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Statewide Const., Inc. v. Pietri Appellant's Brief Dckt. 36934

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

STATEWIDE CONSTRUCTION, INC.,

Plaintiff/Respondent,

v.

SEQUOIA PIETRI, LUKE CRAWFORD, JIM
CRAWFORD and MAGGIE CRAWFORD,
LONNIE R. KING and CHARLENE KING,
husband and wife, M&T MORTGAGE,
LARRY MONKARSH, FIRST HORIZON
HOME LOANS, ESTATE OF RAYMOND
PIATT, ANTHONY F. FRONTINO, GERRY
LEE IKOLA and ELLEN I. IKOLA,

Defendants/Appellant.

SUPREME COURT NO. 36934

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT AND FOR THE COUNTY OF VALLEY

HONORABLE MICHAEL R. MCLAUGHLIN, DISTRICT JUDGE, PRESIDING

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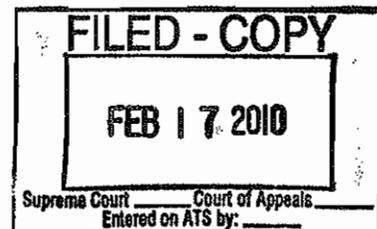


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I. NATURE OF CASE

This case arises out of a declaratory action filed by Respondent Statewide Construction, Inc. ("Statewide") involving the interpretation and application of Idaho Code Section 55-313 to the relocation of a private roadway/easement used for vehicular traffic.

Sequoia Pietri, Luke Crawford and Jim and Maggie Crawford, Lonnie and Charlene King, and Larry Monkarsh (collectively the "Appellants") own express easements granted by deed across property owned by Statewide Construction, Inc. ("Statewide"). The easement area described in their respective deeds is a private road that Appellants use to access their property. Therefore, Appellants are the dominant estate and Statewide is the servient estate to the express easement. Statewide believes under Idaho Code Section 55-313 it may unilaterally relocate the easements without Appellants' consent. Contrary to Statewide's position, Idaho Code section 55-313 does not grant a servient estate owner the right to unilaterally relocate an express easement under the circumstances presented in this case.

II. FACTS AND PROCEDURAL HISTORY

The relevant facts in this case are largely undisputed and accurately set forth in the district court's Memorandum Decision. R. Vol. I, p. 80. Statewide owns a parcel of property in Valley County consisting of approximately 15.18 acres ("Parcel 1"). Supp. R. Vol. I, p. 26. Parcel 1 is the servient estate to easements owned by Appellants. *Id.* Appellants own Parcels 2, 3, 4 and 6, as depicted on the relevant plats. Supp. R. Vol. I, pp. 140-143. Appellants Sequoia Pietri and Luke Crawford own Parcel 2. Supp. R. Vol. I, pp. 118, 134. Appellants Jim and Maggie Crawford, parents of Luke Crawford, claim an interest in Parcel 2. Supp. R. Vol. I, p. 118. Appellants Lonnie King and Charlene King own Parcel 3. Supp. R. Vol. I, p. 140.

Appellant Larry Monkarsh owns Parcel 4. 112. Supp. R. Vol. I, p. 112. Appellant Lonnie King owns Parcel 6. Supp. R. Vol. I, p. 140.

The Appellants access their parcels via their easements, which is a private road crossing Statewide's Parcel 1. Supp. R. Vol. I, pp. 112, 116; 118, 121-22; 134, 137-38; 140, 143, 144-45. This private road provides access from the parcels to Smylie Lane, which is a public county road. Supp. R. Vol. I, p. 143. The location and dimensions of this private road were determined by easement, which easement was expressly granted and conveyed to the Appellants via deed. Supp. R. Vol. I, pp. 116, 121-22, 137-38, 144-45. As part of a proposed residential development, Statewide wishes to unilaterally move the Appellants' easement and change the location where the easement/private road accesses the county road. R. Vol. I, p. 5. None of the Appellants consented to a relocation of their easements across Parcel 1. Supp. R. Vol. I, pp., 112, 118, 134, 141.

Statewide filed a Complaint for a declaratory judgment on October 31, 2008, identifying the Appellants, among others, as defendants in this matter, seeking declaratory relief to unilaterally relocate the Appellant's easements without their consent. R. Vol. I, p. 1. Appellants filed their Answer on November 26, 2008. R. Vol. I, p. 26. Statewide filed a Motion for Summary Judgment on April 16, 2009. Supp. R. Vol. I, p. 23. The Appellants filed their Cross-Motion for Summary Judgment on May 26, 2009. Supp. R. Vol. I, p. 148. Thereafter the parties filed their opposing and reply briefs.

