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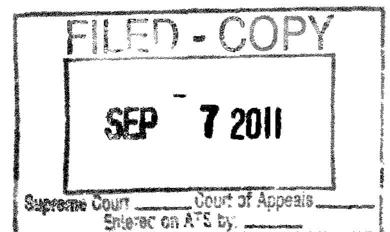
IN THE
SUPREME COURT OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING COMPANY, Plaintiff - Respondent, Vs. DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, Husband and Wife, Defendants-Appellants.	SUPREME COURT NO. 38300-2010 DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE STATE OF IDAHO CV 2002 7671

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

APPELLANTS RESPONSE



Douglas P. Lawrence &
Brenda J. Lawrence
4925 N. Webster Street
Coeur d' Alene, Idaho 83815

TEL.: (208) 704-0644

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SUMMARY JUDGMENT

Capstar argues that while the Lawrences did cite the correct authority regarding summary judgment, that authority seemingly ignores the posture of the case. Citing Intermountain Forest Management v. Louisiana Pacific, Capstar goes on to argue that the trial court is entitled to arrive at the most probable inferences based upon the undisputed evidence and to grant summary judgment despite the possibility of conflicting inferences. In support of this argument, Capstar seemingly inserts itself in the mind of the trial court and attempts to explain all the inferences the trial court made in reaching its decision. Capstar's argument as to what inferences the trial court may have made is nothing more than mere conjecture and speculation and is totally irrelevant regarding the issue of whether or not summary judgment was proper. Capstar simply is not in a position to argue how the trial court arrived at its decision, unless and only unless, the trial court provided some explanation in its written decision.

Where Capstar errors in its interpretation and application of Intermountain to the present case, is that the facts as offered by Capstar are being aggressively disputed. If the Lawrences had failed to produce rebuttal evidence of any kind, then the trail court may have been correct to draw probable inferences from the Rook and Funk affidavits. But that is not what we have in this case. The Lawrences deposed both Rook and Funk, offered conflicting affidavits from Bruce Anderson, Wilber Mead, and others, and submitted court rulings, maps, county records, and business records, all in an effort to defeat the affidavits authored by Capstar's legal team and sent to Funk and Rook to sign. The trial court simply abused its discretion in its summary judgment ruling.

THE EVIDENTIARY ERRORS

The Appellant's opening brief remunerated twenty-four evidentiary errors made by the trial court which in its reply brief, Capstar characterizes as either harmless scrivener errors, "probable inferences", and/or irrelevant. The issue is, that the overwhelming majority of these errors cannot be dismissed as either harmless scrivener's errors or probable inferences. The fact of the matter is, the trial court simply did not get its evidentiary facts correct and the Lawrences were denied their due process rights. And, regardless of how Capstar may want to portray these errors, under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. *State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994).*

Because this is not the first time the Lawrences are appearing on appeal in this matter, it is entirely fair to say that the trial court has a record of making error(s). And, it needs to be noted, that while the Lawrences prevailed on an earlier appeal, the reversal of that summary judgment didn't erase the trail court's earlier errors, it just corrected the judgment. Those earlier errors are entirely relevant to the "whole body" of errors produced by the trial court in this matter. Especially, given the fact that both sets of errors, those noted on the first appeal, and those noted in the present appeal, included among other things, the trial court's interpretation of the subject to and including language of Funk/Human Sale Agreement (which is addressed at some length later in this brief), both sets of errors resulted in summary judgment rulings declaring the existence of easements in favor of the Respondents. Listed below are just a few of the errors made by the trial court:

