8-21-2008

Bird v. Bidwell Appellant's Brief Dckt. 35314

IN THE SUPREME COURT OF THE STATE OF IDAHO

MIKE AND VERLA BIRD, husband and wife,

Plaintiffs – Appellants.

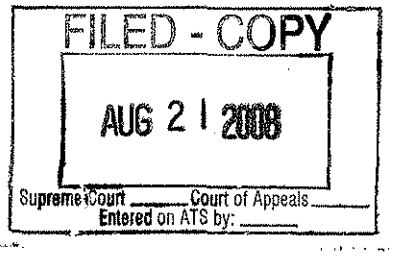
v.

GARY AND LINDA BIDWELL, husband and wife,

Defendants – Respondents.

Supreme Court No. 35314

Case No. CV-2007-443



APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR FREMONT COUNTY.

HONORABLE BRENT J. MOSS, PRESIDING.

Attorney for Appellants

Benjamin K. Mason, Esq.
591 Park Avenue Suite 201
Idaho Falls ID 83402

Attorney for Respondents

Lynn Hossner, Esq.
109 North 2nd West
St. Anthony ID 83445

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STATEMENT OF THE CASE

I. Nature of the Case

This case involves a dispute over a road and right-of-way in Fremont County, which road crosses both the plaintiffs/appellants' (hereafter "the Birds") and the defendants/respondents' (hereafter "the Bidwells") respective properties. The Birds assert that they have an implied easement from prior use over the road which crosses the Bidwells' property.

II. Course of Proceedings

The Birds filed a Verified Complaint For Declarative and Injunctive Relief on August 9, 2007, in Fremont County Case No. CV-2007-443, claiming an implied easement by prior use. Bidwells filed an Answer on August 16, 2007. Thereafter, discovery was conducted and trial was held on January 31, 2008. The trial court entered a Judgment, Memorandum Decision, Findings of Fact and Conclusions of Law on April 4, 2008 denying the Birds' requested relief. The Birds filed a Notice of Appeal on May 12, 2008.

III. Facts

Virgil Mickelson is the father of Appellant Verla Bird, respondent Linda Bidwell and Carol Murri (who is not a party to these proceedings).The Birds were granted a parcel of property[1] in Fremont County, Idaho on December 18, 1995, by Warranty Deed from Virgil Mickelson. (Tr. Vol. I, p.9, L.4-19; Trial Exhibit 8). On the same day, the Bidwells were granted by Warranty Deed a

[1]This parcel is referred to on the respective deeds as parcel "2".

parcel of property[2] immediately to the north of the Birds' parcel of property. (Tr. Vol I., p.1, L.19-20; Trial Exhibit 2). That same day, Virgil Mickelson also granted by Warranty Deed to Roger and Carol Murri the parcel of property[3] immediately to the south of the Birds' property. (Tr. Vol. I, Trial Exhibit 9). The Bidwells purchased that parcel from the Murris in the year 2000 and currently own it. (Tr. Vol. I, p.199, L. 16-23). The parties stipulated at the beginning of trial that all the parcels in controversy were owned, in unity of ownership, by Virgil Mickelsen, at the time of the grant of the dominant estate, which estate is owned by the Birds. (Tr. Vol. I, p. 2, L. 19-25; Tr. Vol I. p.3, L.1-4).

The Deed granting property to the Bidwells contained language that granted to them a "30 Ft. right of way into the property along the west side of property and through and around the existing buildings." (Tr. Vol. I, Trial Exhibit 2). The Deeds granting property to the Birds and Murris respectively granted the property and contained the following language: "Excepting thereon that part used for the 30 ft. right of way on west side of property & road and highway right of way." (Tr. Vol. I, Trial Exhibit 8, 9)(emphasis added). The Birds were also granted an additional 66-foot wide strip of land on the east side of the Mickelson properties, which strip abuts the county road. (Tr. Vol. I, Trial Exhibit 8).