After oral argument on the motion and cross-motion for summary judgment, the district court issued its Memorandum Decision on July 15, 2009, granting Statewide's Motion for Summary Judgment and denying the Appellant's Cross-Motion for Summary Judgment. R. Vol. I, p. 80. The district court issued a Judgment and Rule 54(b) Certificate on September 2, 2009.

R. Vol. I, p. 94. Appellants timely filed their Notice of Appeal on September 23, 2009. R. Vol. I, p. 94.

III. ISSUES PRESENTED ON APPEAL

- A. Does Idaho Code Section 55-313 prohibit a landowner from relocating the existing access of a private road where such access currently enters onto a public roadway?
- B. Does Idaho Code Section 55-313 permit a servient estate to unilaterally move an expressly granted easement without consent from the dominant estate owner?
- C. Are there genuine issues of material fact regarding injury to Appellants under Idaho Code Section 55-313?
- D. Is Idaho Code Section 55-313 unconstitutional?

IV. STANDARD OF REVIEW

On appeal from the grant of a motion for summary judgment from a declaratory judgment proceeding, the Idaho Supreme Court employs the same standard as used by the district court originally ruling on the motion. *Mutual of Enumclaw Ins. Co. v. Pedersen*, 133 Idaho 135, 138, 983 P.2d 208 (1999). Where there are no contested issues of fact below and the issue on appeal involves the interpretation and application of a legislative act, the interpretation and application of the statute is question of law over which the Idaho Supreme Court exercises free review. *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003).

V. ARGUMENT

Statewide cannot unilaterally relocate Appellants' existing easement under the authority of Idaho Code Section 55-313. The right of landowners to relocate a private road traversing their property requires the satisfaction of a two-pronged analysis. The first requirement is found in the Statement of Legislative Intent to Idaho Code Section 55-313, which prohibits landowners from changing a private road's current access if that access enters onto a public road. The second

requirement is found in the language of Section 55-313 itself which prohibits relocation of a private road if such relocation injures “any person or persons using or interested in such access.” I.C. § 55-313. Unless a landowner can satisfy this two-pronged analysis, relocation of the private roadway is not permitted.

A. Idaho Code section 55-313’s Statement of Legislative Intent does not permit Statewide to relocate Appellants’ easement.

Idaho Code section 55-313’s Statement of Legislative Intent prohibits Statewide from relocating the existing easement/roadway because the relocation changes the access of the easement/roadway which immediately enters onto a public highway system (i.e. a public road).

Idaho Code Section 55-313, reads:

55-313. RELOCATION OF ACCESS. Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.

I.C. § 55-313 (underlining added). The legislature further clarified the underlined language above through the inclusion of an uncodified Statement of Legislative Intent, which reads:

**STATEMENT OF LEGISLATIVE INTENT
H 264**

It is the intent of the Legislature that the phrase “any access which is less than a public dedication” in **H 264** shall not include any access that is part of a public highway system.

Supp. R. Vol. I, p. 129 (quotations and bolding in the original).

In order to understand the legislature’s reasoning for preparing the Statement of Legislative Intent, this Court’s review of the legislative process leading to approval of section

55-313 is necessary. Section 55-313 was presented to the legislature in 1985 as House Bill 264 (“HB 264”). Supp. R. Vol. I, p. 126. HB 264 was supported by the agriculture industry, wheat growers specifically. *Id.* The purpose of HB 264 was to enable growers to relocate roads across private lands because “[r]otating sprinklers and erosion are a major factor in the need to change these access roads.” *Id.* In other words, agriculture production issues necessitated moving roadways that became eroded due to irrigation practices. HB 264 was further meant to “...forestall problems with injunctions and neighboring farmers/ranchers.” *Id.*

Discussions on HB 264 in the Senate Transportation Committee focused on concerns of private roadway “access” onto a public highway.¹ In minutes from the Senate Transportation Committee on March 7, 1985, Senator Manning stated:

Mr. Manning expressed concern with the possible effects on highway access. He feels this could allow someone to move access roads without checking with the highway district or ITD. It could endanger the public or users of the land.

Supp. R. Vol. I, p. 127. To alleviate these concerns, the senators agreed to include the Statement of Legislative Intent.

While the primary purpose for the Statement of Legislative Intent was to address the concerns of changing access roads on highways without checking with ITD or a highway district, the committee minutes reveal a second purpose, which was to specifically inform the courts of the legislature’s intent. The senate committee minutes state that the senators chose to include within HB 264, “a statement of legislative intent should there be a dispute in court,” and then voted to send HB 264 to the floor recommending passage “...and a legislative intent directive.”