- A finding that the very same deed that was found to be ambiguous in the Tower case was repeatedly found to be clear and unambiguous in the Capstar proceeding, is not a harmless error, but a fundamental error.
- A finding that the subject to and including language in the Funk/Human sale agreement was "unambiguous" and that such language created an express easement in favor of Capstar, is not a harmless error, but a fundamental error. [R. 32090 p.83]
- A finding that Funk took great care to reserve an easement across the parcel sold to Human Synergistics in 1975; however, he errantly put that language in the Sale Agreement, is not a harmless error, but a fundamental error.
- A finding that the reason there is no express easement is the most convincing evidence as to the implied easement theory, is not a harmless scrivener's error.
- A finding that the Rebeor's affidavit shows that he managed the tower site for Capstar, is not a harmless error, but a fundamental error.
- A finding that Nextel assigned the Access License Agreement to Capstar, is not a harmless error, but a fundamental error.
- A finding that Funk used the property consistently from the six year period from the day he sold to Human Synergistics to the day he moved from the area, is not a harmless error, but a fundamental error.
- A finding that the use Capstar seeks is no different than the prescriptive use Funk made of the Lawrences' land, is not a harmless error, but a fundamental error.

- A finding that when Funk sold the Section 21 parcel to Human Synergistics, Funk included in the sales contract language that gave notice that Funk intended to continue to use the road for ingress/egress, is not a harmless error, but a fundamental error.
- A finding that the Funks and their successors used the road openly, continuously, without interruption, under a claim of right for much longer than the statutory period requires, is not a harmless error, but a fundamental error.

Capstar is simply wrong to characterize the errors the trial court made as either harmless scriveners errors or "probable inferences" within the trial court's prerogative to make.

Capstar also identified items F, J, K, L, M, N, O, P, Q, R, and S in the Appellant's opening brief as issues Capstar considers irrelevant to the present appeal. Capstar suggests that all are statements made by the trail court regarding the Tower Asset Litigation. And, because of that, this Court should disregard them. Capstar certainly doesn't offer any explanation as to why each and everyone is irrelevant, nor do they cite any case law in support. Neither have they offered any legal foundation establishing why Appellants cannot point to ALL the trial court errors in it's written decision they are appealing to a higher Court to review.

The Lawrences did not ask the trial court to offer one opinion for both cases. And, had the trial court offered two separate written decisions, Capstar MIGHT have a valid argument. The problem for Capstar is that they (both Capstar and Tower) <u>intended</u> that both of these cases be tried on the same path. It was a conscious decision on their part(s). Capstar and Tower both hire the same attorney. Both cases happened to be assigned to the same judge. Both, file motions for summary judgments at or near the same time. Both schedule nearly all hearings and court appearances together. Both submit practically the same briefs. And, in just about every case, their

briefs were filed together at the same time. Both agreed that one deposition of Harold Funk be taken and that deposition be used for both cases. At no time, over the past nine years, has Capstar ever objected to the trial court issuance of one written decision to cover both cases.

These two cases are conjoined in other ways. At the first summary judgment hearing in Capstar, the Lawrences moved the court for an extension of time to complete their discovery. Rather, than grant the extension of time for discovery, the trial court held a summary judgment hearing (limited to the express easement theory) and simply withheld its ruling until after a summary judgment hearing was held in the Tower case. Similar to Capstar, Tower also pursued a summary judgment ruling on ALL its easement theories as well. Facing a summary judgment hearing in Tower, the Lawrences abandoned their Pro Se status and retained legal representation. After filing a notice of appearance, the Lawrences' attorney filed for an extension to complete discovery. The trial court granted the extension, but then gave orders that the Tower discovery and summary judgment argument be limited also to the express easement theory alone. The trial court offered no explanation as to why the Tower discovery should be limited. If, as Capstar argues, the facts and proceedings in Tower are totally irrelevant to Capstar, then the trial court would have no apparent reason to limit the discovery (and argument) in Tower to the express easement theory alone. Capstar certainly didn't raise any objection to the trial court's apparent "conjoining" of the two cases then.

The fact of the matter is, that for eight years Capstar and Tower have prosecuted these two cases very similarly and on the same calendar. They did it most likely to help keep their expenses down and the Appellants costs up. There can be no doubt, that defending two cases is certainly more expensive and time consuming than defending only one.