Regarding this "right of way", (which is referred to in testimony and the record as "the road"

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[2]This parcel is referred to on the respective deeds as parcel "1".

[3]This parcel is referred to on the respective deeds as parcel "3".

or "the lane"),[4] the trial court made specific findings of fact, which include the following:

> Prior to 1954, the lane served as access to a family home located across the canal on what is now parcel #1 owned by the Bidwells. Since that time the lane has been fenced on both sides and used as a farm lane to haul hay, move cattle between the corrals and pasture, access the northern end of the farm, clean ditches, picnic, access a flume across the canal to facilitate repairs, move farm machinery, etc.

(R. Vol I, p. 20).

It is the Birds' position that they openly and continuously used this Road for access to the parcel of land that was deeded to them in 1995. Mike and Verla Bird testified that they had used the lane, and witnessed others using the lane numerous times before 1995. (Tr. Vol. I, p.11, L. 8-25; p.12, L.1-17; p.71, L.4-24). The Court made a finding of fact that "[p]rior to 1995, either Virgil Mickelson or Roger Murri operated the farm and used the lane, as necessary, for purposes related to farming. Other family members sporadically used the lane when visiting the family farm." (R. Vol. I, p.21). The Birds' son, Jeff Bird, testified that he had personally used the Road many times prior to 1995, especially during the time that he lived with his grandparents, the Mickelsons, on the properties that were later deeded to the Birds and Bidwells. (Tr. Vol. I, p.86, L.2-25; p.87, L.1-25; p.88, L.1-25).

Jeff Bird also testified that there was no other road for access to the parcel which became the Birds' property. (Tr. Vol I, p.89, L.2-9). Jeff testified that he once became stuck in the ground next to the 66-ft. strip of land that was deeded to his parents, because irrigation season had made the

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[4] Throughout this brief, the "right of way" at issue will be referred to as "the Road" or "the Lane".

ground wet. (Tr. Vol. I, p.100, L.9-25). Mike Bird also testified that they could not use the 66-foot-wide strip of land as an access to their property. (Tr. Vol I, p.22, L.2-16). The Birds had obtained a bid for the cost of building a road on that 66-foot-wide strip of land, but the bid was financially prohibitive at an estimated cost of approximately $30,000.00. (Tr. Vol I, p.121, L.8-11).

Although the parties received ownership of their respective parcels in December of 1995, there was no dispute over use of the Road until after Virgil Mickelson passed away in 2006. (R. Vol. I, p. 7-8). In the summer of 2007, the Bidwells informed Birds they would be "cut off" from use of the Road. (R. Vol. I, p. 7-8). The Birds filed a Verified Complaint for Declarative and Injunctive Relief on August 9, 2007 seeking a declaration that they had an implied easement by prior use for the Road. (R. Vol. I, p. 5-10).

ISSUES PRESENTED ON APPEAL

A. Did the trial court err in finding that the language of the deeds to parcels #1, #2 and #3 specifically excepted the lane from the Birds' use?

B. Did the trial court err in finding that it must be inferred from the Mickelsons' exception of the lane from the deed transcriptions of deeds #2 and #3 that the Mickelsons intended to provide access only to parcel #1 across their homestead and along the existing lane?

C. Did the trial court err in finding that "there [was] no other explanation for [the Mickelsons'] decision to convey the extra 66 feet to the Birds, while exempting the lane, if it was intended that the Birds continue to use the lane to access that parcel"?

D. Did the trial court err in considering and applying the language of the deeds to its determination of whether the Birds had an implied easement from prior use?

E. Did the trial court err in making findings of fact regarding Virgil Mickelson's subjective intent with regard to the use of the lane?

F. Did the trial court err in finding that "the cost of placing a lane along the 66 foot strip from the road to parcel #2 [was] a matter of considerable dispute"?

G. Did the trial court err in examining and considering facts other than the use of the easement to determine whether there was apparent continuous use long enough before separation of the dominant Estate to show that the use was intended to be permanent?