Supp. R. Vol. I, p. 128 (underlining added). The meeting minutes of the Senate Transportation

¹ Idaho Code § 49-109-H(4) defines “highway” as, “the entire width between the boundary lines of every way publicly maintained when any part is open to the use of the public for vehicular travel, with jurisdiction extending to the adjacent property line, including sidewalks, shoulders, berms and rights-of-way not intended for motorized traffic. The term “street” is interchangeable with highway.”

Committee indicate that: (1) the legislators foresaw litigation problems that Section 55-313 might create if landowners changed the existing access of a private road when such access entered onto a public road; and (2) the legislature chose to express their intent in “a legislative intent directive” aimed at informing the courts that Section 55-313 does not permit relocation of accesses currently abutting a public road.

Although this case comes to this Court on *de novo* review, it is helpful to analyze the district court’s reasoning and discuss the error in the district court’s holding. In its Memorandum Decision, the district court held:

Based on the clear language of the statute, the purpose of the phrase ‘less than a public dedication’ is to prevent easements that have been accepted by highway districts as public roads from being changed...

The Defendants argue that because the easement connects to a public road, it is part of the public highway system. However, this reading of the intent would make section 55-313 inapplicable in nearly all cases because virtually every easement that allows use of motor vehicles eventually connects to the public highway system. Stated differently, just because a road connects to the public highway system does not necessarily mean it is ‘part of a public highway system’ as the Defendants argue.

R. Vol. I, 87. The district court’s holding illustrates its misunderstanding of Appellants’ arguments and analysis of Section 55-313’s Statement of Legislative Intent. Appellants’ analysis does not focus on whether a private road will eventually lead to a public road and thus be considered “part of a public highway system.” On the contrary, Appellants’ argument on this issue focuses on a private road’s “access” onto a public road. Simply put, the legislature never intended to grant a landowner the right or authority to move the existing access of private road if that access enters a public highway.

The fact that legislature did not want landowners to be able to use Section 55-313 to change a private road’s access onto a public road finds support when considering the authority of

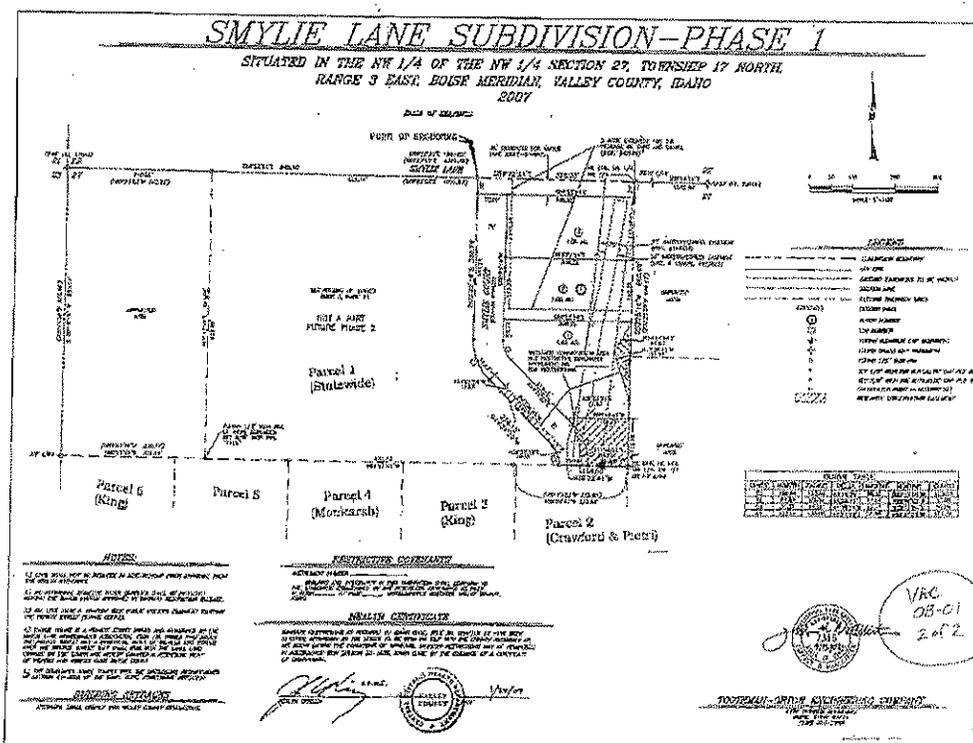
a highway district and ITD (the Idaho Department of Transportation). Neither road authority has authority/jurisdiction over a private road, but both have statutory authority to control access onto public highways (a.k.a. public roads). For example, a highway district board of commissioners “shall have the exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to... **control access** to said public highways, public streets and public rights-of-way.” I.C. § 40-1310(8) (emphasis added). Likewise, the Idaho Department of Transportation has statutory authority to “[d]esignate state highways, or parts of them, as controlled-access facilities and **regulate, restrict or prohibit access** to those highways...” I.C. § 40-310(9) (emphasis added).