In the present matter, the Appellants are appealing from orders the trial court published on June 25, 2007 which is a joint **Memorandum decision and order denying motion to disqualify for cause, I.R.P.C 40 (d)(2)**, a November 30, 2007 joint **Memorandum decision and order denying defendant's renewed motion for permission to appeal from an interlocutory order, I.A.R. 12**, and the February 6, 2008 joint written decision **Memorandum decision and order granting plaintiff's motion for summary judgment.** All three orders were jointly published. Had Capstar taken issue with the joint publication of these orders, Capstar should have made an objection with the trial court at the appropriate time. However, Capstar made no such objection and cannot now argue that this Court should not consider the trial court's written decision in its entirety.

It is also abundantly clear from the trial court's written decision that the trial court considered evidence and arguments from both cases in reaching its decision(s) for both. For example, item F, which Capstar argues is irrelevant, revolves around evidence submitted in Tower which the trial court relied on in ruling in favor of Capstar. Here, the trial court made the finding that on January 13, 2003, Nextel assigned the access license agreement to Capstar. It is completely unclear how the trial court could arrive at such a finding since there was never any assignment of the Nextel License Agreement to Capstar. Regardless, it is an error in a finding of fact as it applies to Capstar and therefore, makes the error and the Tower record entirely relevant for review by this Court.

The Appellants believe that the trial court simply "lumped" these two cases together in its findings of facts, decisions, and judgment making processes. This idea is supported by a couple of statements the trial court offered in its decision: "*Additionally, the analysis above as to*

Capstar's easement by implication from prior use, easement by necessity and easement by prescription, applies to the Halls [R. 35120 v. 3 p. 589] ... *Just as in the Capstar case, Lawrences in this Tower Asset case also make the arguments of statute of limitations and laches... The analysis above as to those arguments applies in the Tower Asset case* [R. 35120 v.3 p. 590].

Lastly, there can be no doubt that the trial court made its findings in Tower entirely relevant to Capstar, when it published a joint written decision; and, that written decision became a part of the clerks record on appeal. Had the trial court believed the facts and issues in each case were irrelevant to the other case, then the trial court would have and should have exercised due care not to taint each by the other. Clearly, that is not what has happened in this case. By publishing joint decisions and joint findings of fact, the trial court simply made each case relevant to the other. All the trial court errors noted in the Appellants' opening brief are relevant to Capstar because the trail court made them a part of the Capstar record which is up for review.

THE ISSUE OF NECESSITY

Exhibit 1 is a scanned image of page 20 of Capstar's Respondent's Brief (Docket #35120) containing a map that Capstar argues is an illustrative depiction of the properties in question utilizing a Kootenai County public road map from the Brownsberger affidavit. Capstar states that the properties Funks originally acquired are highlighted in yellow and the red x's on the map illustrate the approximate location of Mellick Road. Capstar makes the claim that this map is evidence that the logging road across the Funk parcel did not extend all the way to

Mellick and that Mellick Road crosses into Section 21 and does not provide access to his land in Section 22.

Notwithstanding the fact the Lawrences raise issue with the foundation and accuracy of the map, even this map clearly shows Mellick road entering Funk's land in Government Lot 3, the SW ¼ of the SW ¼ of Section 15.

During the presentation of oral argument on April 6 2010, this Court questioned Capstar's attorney specifically regarding the Mellick Road access to Funk's land in Section 15. The following verbal discourse was exchanged between Justice Horton and Ms. Weeks during oral argument.

Justice Horton: *"If we're focusing on the Funk parcel, then wasn't their access to their parcel in Section 15 via Mellick Road?"*

Ms. Weeks: *"Your honor, I know that the little map I drew, the red, touches that corner – but the Mellick road survey and I believe if you look at the one that Judge Haman put in there does not take it in other than to that one corner. Yes. But it didn't continue on in. There wasn't a road on in. He would have had to have created the road in to there and Mr. Rook, testified ...or excuse me not Mr. Rook, Mr. Funk testified that that the terrain was such that it wasn't a reasonable option. But, yes, I do think that if you look at those that it may have touched the corner of Section 15 of part of his ownership."*

Justice Horton: *"Which is basically all that is required for an easement by necessity, is that the parcel actually be accessible, not that all portions of the parcel be readily accessible."*

Ms. Weeks: *"That's correct."*

Clearly, Ms. Weeks acknowledged to this Court that Funk's access in Section 15 was via Mellick Road. Furthermore, Ms. Weeks agreed with Justice Horton that all that is required is that the parcel is accessible and not all portions of the parcel be accessible. Yet, Capstar's reply brief appears to be a reversal from Ms. Week's acknowledgments to this Court. Capstar's reply brief is largely a re-hash of the same false claim i.e. "At the time Funks purchased the property in 1969, the GTC easement road was the only existing road providing access to the Funk's real property."