H. Did the trial court err in finding that "when the Mickelsons, at the Birds' request, deeded the strip abutting the county road and specifically excluded the lane in the same deed they extinguished any basis for the Birds to rely on what may otherwise have been an implied easement to use the lane"?

I. Did the trial court err in finding that "the specific reference to a right of way in the Deed conveying parcel #1 to the Bidwells, coupled with the specific exceptions to the lane found in the language of the Deeds conveying parcel #2 and parcel #3, clearly establish that the Mickelsons did not convey nor did they intend to grant an easement across their homestead or on the lane along the western portion of parcel #3 for the benefit of the Murris or the Birds."?

J. Did the trial court err in determining that "the Birds have failed to meet their burden

to establish that use of the lane was ever intended to continue for any parcel other than parcel #1 when the Mickelsons divided their farm among the family"?

ATTORNEY FEES

The Birds request their attorney's fees and costs on appeal pursuant to Idaho Code §§12-121, 12-123, Rule 54 of the Idaho Rules of Civil Procedure and Idaho Appellate Rules 40 and 41, or other applicable rule of civil procedure, or statute.

STANDARD OF REVIEW

When a case has been tried to a court, it is the province of the trial judge to weigh the conflicting evidence and testimony and to assess the credibility of witnesses. I.R.C.P. 52(a); *Kootenai Elec. Co-op., Inc. v. Washington Water Power Co.,* 127 Idaho 432, 434-35, 901 P.2d 1333, 1335-36 (1995). On appellate review, the trial court's findings that are supported by substantial and competent evidence will not be set aside, *Id.*.; *Margaret H. Wayne Trust v. Lipsky,* 123 Idaho 253, 256, 846 P.2d 904, 907 (1993), and those findings will be liberally construed in favor of the judgment entered. *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 547, 808 P.2d 1289, 1292 (1991). However, the appellate court is not bound by the trial court's legal conclusions, and is free to draw its own legal conclusions from the facts presented. *Kootenai Elec. Co-op., Inc.*, 127 Idaho at 435, 901 P.2d at 1336; *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992).

Further, the appellate court should freely review the question of whether the facts found, or

stipulated to, are sufficient to satisfy the legal requirements for the existence of an implied easement. *Davis v. Peacock,* 133 Idaho 637, 640, 991 P.2d 362, 365 (1999), citing *Walker v. Hollinger,* 132 Idaho 172, 176, 968 P.2d 661, 665 (1998). The trial court's findings of fact will be upheld if supported by substantial and competent evidence, but the appellate court will freely review the trial court's conclusions of law. *Leavitt v. Leavitt,* 142 Idaho 664, 668, 132 P.3d 421, 425 (2006).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE LANGUAGE OF THE DEEDS TO PARCELS #1, #2 AND #3 SPECIFICALLY EXCEPTED THE LANE FROM THE BIRDS' USE

The trial court made a finding that the Mickelsons, in granting a deed to the Birds, and a deed to the Murris, "specifically excepted the lane in the deed conveying [the parcels]." (R. Vol. I, p. 24). The trial court then found that:

> "The Bidwell deed specifically grants a 'right of way' through the homestead and along the lane to access parcel #1. On the other hand, the Bird deed to parcel #2, and the Murri deed to parcel #3 specifically except the lane from such use, and both parcels abut the county road under the conveyance. Were it not for these facts, the Court would conclude that the doctrine of implied easement by prior use would support the Birds' claim to use the lane."

(R. Vol. I, p. 24 (emphasis added)).

There is no evidence in the record for the proposition that the Mickelsons or the respective Deeds excepted the lane from the **use** of the Birds or the Murris. A plain reading of the Deed shows that the lane is excepted from **ownership** by the Birds or Murris. (Tr. Vol. I, Trial Exhibit 8). Indeed, the paragraph in which the "excepting" language is found describes the bounds of the

property which granted **ownership** to the Birds and Murris. (Tr. Vol. I, Trial Exhibit 8). Further, the "excepting" language of the deed states that what is excepted is "**that part** used for the 30 ft. right of way..." not the use of the right of way. (Tr. Vol. I, Trial Exhibit 8)(emphasis added). There is no language in any deed even referencing the use of the road, let alone any explicit language denying that use to the Birds or the Murris. It is an unreasonable supposition by the trial court that this "excepting" language was meant to explicitly deny the Birds the use of the lane, rather than its ownership, even when read in connection with a grant of property to the Birds which abuts a county road. A granting to the Bidwells in their Deed of a "right of way" on the road is not inconsistent with subsequent use by others of the same road and "right of way".