Thus, the first test to determine whether a landowner may use Section 55-313 to relocate a private road focuses on whether the relocation involves changing the road’s existing access onto a public highway. If that access is being relocated, the legislature has stated that Section 55-313 cannot be used for that purpose.

In this case, the Statement of Legislative Intent for Idaho Code Section 55-313 prohibits the actions attempted by Statewide. Contained in the Supplemental Clerk’s Record on Appeal, Supp. R. Vol. I, 143, is a subdivision plat map depicting Appellants’ road/easement area in dashed lines. The location of Statewide’s road is depicted in solid lines and is identified on the plat as “Smylie Court.” Supp. R. Vol. I, 143. For this Court’s convenience, a reduced version of the plat map is reproduced here as **Figure 1** below.

[Remainder of page intentionally left blank]

Figure 1



Immediately north of the Appellants' road/easement and Statewide's new road, is Smylie Lane. The district court specifically found in its Memorandum Decision that Smylie Lane is a county road. R. Vol. I, 85. The plat map reveals that, Appellants' private road/easement area currently "accesses" this county road. Moreover, this Court need merely examine and compare the graphical depictions of Appellants' roadway/easement area to Statewide's relocation area (i.e. Smylie Court) to see that Statewide is attempting to move the current "access" onto a public highway to a different location in direct contravention of Idaho Code Section 55-313's Statement of Legislative Intent.

Based on the discussion above, Appellants ask this Court to find that the application of Idaho Code Section 55-313 is not applicable given the facts of this case. Statewide is attempting

to relocate an existing roadway access onto a public road. As such, Appellant's request this Court to reverse the district court's judgment granting Statewide's relocation of the existing private road.

B. Statewide may not unilaterally relocate the existing roadway easement because it constitutes an injury to Appellants.

The second question that must be answered when determining whether a land owner may relocate a private road under Section 55-313 is to determine whether such relocation injures "any person or persons using or interested in such access" I.C. § 55-313. Unless the landowner can relocate the private road without causing injury, relocation of the private roadway is not permitted.

1. Idaho Code Section 55-313 cannot be interpreted to permit a servient estate owner to unilaterally relocate an express easement without consent of the dominant estate owner because relocation without consent is a *per se* injury.

In its Amended Complaint for Declaratory Judgment, Statewide alleges that it is "entitled to relocate the roadway easement without consent of the dominant estate owners under § 55-313." R. Vol. I, 50. Appellants argue that since the private roadway including its dimensions and location, were established through an easement "expressly" granted in their deeds, the easement may not be relocated unless both dominant and servient estate owners agree.

An express easement, being an interest in real property, may only be created by a written instrument. *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 707-708, 152 P.3d 575, 578 – 579 (2007) citing *Shultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948, 951 (1976) (citing I.C. § 9-503). An easement is a recognized interest and right in real property. *Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 531, 547, 66 P.3d 798, 802 (2003). Although an easement is a property right that is less than fee, this Court has recognized that an easement owner's

property right is so important that the taking of an easement by the government is subject to the same constitutional safeguards for requiring that the taking be made for a public purpose and that the owner must be paid just compensation. In *Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958), this Court held that, “[a]n easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken...” *Id.* at 90, 328 P.2d at 401.

The issue of whether a servient estate owner may unilaterally change the location or dimensions of an express easement has not been decided by this Court. However, it is Appellant’s position on appeal that where a private roadway is created through an express grant of an easement, once the easement is established, neither party may unilaterally change the location or dimensions of the express easement. To this end, Appellants ask this Court to consider and adopt the rationale of the Arizona Supreme Court in *Stamatis v. Johnson*, which discussed the general rule of easements:

The general and almost universal rule with reference to change in the location of an easement after the location has once been definitely established, regardless of whether it has been acquired by grant or by prescription, is laid down as follows in 17 Am.Jur., Easements, Sec. 87: ‘The general rule is that the location of an easement once selected cannot be changed by either the landowner or the easement owner without the other’s consent. The reason for this rule is that treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged. Accordingly, a definite location of an easement determines and limits the right of the grantee so that he cannot again exercise a choice. Similarly, a definite location binds the grantor so that he has no right either to hinder the grantee in the exercise of his right or to compel him to accept another location although the latter location may be equally convenient with the right or privilege originally granted....