The undeniable fact is that Mellick Road provided legal access to the Funk parcel in Section 15. This fact is proven by no less than the 1907 Survey and Viewers Report, the Bruce Anderson affidavit, the 1959 Metsker map, the District Court's finding in the Loudin v. Stokes case, the Brownsberger map, Funk's deposition testimony, and Ms. Weeks own testimony to this Court. It clearly goes against statements contained in the Funk and Rook affidavits stating otherwise and does raise the question regarding the reliability of those affidavits.

Both easement theories, an easement by necessity and easement implied by prior use, require that the claimant "prove" (among other things) the element of necessity. For an easement by necessity, the claimant must prove strict necessity; generally meaning that the parcel is completely devoid any legal access. Given the undeniable fact that Funk's land in Section 15 benefited from the Mellick Road access, this element cannot be established and Capstar's claim of an easement by necessity is defeated.

IMPLIED BY PRIOR USE

For an easement implied by prior use, the claimant need not prove strict necessity. Rather, the claimant only needs to prove something less than strict necessity; generally meaning

that acquiring the access would prove either too costly or too difficult. Here too, because Funk's land benefited from the Mellick road easement in Section 15, there is no necessity. Simply stated, Capstar cannot establish an easement implied by prior use because it cannot establish the element of necessity. The Funk parcel benefited from the Mellick road easement and therefore, there was no element of necessity.

Capstar attempts to make the argument that because Mellick road didn't extend all the way into Funks' Section 22 property or because it needed work, created a necessity for access to Funk's Section 22 land. This argument is clearly unsupported by law. Capstar has failed to cite any case law that supports the argument that anyone who cannot access a part of their land, can take the property of their neighbor for access. There simply is no law that provides that every portion of a parcel must have legal access.

Regardless, the undeniable fact is that there was a logging road that extended from Mellick road in Section 15 to Funks land in Section 22. Whether or not that road had become overgrown or had passed through Section 21 is clearly irrelevant. Theoretically, even if the owner of Section 21 denied Mr. Funk the right to travel on the logging road as it passed through Section 21, Mr. Funk could have redirected the road to connect up with Mellick road in his Section 15 property. There was nothing that stopped him other than the desire to do it.

Capstar's argument that the terrain was too steep or too difficult for Mr. Funk to improve is unsupported by the evidence and completely without merit. To the contrary, Mr. Mack testifies in his affidavit that he improved the old logging road. It certainly did not appear to be too difficult or prove to be too costly for him. One has to ask, if Mr. Mack didn't have any trouble cleaning out the old logging road, then why would it be too difficult for Mr. Funk?

It is undeniable that the logging road did extend from Funk's land in Section 15 to Funk's land in Section 22. This fact is supported by Mr. Funk's deposition testimony, the Metsker map, and the affidavits of Douglas Lawrence and John Mack. The fact that Mr. Funk *elected* not to clean or maintain the logging road is supported by Mr. Funk's own deposition testimony. Mr. Funk cannot create a necessity for his land in Section 22 by electing not to clean and improve his Mellick road access. The law in Idaho is clear. "Owner of property cannot create a necessity for an easement by his or her own actions". *B & J Development and Inv., Inc. v Parsons, 126 Idaho 504, 887 P.2d 49 Rehearing Denied (1994).*

Capstar has other problems with their easement implied by prior use claim. First, the easement Capstar claims to have existed in 1975 didn't exist. Prior to 1989, the Capstar parcel was just part of the larger tract of land the Funks owned. There simply was no access road to the Capstar parcel. In 1975, there was only an access road to the Funk parcel.