In contravention of the trial court's unreasonable supposition is the language of the deed by which Mickelsons transferred the majority of the property at issue to Roger Murri in 1986. As Mike Bird testified at trial, Roger Murri was purchasing the property from Virgil Mickelson from 1986 until May of 1995, when, due to a failure to make payments, the land was deeded back to Virgil Mickelson. (Tr. Vol. I, p. 39, L.12-25; p. 40, L.1-18). The Deed which transferred the property to Roger Murri at that time also referenced a "right-of-way", and "excepted" from the deed, along with several specific items of property, "the county road right-of-way along the South boundary of the property." (Trial Exhibit 17). The road is referred to as "right-of-way", yet interpreting this use to mean "right to use" would be nonsensical, as Mickelsons did not have the power to deny use of the county road to anyone. It is clear that the term "right-of-way" was used as a synonym for "road",

and was to designate the dimensions of the property excepted, not as a proscription on use. Indeed, Mike Bird testified that he had never been denied use of the lane, even during the time Roger Murri "owned" the property. (Tr. Vol I, p.25, L.13-18). Verla Bird testified that she had never been denied use of the lane, even during the time Roger Murri "owned" the property. (Tr. Vol I, p.71, L.11-25; p.72, L.1).

The testimony of the Mike Bird at the time of his deposition also contravenes the trial court's unreasonable supposition. Although the Birds contended then, and contend now that such information is not relevant to the determination of the issues herein, Mike Bird testified that since the granting of the deeds in 1995, until Virgil's death in 2007, Virgil Mickelson had never reminded the Birds of any obligation to build another road, nor asked the Birds to build a road on their 66-foot wide strip. (Trial Exhibit 43, p.56, L.1-10). After the severance of the parcels in 1995, the Birds were never denied use of the road by Virgil Mickelson or anyone else until after Virgil's death in 2006. (R. Vol I, p.7-8).

For the trial court's reasoning to be consistent, the court would have to find that Virgil Mickelson intended to deny himself the use of the lane after the grant in 1995, while still maintaining a homestead that the "right-of way" traversed. Yet, there is no testimony that Virgil Mickelson ever built another access road from his homestead to the county road. The trial court's reasoning defies common sense and the plain language of the deeds. If Virgil Mickelson "intended" to deny the use of the lane to the Birds, and consequently granted them the 66-foot strip explicitly as an alternate

access, why is the 66-foot strip not explicitly referred to as a "road and right-of-way"? It is not logically consistent to infer specific intent from the grantor based on portions of the deed, and ignore other portions of the same deed which contradict or conflict with such inferred intent.

It is also an unreasonable conclusion by the trial court that reserving ownership is always the same as explicitly denying use of the land by others. If this conclusion were to stand, the entire law of easements in Idaho would be abolished. An easement, by definition, is " the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Luce v. Marble*, 142 Idaho 264, 273, 127 P.3d 167, 176 (2005) (emphasis added) (quoting *Abbott v. Nampa Sch. Dist. No. 131,* 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991)) (internal quotations omitted). If an easement (the right to use the land) must be expressly granted in a deed before it becomes enforceable, the entire body of law regarding implied easements would also be abolished. The reservation of land in a granting deed cannot, without more, operate to defeat an easement. Further, the conclusion that the use of the term "right of way" was intended to convey intention regarding future use is an unsupportable and illogical conclusion. As noted above, there is no competent evidence or support, either in logic, common use of language, nor the actual language of the deeds, for the conclusion that the deeds even addressed the Birds' use of the disputed lane, let alone explicitly denied them that use.