Stamatis v. Johnson, 71 Ariz. 134, 136-137, 224 P.2d 201, 202 – 203 (Ariz.1950); *See also MacMeekin v. Low Income Housing Institute, Inc.*, 45 P.3d 570, 575 (Wash. Ct. App. 2002) (recognizing that the rule that both parties must consent to relocation of an easement is the

traditional common law rule, which is followed by a majority of jurisdictions in the United States); *See also* Restatement Third Property, Servitudes § 4.8 (2002) (a servient estate owner is permitted to make reasonable changes to the location or dimensions of an easement except where the location and dimensions are created by instrument).

The rule of law discussed in *Stamatis* is in accord with Idaho case law and Idaho statutes. For example, in *Villager Condominium Ass'n v. Idaho Power Co.*, 121 Idaho 986, 829 P.2d 1335 (1992), Idaho Power obtained an express easement to install power lines supplying power to the Villager Condominiums. *Id.* at 987, 829 P.2d at 1336. The power lines and transformers were to be placed underground per the language in the agreement granting the easement. *Id.* After the condominiums were built out, Idaho Power “relocated” the transformers above ground and placed them on cement pads. *Id.* at 988, 829 P.2d at 1337. This Court held in *Villager* that Idaho Power did not have the right to “expand” the easement (i.e. change the physical location of the easement) by relocating the transformers above ground. *Id.* Although Idaho Power was the dominant estate owner, this Court recognized that the unilateral relocation of an express easement is impermissible. The same result should apply where a servient estate holder attempts to move the location of an express easement.

Moreover, the rule of law discussed in *Stamatis* is also in accord with other Idaho Statutes. Interestingly, at oral argument on the cross motions for summary judgment, Statewide erroneously argued that the right of a servient estate owner to relocate an easement without consent of the dominant estate had been “established in Idaho long ago.” (Tr. Pg. 12, ll. 12-25 through pg. 13, ll. 1-4). In support of this proposition, Statewide cited to Idaho Code Section 42-1207 which permits a landowner to relocate a ditch. Idaho Code Section 42-1207 reads in pertinent part:

Where any ditch, canal, lateral or drain or buried irrigation conduit has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling said land shall have the right at their own expense to change said ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

...

The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner.

I.C. § 42-1207 (underlining added). The underlined language in Section 42-1207 is strikingly similar to Section 55-313's language that the roadway "change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access." I.C. § 55-313. However, Section 42-1207 contains additional language that is in accord with the general rule of easements discussed in *Stamatis* that does not support Statewide's position. Section 42-1207 requires that before a landowner changes the location or buries the ditch of another, "[t]he written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner." I.C. § 42-1207 (underlining added). The Idaho legislature most likely recognized that ditch rights for the transportation of water involved quite often, if not always, some form of easement by express grant, implication or necessity and chose to ensure that dominant estate owners' property rights would be preserved.

Lastly, this Court's discussion in *Turner v. Colds Springs Canyon, L.P.*, 143 Idaho 227, 141 P.3d 1096 (2006) indicates this Court likely agrees with the general law of easements discussed in *Stamatis, supra*. In *Turner* this Court discussed in dicta, that when an express

easement is granted in a deed of conveyance, absent language within the deed granting the servient estate holder the right to relocate the easement, the easement cannot be unilaterally relocated by the servient estate holder. 143 Idaho 227, 229, 141 P.3d 1096, 1098 (2006).

The plaintiffs in *Turner* filed a declaratory judgment action to establish a permanent easement. *Id.* at 229, 141 P.3d at 1098. The district court found evidence of an express easement, a finding this Court affirmed. *Id.* On appeal, the plaintiffs argued that the deed at issue allowed them to relocate the easement. *Id.* The deed at issue in *Turner* included a statement, in relation to an express easement, that the easement “may be modified and relocated as the [previous owner of the servient estate] may desire in accordance with her own personal reasons or any prospective plan for development.” *Id.* The *Turner* Court recognized, however, the previous owner no longer owned the servient estate and the right to relocate the easement was granted only to the previous owner. *Id.* The *Turner* Court also held that the lower court: “did not err in creating a permanent, unmovable easement...”. *Id.* As a result, this Court held that the plaintiffs, the current servient estate owners, had no right to relocate the easement because the express easement provided no such authority, nor did it express any intent that the right to relocate the easement extended to any party other than the initial owner of the servient estate. *Id.*

In this case, there is no dispute that the Appellants own the dominant estates and hold an express easement that was conveyed in their respective deeds for ingress and egress to their respective parcels. Additionally, there is no dispute that the private roadway at issue in this case is that express easement area described in Appellants’ deeds. Appellants are the persons using or interested in the access as described in Section 55-313. Therefore a determination whether Appellants have suffered some “injury” under the statute is paramount.