As Mr. Funk testifies, he did not approach the owners of Section 28 for an easement. According to Mr. Funk, the twenty or thirty times when he drove to his land, he typically did not drive across Section 28. Rather, he drove to a spot (that he identified on a map used at his deposition) that was west of the Lawrences' parcel and did not require passing through Section 28. There can be no doubt that the Funks did use "a portion" of the Apple Blossom Road to access their property to the west of the Lawrence parcel. However, the Funks certainly did not make use of the Lawrence parcel as Capstar suggests.

There can also be no doubt that the Funks only made two or three trips to their property after 1975 and absolutely no trips after 1981, some eight years prior to the creation of the Capstar parcel. Two or three trips over a six year (1975-1981) period across wild, uninhabited and open

forest land, and unbeknownst to anyone but themselves, hardly rises to the legal definition of an implied prior use. Mr. Funk claims that from 1969 to 1975 he made twenty to thirty trips to his property across the land owned by Wilber Mead. In an affidavit offered by Wilber Mead, Mr. Mead states that prior to granting the Funks an easement in 1972, the only people he was aware of using his road was GTE. If Mr. Mead wasn't aware of the use the Funks made of his land prior to 1972, then how would anyone else be aware of the Funks' two or three trips made over a six year period. There is simply no evidence that anyone, other than the Funks themselves, even knew of such use. Even Rook testifies that he didn't know what road Funk used.

Prior to 1975, the Funks used the Apple Blossom Road to access a point to the west of the Lawrence parcel. After the Funks move to American Falls in 1975, for all practical purposes, the Funks use of the Apple Blossom access road terminates. The only established use that the Funks made of the Apple Blossom Road is the use they made of the road between the period of 1972 and 1975 to reach an area that Mr. Funk identified on a map that lays to the west of the Lawrence parcel.

It also needs to be noted that at all times relevant, the Funks were in legal title to all their lands in Sections 15, 21 and 22. In order for Capstar to establish the element of necessity they claim to have existed in Funks' Section 22 parcel, Capstar would have to establish that the Funks conveyed title ownership of the Lawrence parcel in 1975. That simply did not happen.

FUNK/HUMAN SYNERGISTICS SALE AGREEMENT

Capstar asserts that the trial court correctly noted that after Funk sold the property to Human Synergistics in 1975, he recorded a sales agreement which contained the clause that the

parcel was subject to an ingress/egress easement for the benefit of Section 22. And, even though this language did not reserve an express easement, it evidenced a claim of right for Funk and their successors to use the road for ingress and egress to Section 22.

The Funk/Human Synergistics land sale agreement was neither a conveyance or any claim of rights by its own terms. The Sale Agreement was merely an executory land sale agreement to place third parties on notice that the Buyer has a beneficial interest in the land. In *Capstar v. Lawrence, 143 Idaho 704, 152 P.3d 575 (2007)*, this Court agreed:

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

Being that the sales agreement was not a conveyance as Capstar claims, the Funks retained title ownership in the property until they actually conveyed the title in 1992. Therefore, whatever use Capstar claims the Funks made of the Lawrence property prior to 1992, could not be considered a prescriptive use. One simply cannot create a prescriptive use over the lands they own. The trial court was in error when it ruled that: "The use Capstar seeks is no different than the prescriptive use Funks made of the Lawrences' land for that six year period from 1969 to 1975." [R. 35120 v. 3 p. 575]

Capstar initially claimed that the "subject to and including language" of the Sales Agreement amounted to a reservation of an easement. And, this was the finding of the trial court on our first appeal [R. 32090 p.83]. This Court simply disagreed with trial court's finding concluding:

> "There is nothing in the sale agreement that indicates an immediate grant of easement rights... The sale agreement therefore does not, by itself, create any

> easement either by grant, reservation or exception. The district court erred in concluding that it did."