The trial court erred in holding that the language of reservation in the Birds' deed defeated their claim of implied easement by prior use. And, because the trial court expressly held that, if not

for this finding, it would have held that the Birds' satisfied the elements of their claim for an implied easement by prior use, the Birds are entitled to judgment that they have an easement over the disputed Road.

II. THE TRIAL COURT ERRED IN CONSIDERING THE EXTRA 66 FEET GRANTED TO THE BIRDS

In order to establish an implied easement by prior use, the party asserting the easement must prove three elements: (1) unity of title or ownership and a 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. *Thomas v. Madsen*, 142 Idaho 635, 638 (2006); *Davis v. Peacock*, 133 Idaho 637 (1999).

In this case, the parties stipulated that the first element was satisfied. (Tr. Vol. I, p. 2, L. 19-25; p.3, L.1-4). However, the trial court's finding that "[t]here is no other explanation for their decision to convey the extra sixty-six feet to the Birds, while exempting the lane, if it was intended that the Birds continue to use the lane to access that parcel" was in error and confuses the remaining two elements. The trial court was to consider the use of the lane and determine whether the use was long enough before separation of the dominant estate to show that the use was intended to be permanent. The subjective intent of the grantor is not relevant to this determination, and specifically irrelevant to the question of whether the use of the road was "apparent and continuous". See *Thomas*, 142 Idaho at 638.

In determining whether an implied easement by prior use has been established, Idaho law does not contemplate an inquiry into the mind of the grantor or his subjective intentions. For example, in the case of *Thomas v. Madsen*, the plaintiff was the grantor himself. *Id.* at 637. There is no mention anywhere in the Supreme Court's analysis of any inquiry into the intentions of the grantor (Thomas) at the time of severance, which would surely have disposed of the matter conclusively in favor of the plaintiff. However, the only inquiry was into the use of the road. So it must be in this case as well. The Birds have provided voluminous testimony regarding not only their "apparent and continuous" use of the road, (which testimony is wholly uncontradicted by the Bidwells), but also of the use of the road by the grantor Virgil Mickelsen (which testimony was likewise uncontradicted by the Bidwells). (Tr. Vol. I, p.11, L. 8-25; p.12, L.1-17; p.71, L.4-24; p.86, L.2-25; p.87, L.1-25; p.88, L.1-25; R. Vol. I, p.21).

Even if the grantor's subjective intent were relevant, there is no competent evidence to support the conclusion that grantor Virgil Mickelson intended to deny the use of the lane to the Birds. First, there is nothing logically inconsistent with granting the Birds land which abuts a county road on the east side of the property while simultaneously allowing them to use the Road on the west side of the property. That is, there is no law which forbids a party more than one access point, and the conjecture by the trial court that grantor Virgil Mickelson could not have intended the Birds to have multiple access points is wholly unwarranted and unsupported by any testimony or competent evidence in the record. In fact, as conjectures go, it is much more likely that Virgil Mickelson drafted

the deeds to assure that the Birds could not cut off the Bidwells' access, rather than to assure that the Birds' access was denied.

The trial court's conjecture is directly contradicted by Mike Bird's testimony. He testified that after severance of the parcels in 1995, until Virgil's death in 2007, grantor Virgil Mickelson had never reminded the Birds of any obligation to build another road, nor asked the Birds to build a road on their 66-foot wide strip. (Trial Exhibit 43, p.56, L.1-10). Jeff Bird, the Birds' son, testified that his grandfather, Virgil Mickelson had never told him that he couldn't travel the Road on the three-wheeler or a pickup truck. (Tr. Vol., I, p.113, L.11-17). Further, the Birds had continuously used the Road to access their parcel after the severance for nearly 12 years, until the summer of 2007, when the Bidwells first denied the Birds use of the Road, thus precipitating this litigation. (R. Vol I, p.7-8).