Idaho Code Section 55-313 expressly prohibits relocation by the landowner by requiring that such, “change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.” I.C. § 55-313. The term “injury” as used in Section 55-313 must be determined on a case by case basis because each case will have unique facts giving rise to an “injury.” This Court may question whether there is an “injury” in this case because the purpose of the old roadway/easement is not frustrated by the relocation to the new roadway.

The district court alluded to that line of reasoning when it discussed the issue of injury to the dominant estate owners in terms of whether the new road was being moved a couple miles away versus a couple hundred feet. *See.* (Tr. Pg. 34, ll. 6-16). However, the issue of “injury” goes beyond the purpose for which the original roadway was built when the facts involve the creation of the roadway through an express grant of easement. Based on the legal analysis above, once an easement is established through an express grant, neither the servient estate nor dominant estate may move the easement absent the consent of the other party. Therefore, where Statewide has failed to obtain consent of the Appellants to move the roadway/easement in question, the unilateral relocation of the easement is a *per se* injury under the statute because Appellants’ established property rights, that is, their right to give consent to changing the easement location has not been complied with.

When construing a statute, this Court’s goal should be to seek a sensible construction that will avoid an absurd result. *State v. Paciorek*, 137 Idaho 629, 632, 51 P.3d 443, 446 (Ct. App. 2002). Similar to Idaho Code Section 42-1207’s written permission requirement, Idaho Code Section 55-313 must be interpreted to mean a landowner must obtain approval from persons using or having an interest in the access when the roadway in question was created by an express

grant of an easement. To hold otherwise would lead to an absurd result because it would trample on Appellants' property rights and throw the law of easements in this state into question. It is for this reason and the reasons discussed above that Appellants ask this Court to reverse the district court's judgment.

2. Statewide's relocation of roadway/easement for a purely private purpose is an injury to Appellants because it violates a constitutional protected right.

If Statewide is permitted to use Section 55-313 to unilaterally relocate the original easement area granted to Appellants, the relocation will have the same affect as vacating Appellants' express easement. That is, Appellants are forever barred from exercising their right to ingress and egress over a specific portion of property identified and legally described in their deeds. The physical taking of private property requires that the taking be made for a public purpose and that the property owner be paid just compensation.

a. Public versus Private Use.

This Court has held that an easement is a recognized interest and right in real property. *Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 531, 547, 66 P.3d 798, 802 (2003). As a property right, easements are included in the classification of estates and rights in lands which may be taken for public use. *Hughes v. State*, 80 Idaho 286, 290 328 P.2d 397, 401 (1958). When property is taken, both the Idaho Constitution and United States Constitution require not only that the taking be for public use, both constitutional protections require the payment of just compensation. Specifically, the Idaho Constitution requires, "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." Idaho Const. Art. I, § 14. Similarly, the just compensation clause of the Fifth Amendment of the United States Constitution provides that no person shall "be

deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.”

The power of eminent domain generally applies only to the government, but there has been occasion where this Court has upheld the right of a private entity to exercise the power of eminent domain. *Cohen v. Larson*, 125 Idaho 82, 84, 867 P.2d 956, 958 (1993). In the context of a private party exercising the power of eminent domain, this Court has stated that it “... has never held that private individuals may take property of other private individuals in order to enhance their purely private enjoyment of their property.” *Id.* In other words, identical to the constitutional mandate placed on government, a private entity may use eminent domain only if it is for “public use” and not purely for private enjoyment. Public use is defined as a use “necessary to the complete development of the material resources of the state or the preservation of the health of the inhabitant.” *Id. quoting* Idaho Const. Art. I, § 14.

Cohen involved a private condemnation action by lakeside lot owners seeking to condemn a right-of-way in order to construct seven new houses. This Court found that no public use existed by reasoning that “[t]he Cohen group’s proposed development would make available a maximum of seven new houses or condominiums to already-designated private purchasers. This is not something which is ‘necessary to the complete development of the material resources of the state’ as required by the Constitution.”

The facts and holding in the *Cohen* case are directly on point with this case. Statewide applied for a conditional use permit on May 31, 2005 in Valley County to develop a seven (7) lot subdivision owned by Statewide. Supp. R. Vol. I, 41. The plat map for the subdivision found in Supp. R. Vol. I, 143, (**Figure 1**) above shows the location of proposed lots. If successful in relocating/vacating Appellant’s easement, Statewide would be able to develop three out of the

seven (7) lots over the vacated easement. Like the lakeside owners in *Cohen*, Statewide's unilateral relocation/vacation of Appellants' easement is for the purely private purpose of creating lots on which to build homes. It cannot be said that the creation of those three building lots is necessary to the complete development of the material resources of the state as required by the Constitution.