Either the trial court did not read this decision or it simply disagreed with the Supreme Court's opinion. The trial court made it obviously clear, it thought otherwise:

> "Funks actually did take great care to reserve an easement across the parcel he sold to Human Synergistics in 1975; however, they errantly put that language in the sale agreement. That is why there is no express easement." [R. 35120 v. 3 p. 569]

The undeniable fact is that the subject to and including language in the sales agreement was simply declaring that the parcel being sold was *subject* to an easement that had been previously granted to GTE in 1966 and it also *included* an easement (appurtenant) that the Funks acquired across the property owned by Wilber Mead in 1972. This fact was supported by the 1998 writing Harold Funk offered by the Lawrences, as well as the 1966 GTE warranty deed, the 1972 Mead/Funk easement, and the 2007 Supreme Court opinion in Capstar.

After this Court remanded this case back in 2007, Capstar invents a <u>new</u> argument for the sales agreement; claiming that while the language did not reserve an easement, it did evidence a claim of right for Funk and their successors to use the road for ingress and egress to Section 22. This argument is simply disingenuous and without merit. It was a product created to fill a void in their prescriptive easement claim. The void that involves the element of notice. Capstar simply has not produced any evidence that supports the notice element that's required for a prescriptive easement claim. Because there is no evidence, they attempted to invent it. Capstar never really explains how the language creates a claim or points to the exact wording that creates the claim. They just suggest that it does and the trial court was ever too eager to go along.

FARMANIAN/MACK EASEMENT

Capstar argues that Lawrences' predecessor in title "Farmanian," immediately prior to signing the Lawrence sale agreement, entered into a grant of easement and quit claim deed with John Mack. As Capstar argues, in that writing, Farmanian and Mack recognizes the GTC easement road (as it crosses the Farmanian parcel) as the historical access road being used by Funk and his successor Mack. However, Capstar offers no other evidence of any kind to support this claim, nothing from the Farmanians and nothing from Mack. And, as the record abundantly shows, the Farmanians would have absolutely no first hand knowledge of the Funks use of the road.

The Farmanians' interest in the Lawrence parcel begins on June 28, 1996 when National Associated Properties conveys to them a Warranty Deed and ends just three months later when on October 1, 1996, the Farmanians convey a warranty deed to the Lawrences. There is absolutely nothing in the record that reveals the Farmanians having any interest in the Lawrence property prior to June 28, 1996.

Funk testifies that he only made two to three trips to his property after 1975 and made absolutely no trips after 1981, a full fifteen years before the Farmanians take an interest in the property. It simply is not possible for the Farmanians to know what road(s) the Funks used or even what part of their property the Funks visited. There simply is no evidence in the record of the Farmanians ever visiting the property, actually witnessing anyone using the road, or even knowing any of the history of the property. And, they certainly cannot testify to anyone's use of the road prior to 1996.

ROOK AFFIDAVIT

Capstar argues that there is no indication in the record that the medication Mr. Rook was on when he signed his affidavit, affected Mr. Rook's ability to perceive and understand what he was doing when he signed the affidavit in 2004. Capstar further attempts to minimize the medication issue by making the *unsupported* claim that the medication only affected his ability to recall the period of time after he signed the affidavit, which is not what Mr. Rook testifies to.

During deposition, Mr. Rook was asked by J.P. Whelan *"Now, can you tell me, how did this affidavit come into being? Was it prepared by Susan Weeks?"* Rook's answer *"You know, I don't even recall it."* [RD (*Rook Deposition*) 47:21-24, R. 35120 v.2 p.412] A few moments later Mr. Rook is asked *"And do you think you read this before you signed it?"* His answer, *"probably."* [RD 48:16-18] Meaning, Mr. Rook can't even testify to the fact that he even read the affidavit before he signed it or even knew what the affidavit contained. Mr. Rook explains why he doesn't remember the affidavit. At the time he signed it, he was on some *"pretty strong medication"* [RD 48:4] for a heart attack and offers *"I don't recall much of anything during this period that I had my heart attack."* [RD 48:7-9]

Mr. Rook's deposition notice required that Mr. Rook produce documentation for his deposition. When Mr. Rook arrived at his deposition, he was asked for this documentation, he produced nothing. According to Mr. Rook, about four years earlier, he had tossed every single thing that had to do with his radio and broadcast career out. [RD 5:8-10] He kept absolutely no paperwork of any kind relating to the radio station. He certainly didn't bring a copy of the affidavit he signed.