If , as the trial court decided, "there is no other explanation for their decision to convey the extra sixty-six feet to the Birds, while exempting the lane, if it was intended that the Birds continue to use the lane to access that parcel", then why did Virgil Mickelson, in the eleven years between severance of the parcels and his death, never forbid the Birds from using the Road, nor require that they build a usable road on the 66-foot-wide strip of land? If it was Virgil Mickelson's intent that the Road be used only by the Bidwells after the severance, why did the Bidwells not attempt to cut off the Birds' use of the Road until after Virgil Mickelson had passed away? (R. Vol I, p.7). The only reasonable answer is that Virgil Mickelson never had such "intent".

Finally, the trial court's finding that "there is no other explanation for their decision to convey the extra sixty-six feet to the Birds, while exempting the lane, if it was intended that the Birds continue to use the lane to access that parcel" improperly takes into account the 66-foot strip of land, deeded to the Birds, which abuts a county road. The trial court is essentially ruling that because part of the Birds' property borders the public highway and therefore was not landlocked, the Birds could have simply built another access road, and *that this possibility weighs against their implied easement by prior use*.. However, because an implied easement from prior use requires only reasonable necessity, not great present necessity, there is no requirement that the dominant estate be landlocked. *Thomas*, 142 Idaho at 639. In *Thomas*, the Court specifically rejected an argument by the defendant that the plaintiff could simply have built another road on his own land. *Id.* The trial court has improperly considered this fact in its analysis of the Birds' implied easement in this case.

There is no competent evidence to support the trial court's findings on the subjective intent of the grantor, Virgil Mickelson, regarding the use of the Road at issue. Further, the trial court erred by improperly considering the subjective intent of the grantor when applying Idaho law on implied easements by prior use.

III. THE TRIAL COURT ERRED IN FINDING THAT "THE COST OF PLACING A LANE ALONG THE 66 FOOT STRIP FROM THE ROAD TO PARCEL #2 [WAS] A MATTER OF CONSIDERABLE DISPUTE"

The third element of a claim for implied easement by prior use is that the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Thomas*, 142 Idaho at 638 .

However, as Idaho cases have made clear, reasonable necessity is something less than the "great present necessity" required for an easement implied by necessity. *Davis*, 133 Idaho at 643. It is the task of the trial court to balance the respective convenience, inconvenience, costs, and other pertinent facts when determining whether the easement is reasonably necessary. *Thomas*, 142 Idaho at 638. However, the trial court's factual findings must be based upon substantial and competent evidence.

In *Thomas*, the trial court analyzed the reasonable necessity of the road at issue by weighing the expense and time of constructing a road of the same quality on Thomas's land. *Id.* In this matter, the trial court found that the cost of placing a lane along the Birds' 66-foot strip of land "[wa]s a matter of considerable dispute". (R. Vol. I, p. 25). However, there is no substantial and competent evidence in support of this proposition. The Birds' engaged an expert, Jack Zollinger, to testify regarding the expected cost of building a road on that strip of land. Mr. Zollinger testified that he had been in the construction business since 1976 (Tr. Vol., I, p.114, L. 19-20), that he had a degree in civil engineering (Tr. Vol., I, p. 114, L.23-25), and that he has built roads for the Forest Service, the Idaho Department of Transportation, Fremont County, and the cities of Rexburg, St. Anthony and Sugar City. (Tr. Vol., I, p.116, L.3-6). He testified that he had built every kind of road during his career. (Tr. Vol., I, p. 116, L.7-10). He testified that he had visited the Birds' property, surveyed the ground and compiled a bid for a road on that ground. (Tr. Vol., I, p. 117, L.16-25, p.118, L.1-17; Trial Exhibit 10). The bid was a lump sum for mobilization and cubic yard prices for gravel. (Tr. Vol., I, p.118, l.21-25; p.119, L.1-4). The bid for the road was approximately

$30,000.00. (Tr. Vol., I, p.121, L.8-11). Mr. Zollinger testified that he could build a road of lesser quality for three or four thousand dollars less than that $30,000 bid, but such would expose the road to the risks of not standing up to the elements. (Tr. Vol., I, p.122, L.15-24). He testified that his rates were comparable to the rates of other road builders in the area. (Tr. Vol., I, p.123, L.21-24).