Appellants' express easement is a property right subject to the protections of the Idaho and United States Constitutions. Statewide's unilateral relocation of Appellants' easement without their consent, has the effect of vacating their easement forever barring Appellants from exercising their right to ingress and egress over that specific portion of property identified and legally described in their deeds. As such, the vacation of the easement is a taking of Appellants' private property, which mandates that the taking must be made for a public use. Again, the creation of lots to build new homes is not a public use. Therefore, Appellants will suffer an "injury" under Idaho Code Section 55-313 if unilateral relocation is allowed because their constitutionally protected property rights will be violated if Statewide is allowed to take their easement for a private purpose.

b. Just Compensation.

The Idaho and United States Constitutions protect the individual's right to the payment of just compensation for a taking of property. The Idaho Constitution states that "[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore." Idaho Const. Art. I, § 14. Similarly the just compensation clause of the Fifth Amendment of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Appellants have a protectable property right interest in their express easements. Statewide's unilateral relocation of their easement without Appellants' consent has the same effect as vacating their easement which is nothing more than a taking of their easement. Although Idaho Code Section 55-313 provides that the owner of the private land "shall have the right at their own expense to change such access to any other part of the private lands," the payment for construction of the new roadway does not meet the definition of payment of just compensation. The United States Supreme Court has held that "just compensation normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'" *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934). Thus, Appellants are entitled to the market value of their easement at the time it was vacated/taken.

Appellants have not been compensated for the taking of their easement. Since persons are entitled to the payment of just compensation for a taking of their property, Statewide's non-payment of just compensation to Appellants is a *per se* injury under Section 55-313.

C The District Court erred in determining that there was no genuine issue of material fact with regard to injuries that Appellants will suffer as a result of Statewide's unilateral movement of the easement.

In addition to the various *per se* injuries the Appellants will suffer as a result of Statewide's unilateral relocation of their easement without their consent, the Appellants will suffer additional injuries, both personally and commercially, as a result of Statewide's unilateral relocation of their easements. Therefore, there are genuine issues of material fact as to the issue of injury that the Appellants will suffer as a result of Statewide's unilateral relocation of their easement, which precludes summary judgment in favor of Statewide.

A landowner may relocate a private road's access under Section 55-313 if the relocation will not "otherwise injure any person or persons using or interested in such access." I.C. § 55-313. In support of Appellants' Cross-Motion for Summary Judgment, Appellants submitted affidavits identifying a number of legitimate injuries that they will suffer as a result of Statewide's unilateral relocation of their easements.

Appellants King, Pietri and Crawford conduct commercial business activities out of or on their parcels. The existing easement/road, as currently configured, provide them access in a safe and useful configuration for their commercial purposes. Supp. R. Vol. I, pp. 118, 134, 140-41. Statewide's unilateral relocation will create a less direct route to their parcels, which will require them to drive heavy equipment (often covered with mud, dirt and grime) through a residential street, and will create safety problems and concerns with residents who will live the area. *Id.* Moreover Appellant King has a business relationship with the other Appellants to plow snow over the existing easement. *Id.* Relocation of the easement will interfere with Mr. King's direct business relationships. Supp. R. Vol. I, p. 140-41. Appellant Monkars, based on his personal experience, asserts that Statewide's unilateral relocation of the easement will result in additional safety issues because the proposed relocation will create increased difficulties in seeing oncoming traffic for purposes of accessing the public highway to which the easement connects. Supp. R. Vol. I, p112. All these reasons stated above establish genuine issues of material fact such that Statewide's motion for summary judgment would not be proper.

In its decision below, the district court found that there was no genuine issue of material fact as to the issue of injury. R. Vol. I, p. 91. The district court reasoned that the only injury contemplated by section 55-313 is "a taking or a lessening in value to the dominate estate holders." The portion of the statute at issue states that relocation is impermissible if the

relocation will “otherwise injure any person or persons using or interested in such access.” I.C. § 55-313. This language does not support the district court’s conclusion that the only type of injury contemplated by the statute is a taking or a lessening in value – the statute refers to use or interests in access in the context of injury. The Appellants have established that their use and access will be impaired by Statewide’s unilateral relocation. The district court, even as the trier of fact, is obligated to hear and consider evidence as to the extent and value of the injury that the Appellants will suffer as result of Statewide’s unilateral relocation of their easements. As a result, the district court erred in granting Statewide’s Motion for Summary Judgment because the Appellants have created genuine issues of material fact as to the nature and extent of their injuries as a result of Statewide’s unilateral relocation of their easement. The Appellants are entitled to present evidence on these issues at trial.