Regarding the affidavit, Mr. Rook said "*he didn't recall it*" meaning, he doesn't have any recollection of it at all. Having no recollection implies that he cannot testify to anything contained in the affidavit. He simply doesn't know whats it says or what it contains. Obviously, the medication Mr. Rook was on at the time he signed his affidavit affected his mental capacities. He testifies that he doesn't recall much from the period that he had his heart attack and really points to the medication as the cause.

The real purpose of depositions are to get to the facts of what an individual knows and what an individual can testify to. The fact of the matter is: Rook does not testify that he read the affidavit; does not testify that he is aware of its contents; does not testify that he understood what he was signing when he signed it. And, when asked what he knew about specific statements made in his affidavit, he <u>could not</u> validate those statements. For example: Mr. Rook's affidavit contained this statement in paragraph 4 "The existing private road was visible and in use by Funks at the time Kootenai Broadcasting purchased its parcel" When asked about this statement Mr. Rook replied *"How do I know it was Mr. Funk's access? I have no - - I wouldn't. I can only say that thats the one road that I used or that my station used going in and out of that place over all the time we owned it was that one road."* [RD 52:24 – 53:3] A few moments later, Mr. Rook was asked: "How do you know that the Funks were using that road at the time Kootenai Broadcasting purchased its parcel?" His answer, *"The only thing – the only answer to that is that thats what Bill Gott would have told us was – whether Funks used it, <u>I don't know whether Funks had been up that hill before</u>. I'd never met the man."* [RD 56:24 – 57:5]

Here, Mr. Rook's deposition testimony completely contradicts the statement(s) offered in his affidavit. Yet, the trial court completely ignores what Mr. Rook said regarding this in his

deposition. The trial court writes "*John Rook corroborates Harold Funk, but does so at a later time in 1989 when Kootenai Broadcasting, Inc. purchased its land. Rook testified in his affidavit that in 1989 the private access road was the only road that provided access to the Funk's parcels in the Southwest Quarter of Section 22. Affidavit of John Rook in Support of Motion for Summary Judgment, p. 3 ¶¶ 4, 6. [R. 35120 p. 586]*

The trial court either didn't review Mr. Rook's deposition testimony, just dismissed it, or had other motives for citing his affidavit testimony and not citing his deposition testimony. Clearly, there are obvious conflicts between his affidavit and his deposition that the trial court didn't resolve in its written decision. Because of the conflicts in his testimony and the fact Mr. Rook cannot testify to anything in his affidavit, the trial court should have completely impeached the Rook affidavit and therefore the trial court abused its discretion by admitting the affidavit testimony.

PREJUDGMENT ACCESS TO THE LAWRENCE LAND

One of the issues raised in their opening brief was whether or not the trial court abused its discretion by granting Capstar prejudgment access to the Lawrence parcel, without the application of a TRO, Preliminary Injunction, or the taking of a bond. This issue refers to a hearing that was held on October 29, 2007 in which Capstar filed an application for access across the Lawrence parcel. [HT (*Hearing Transcript*) 119:1-131:3]

This application was filed with the trial court together with a motion to shorten time, just three days before the hearing was held. With only three days notice, the Lawrences were unable to file a reply brief.

The Lawrences objected to the motion to shorten time on the grounds that the motion did not cite a rule, nor did it state a reason to shorten time, nor did it have an affidavit in support. The Lawrences also objected to the application for access on the grounds that there was no rule cited, no affidavit in support, no injunction or TRO in place, and no bond in place. The Lawrences also argued that when the trial court issued a permanent injunction, the permanent injunction superseded the preliminary injunction, resulting in the exoneration of the bond Capstar posted for the preliminary injunction. Then, when the Idaho Supreme Court reversed the decision that created the permanent injunction, that it only stands to reason that the permanent injunction would not be left in place. Therefore, having no preliminary injunction in place and no permanent injunction in place, before the trail court could grant access to Capstar, Capstar would necessarily have to apply for a TRO or preliminary injunction and post another bond. The Lawrences' objections were summarily over ruled and the trial court granted Capstar access. Capstar offered absolutely no argument or response regarding this issue in their reply brief.