The Bidwells produced no witness or expert to testify regarding the cost of building a road on the 66-foot strip of land. Instead, they simply submitted a "bid" they'd received from Parker Sand and Gravel, a gravel company in Rexburg, Idaho. (Tr. Vol. I, Trial Exhibit 39). The "bid" was for $6,800.00, submitted to Gary Bidwell. (Tr. Vol. I, Trial Exhibit 39). There was no testimony from Bidwells or any of their witnesses regarding what methods were used by Parker Sand and Gravel to compile such "bid."

However, Mr. Zollinger testified that such "bid" contemplated only the "bare minimum", including simply depositing a minimal amount of gravel on the "road", without any preparation. (Tr. Vol. I, p.125, L.4-13). Further, Mr. Zollinger testified that the risks associated with this type of "bid" would be that the "road" would eventually develop "muck holes" and the material would have been wasted. (Tr. Vol. I, p.125, L.17-25; p.126, L.1-6).

Mr. Zollinger's testimony was uncontroverted. There simply is no competent evidence in the record for the trial court's determination that there was "considerable dispute" about the cost of building a road on the 66-foot strip of land. To the degree that the trial court factored this "dispute" into its conclusions that the Birds had not satisfied the third element of the their claim, that of

"reasonable necessity", the trial court erred.

IV. THE TRIAL COURT ERRED IN FINDING THAT "WHEN THE MICKELSONS, AT THE BIRDS' REQUEST, DEEDED THE STRIP ABUTTING THE COUNTY ROAD AND SPECIFICALLY EXCLUDED THE LANE IN THE SAME DEED THEY EXTINGUISHED ANY BASIS FOR THE BIRDS TO RELY ON WHAT MAY OTHERWISE HAVE BEEN AN IMPLIED EASEMENT TO USE THE LANE"

The trial court essentially concluded that the Birds knew at the time of severance that they had no right to use the Lane because of the language in the Deed and because they were granted land on the east side of the property which abuts a county road. The trial court then concluded that this knowledge "extinguished" their implied easement by prior use. However, these conclusions are totally at odds with the Idaho Supreme Court's holdings in *Davis* and *Thomas.*

As noted above, the language of the deed to the Birds excepts from their ownership "that part" of the land contained within the land description which is "used for the 30 ft. road and right of way". (Tr. Vol. I, Trial Exhibit 8). This language could not possible have put the Birds "on notice" that they were denied the use of the Lane, notwithstanding the specific exemption of the Lane from their ownership.

More importantly, in *Davis*, at the time the Davises purchased the property from their predecessors-in-interest, they knew that their estate was not landlocked. *Davis*, 133 Idaho at 640-41. Further, the Davises had actually built another access road on their property since the time of severance, and before the initiation of the lawsuit. *Id.* at 643. However, the Court held that "the well-established rule is that, unlike an easement by way of necessity, an implied easement by prior

use is not later extinguished if the easement is no longer reasonably necessary." *Id.* The Davises' knowledge did not extinguish their basis for an implied easement by prior use.

If an easement by prior use cannot be extinguished by later actual access along another portion of ground, the Birds fail to see how it could be extinguished by the theoretical future access along another portion of ground. In fact, this "theoretical future" access is discussed by the Court in the *Thomas* decision.

Mr. Thomas's property was not landlocked either and Mr. Thomas, being the grantor, knew at the time of severance that it was not landlocked. *Thomas,* 142 Idaho at 638. The defendant argued that Mr. Thomas "could have simply built another access road." *Id.* The Court flatly rejected this argument. "[T]here is no requirement that the dominant estate be landlocked." *Id.* (citing *Davis,* 133 Idaho at 637.)