D. If this Court determines that Idaho Code Section 55-313 permits Statewide to unilaterally relocate Appellants’ express easement, Idaho Code Section 55-313 is unconstitutional because Appellants are deprived due process to determine just compensation for a taking of its property right.

Appellants argue in the alternative that if this Court determines that Idaho Code Section 55-313 may be used by a servient estate owner to relocate an express easement without the consent of the dominant estate, the statute is unconstitutional because it denies Appellants’ due process rights for determination of payment of just compensation.

The constitutionality of a statute is a question of law over which this Court exercises free review. *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and “must overcome a strong presumption of

validity.” *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). The judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. *State ex rel. Brassey v. Hanson*, 81 Idaho 403, 406, 342 P.2d 706, 709 (1959).

This Court has held that where a statute grants a party possession of property under an order for possession prior to final determination of the case, and payment of just compensation, the statute is unconstitutional. *Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288. In *Yellowstone*, a pipeline builder moved for an order of immediate possession of private land of another authorized under Idaho Code Section 7-717 (1953). The 1953 amended version of Idaho Code Section 7-717, which applied in *Yellowstone*, also contained language that permitted the party seeking to condemn property the ability to take immediate possession upon the condemning party depositing, “*a sum equivalent to twice the amount set forth in the affidavit of the plaintiff, and thereupon title to said lands in fee...shall vest in the plaintiff.*” *Id.* at Idaho 41, P.2d at 293. This Court held that Section 7-717 was unconstitutional because it violated land owners’ constitutionally protected right to due process under Idaho Const. Art. I, § 13 to determine the just compensation amount prior to the condemning party taking possession of the property. *Id.* at Idaho 44, P.2d at 296. This Court later interpreted the *Yellowstone* decision to mean that the Idaho Constitution requires that compensation be paid to the property owner prior to the taking. *Independent School Dist. of Boise City v. C. B. Lauch Const. Co.* 78 Idaho 485, 490, 305 P.2d 1077, 1080 (1957).

In this case, if this Court affirms the district court’s decision allowing a servient estate owner to relocate/vacate an express easement, a taking under the Idaho and United States Constitution has occurred requiring the payment of just compensation. Based on this Court’s

holdings applying the Idaho Constitution, payment of just compensation must be made prior to the vacation/taking of Appellants' easement. If that is the case, Idaho Code Section 55-313 is no different than the 1953 amendment to Section 7-717. Idaho Code Section 55-313 permits the servient estate to vacate an express easement and build a new roadway but with no provision regarding how just compensation is to be paid. In fact, Section 55-313 has no mechanism requiring that the servient estate even pay just compensation for the easement it takes. Therefore, Idaho Code Section 55-313 is unconstitutional because it violates an easement holder's due process rights.

A court should construe a statute to avoid, if possible, an interpretation rendering the statute or portions of the statute unconstitutional. *See Williams v. Paxton*, 98 Idaho 155, 163 fn. 1, 559 P.2d 1123, 1131 fn.1 (1976) (stating that statutes should be construed "to avoid constitutional challenges upon our construction of the statute"). The unconstitutional infirmity discussed in this section can certainly be avoided if this Court were to hold that a servient estate owner must obtain consent from the dominant estate to move an express easement.

IV. CONCLUSION

Idaho Code Section 55-313's Statement of Legislative Intent prohibits landowners from relocating an existing private access if that access currently enters onto a public road. Moreover, Idaho Code Section 55-313 cannot be interpreted to allow a servient estate owner to unilaterally relocate an easement. Such a result is an impermissible interference with the Appellants' protected property rights under the general law of easements as well as rights under the State and Federal constitutions. The moving of an express easement without the dominant estate's consent, the vacating/taking of Appellants' existing easement without just compensation and without a public purpose can all be considered *per se* injuries under the Section 55-313. Lastly,

genuine issues of material fact exist whether Appellants have or will suffer injuries that are not otherwise deemed *per se* injuries.

Alternatively, assuming Idaho Code Section 55-313 allows a servient estate owner to interfere with a dominant estate owner's property right and unilaterally relocate an easement, the Appellants have established that Idaho Code Section 55-313 is unconstitutional because it deprives the dominant estate owner of due process to determine just compensation. For this reason, and the reasons set forth above, Appellants respectfully request this Court to reverse the district court's decision granting Statewide Construction, Inc.s' Motion for Summary Judgment and with instructions to grant Appellants' Cross-Motion for Summary Judgment.

DATED this 17 day of February, 2010.

EVANS KEANE LLP

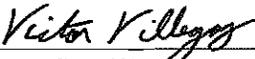
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of February, 2010, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

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