore, Petersons and Klages lacked title to the property within BBTI to replat the same as BBTII.

M. Validity of BBTII Plat.

Respondents' argument as to the validity of the BBTII plat is, essentially, a repetition of their argument that the BBTI plat is *not* valid. As discussed above, the Law of the Case, Mortgagee Analogy, and Smith's unquestionable authority to plat the Section 18 property render Respondents' arguments to be without merit, and to re-iterate the same would simply be redundant. Thus, it remains that the BBTII plat is not valid, at least with respect to the BBTI common areas that were contained therein.

N. Abandonment of BBTI.

While Smith subsequently divested himself of his interest in BBTI, it remains that there is no evidence that, by doing so, he intended to abandon the BBTI plat. Had he intended to "abandon" the plat, it would have made little sense to record the same immediately prior to conveying his interest to a third party. Thus, the District Court remains in error on this regard. Furthermore, under *Smylie,* 93 Idaho at 191, 457 P.2d at 430, "[w]hen an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished. This dedication is irrevocable except by statutory process."

O. Bifurcation.

Appellants have clearly set forth as to how and why the District Court abused its

discretion in bifurcating the trial in this matter. In this case, given the length that these proceedings have been pending, it is not "conducive to expedition and economy" to reserve a second trial with regard to Appellants' damage claims. *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982), is instructive. In that case, which involved a "taking," this court affirmed the trial court's denial of the Motion to Bifurcate, stating:

> If no jury had been impaneled until after the trial court had determined whether or not a taking had occurred, a significant period of time would have had to have elapsed between the bifurcated halves of the action. Moreover, the damages portion of the case would have required duplication of proof concerning the land, what had happened to it, what it had been used for, its size, its location, and its character.

Id. at 80; 644 P.3d at 1339. Similarly, here, should the District Court's judgment be reversed, "a significant time will have elapsed between the bifurcated halves of the action," and the damages portion will "require duplication of proof concerning the land." Ergo, the District Court abused its discretion in bifurcating trial in this case. Given that the bifurcation led directly to the failure to rule with regard to Appellant's request for a jury trial, that portion of the District Court's decision should be reversed as well.

P. Grant of Easement to Appellants

Respondents next step back into their Cross-Appeal, and take issue with not only the grant of an easement in Lot 10 itself, but to the width thereof, and the grant of the secondary easement. Respondent's Brief at 32–36.

1. Lake Frontage.

While Respondents argue that the Schafhausen Deed's "Lake Frontage" language does

not apply to Lot 10 in its entirety, they cite only to testimony from a surveyor, who was not privy to any of the negotiations or interactions between Smith and Schafhausen, in which he offers an opinion as to *his* definition as to what "lake frontage" means. Respondent's Brief, 32–33. However, it is not a surveyor's *ex post* speculation as to the language that is at issue in this case; it is the intent of the parties that controls. As set forth above, and in Appellant's Opening Brief, the substantial weight of the evidence on the record shows that the parties intended for the entirety of Lot 10 to be used for "Lake Access" (whatever that may mean): Michael Smith, clearly testified numerous times that he intended Lot 10 to serve as a common area for recreational uses, (Tr. at 265, 273-74, 275-77, 279, 280). Mark Schafhausen also testified that language in the Schafhausen Deed was specifically negotiated in order to assure an interest in Lot 10 for access to the lake. (Tr. at 380). The District Court even noted in its own initial Memorandum Decision: "[Smith] intended Lot 10 to serve as a means for the residential lot owners to be able to claim some sort of right of access to the lake." Memorandum Decision at 41. Interpreting the Schafhausen Deed: "[the] language states that the grantees and its successors and assigns may use Lot 10 'for access to the lake.'" Memorandum Decision at 44. No argument was made by any party to this case, prior to Motion for additional Findings and the second trial, that Smith only intended to dedicate a *portion* of Lot 10. The "location and width" of said easements were intended to be the boundaries of the common areas and Lot 10 as shown on the plat. Therefore, again, to the extent that the District Court erred with regard to the easement in Lot 10, said error was in Respondent's favor.

2. 4' Width.

While Appellants agree that a four foot width was not intended by the parties (and contend that it was the entire lot that was intended for access to the Lake), the evidence supports the proposition that, if this Court should hold that a limited easement was intended, that the width should be at *least* four feet wide. Initially, there is a common area denoted on the Berven Bay Terrace I plat, which is a ten-foot wide strip of land connecting the upper lots thereon, to Lot Ten. (Exhibit 79.2). The District Court in the original Memorandum Decision implies that the purpose of this *ten* foot corridor was, in fact, to allow the upper lots access to the Lake, via Lot 10. Memorandum Decision at 31. The Respondents did not seek cross-appeal of that determination. Given that a *ten* foot corridor was platted by the grantor in order to provide access to the lake on one portion of the plat, it strains credulity that the grantor would intend for a narrower corridor for access to the Lake from the other lots.

Furthermore, there is testimony on the record that would support the grant of a wide easement. Scott Rasor, the Plaintiffs' expert witness, testified to the unfeasibility of a three-foot wide path. (Tr. at 1297–98). Earl Sanders, another surveyor (who was involved in the preparation of the initial plat) testified as to varying widths, between up to four and one-half feet. (Tr. at 1325). Respondent Felsing expressly testified that he would have no objection to a four-foot easement, with an additional easement for construction (Tr. at 1359). Moreover, the paths constructed by Appellants were also in the neighborhood of four feet in width. (Tr. at 929, 1264–65).

As such, the substantial evidence on the record supports the finding that, to the extent that the easements were to be less than the entirety of the lot, that they were to be at *least* four feet in

width, and Respondent's argument must fail.

3. Secondary Easement.

Finally, Respondents contend that the express reservation of a "secondary easement" unreasonably burdens the servient estate. However, given that the evidence shows that the parties intended for a broad use of Lot 10 on the part of the BBTI landowners, there is no showing that the District Court's express reservation is unreasonable, or not supported by the evidence on the record. Therefore, should the finding of the four foot paths be affirmed, the reservation of a secondary easement should likewise be affirmed.

Q. Judicial Estoppel.

Finally, Respondents argue (for the first time on Appeal) that Appellant's award from their title insurer should operate to estop Appellants from asserting their claims to the Common Areas herein. Respondent's Brief, 36–37. However, the arbitration award (based, in part, upon the Title Insurer's refusal to defend Appellants in this matter) is not an "incompatible position" to that taken in this case. In the Arbitration, Appellants claimed they were divested of their interest in the Common Areas of BBTI – which was the true effect of the District Court's decision. In this case, Appellants are claiming that the District Court did so in error. At *most*, Respondents have shown compensation from a collateral source which, to the extent that it is relevant at all, is only relevant when it comes to determinations of damages. This situation would be directly analogous to a personal injury plaintiff receiving an award from his insurance company, but appealing a judgment in a lawsuit relating to the injury. It is a collateral source recovery, which may or may not operate to effect Appellants' damages should they prevail. *Not* an inconsistent

position that would operate as a judicial estoppel.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the District Court should be REVERSED, VACATED, and the matter REMANDED to the District Court with instructions pursuant to the legal and equitable principles set forth hereinabove.

DATED this 13th day of July, 2012.

JAMES McMILLAN,

Attorney for Appellants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2012, I caused to be served two (2) true and correct copies of the foregoing on the following by the method indicated below:

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