The trial court erred by concluding that the Birds' right to an implied easement by prior use was "extinguished" by either a request for land abutting the county road or the fact that such land did abut the county road.

V. THE TRIAL COURT ERRED IN DETERMINING THAT THE BIRDS FAILED TO MEET THEIR BURDEN TO ESTABLISH THAT USE OF THE LANE WAS EVER INTENDED TO CONTINUE FOR ANY PARCEL OTHER THAN PARCEL #1 WHEN THE MICKELSONS DIVIDED THEIR FARM AMONG THE FAMILY.

All of the trial court's errors regarding the language of the respective Deeds and the Birds' possession of property abutting the county road occurred because the trial court strayed from the

standards set forth by the Idaho Supreme Court in *Davis* and *Thomas.* In those cases, the Court very clearly stated that:

> In order to establish an implied easement by prior use, the party asserting the easement must prove three elements: (1) unity of title or ownership and a 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.

Thomas, 142 Idaho at 638.

As noted above, the first element was stipulated to by the parties. As to the second element, the trial court made a factual finding that, since 1954, "the lane ha[d] been fenced on both sides and used as a farm lane to haul hay, move cattle between the corrals and pasture, access the northern end of the farm, clean ditches, picnic, access a flume across the canal to facilitate repairs, move farm machinery, etc." (R. Vol I, p.20). The trial court also made a finding that "[p]rior to 1995, either Virgil Mickelson or Roger Murri operated the farm and used the lane, as necessary, for purposes related to farming. Other family members sporadically used the lane when visiting the family farm." (R. Vol. I, p.22). However, rather than apply these facts to the second element of the standard ("apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent"), the trial court used a different standard to determine whether the Birds had an implied easement from prior use. That standard appears to be either the "subjective intent of the grantor" and/or "whether the use is expressly granted in the Deed". The Birds submit that the use of these alternative standards is clear legal error.

Even if the use of these alternative standards were not directly contradicted by binding precedent, the logical basis for such standards is deeply flawed. A standard that makes an express easement in the Deed a prerequisite for the finding of an implied easement is a logically impossible standard, and would turn the law of easements on its ear.

The parties stipulated to the first element. On the second element, the Birds produced substantial evidence and testimony, and the trial court made findings of fact that the Birds had enjoyed open, continuous use of the Road at the time of severance. On the third element, the Birds produced uncontroverted evidence and testimony that building a road on their land that abutted the county road would cost more than $30,000.00. Yet the trial court applied a different standard to defeat the Birds' claim.

Because this court exercises free review over questions of law, this court can find, based on the actual evidence adduced at trial, that the Birds satisfied the three elements required by Idaho law for establishing an implied easement by prior use. The trial court's own findings of fact support this conclusion when the proper law is applied to those findings.

CONCLUSION

Based upon the foregoing, plaintiffs/appellants request that this Court issue its decision vacating the entry of judgment against plaintiffs and instead enter judgment for plaintiffs, and find that the Birds have satisfied the elements of an implied easement by prior use.

DATED this 14th day of August, 2008.

NALDER LAW OFFICE, P.C.

By: 

Benjamin K. Mason, Esq.

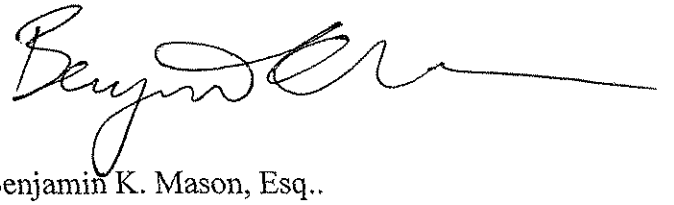
CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 14th day of August, 2008, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

W LYNN HOSSNER ESQ
109 N 2ND W
ST ANTHONY ID 83445

[X] Mail
[ ] Hand Delivery
[ ] Facsimile (522-8057)

NALDER LAW OFFICE, P.C.

By: 

Benjamin K. Mason, Esq..

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5787-1\030 appellate brief