PRESCRIPTIVE EASEMENT

Capstar acknowledges on reply that the Lawrences correctly noted that the trial court made an error regarding the prescriptive period as applied to Funk. Capstar then goes on to argue that the trial court evidently became confused regarding the dates. And, that this defect in the Court's analysis regarding the time period of Funk's use does not invalidate the trail court's finding that there was a prescriptive easement established over the property. Because, according to Capstar, the record shows that the Funks made two or three trips to the property between the six year period of 1975 and 1981.

As discussed earlier at some length, the Funks retained legal title to the Lawrence parcel until the year 1992. Because the Funks were in still title to the property from the years 1975 – 1981, the Funk's use of their own property could never have ripened into a prescriptive use. Capstar completely ignores this fact.

Also, Capstar seemingly ignores the fact that the Funks completely abandoned their use of the road after 1981. For the eight year period immediately preceding the creation of the Capstar parcel, the Funks make not a single use of the road. The Lawrences will argue, that the trial court also erred by not considering this fact. One of the elements required to establish an easement by prescription is that the use of the easement is "continuous and uninterrupted" for the statutory period. What the Funks testify to is that over a six year period, they made roughly two or three trips – then completely abandoned the use of the road. It is certainly hard to understand how two or three uses over a six year period rises to the level of "continuous and uninterrupted." It is even more difficult to understand how the trial court could conclude that an eight year absence is not an uninterrupted use.

The statutory period for the present action is five years. In effect, the Funks abandoned their use of the road for three years more than the required statutory period. Therefore, whatever claims over the road the trial court concluded the Funks acquired, the trial court should have also concluded that they were extinguished through abandonment. It only stands to reason, that if the use of a road for the prescriptive period can benefit the dominant estate, then non-use of a road for the same prescriptive period should benefit the servient estate. It doesn't make equitable sense that rights only accrue in favor of the dominant estate and never in favor of the servient estate.

Capstar also argues on reply that the origin of the easement is known. According to Capstar, it commenced on the purchase of the Funk property and continued after severance.

In *Hughes v. Fisher, 124 Idaho 474, 129 P.3d 1223 (2006*), this Court reiterated the general rule that the regular crossing of another's property was presumed to be adverse with the exception where a landowner constructed a way over his land for his use and convenience, the mere use of it by others that doesn't interfere with his use will be presumed permissive. Capstar then goes on to argue that the trial court had no basis to presume Funks use of the road was permissive because there is no evidence that Lawrence or his predecessor constructed the road. This assertion clearly goes against the all evidence in this record and what Capstar has been testifying to all along. In its Memorandum in Support of Renewed Summary Judgment [R. 35120 v.1 p. 20] Capstar acknowledges that they do not know who built the road *" When the road providing access to the Funk's Section 21 and Section 22 parcels was established is unknown."* Capstar also acknowledges that the road was there prior to the Funks taking title to their land. [R. 35120 v.1 p. 13] *"The private road used by GTC, Funk, and Rook was the only existing road that provided access to the parcels at the time that Funks purchased the property.*" The 1959 Metsker map clearly shows the road as having existed as early as 1959, some seven years prior to GTC acquiring easement rights and building a tower site. The evidence also shows that this road was in existence when GTC acquired easement rights. Exhibits 2 and 3 are copies of the easements GTC acquired from Blossom and Ulrich which state in part:

> "Grantee is granted the right to make all necessary improvements and minor relocation on the present road site in order to facilitate moving its equipment and machines to and from the site of said microwave tower."

It is clearly undisputed that the road existed prior to GTC acquiring easement rights in 1966. The trial court should have concluded, lacking evidence to the contrary, that the road was built as early as 1959 and for the specific use and convenience of owners at that time. As this Court noted in *Marshall v. Blair, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997)*

> "Use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part, negates any presumption of individual right there in his favor."

Therefore, the trial court should have directed its inquiry towards a decisive act that constituted some actual invasion or infringement of the rights of the owner of the servient property in order to determine if the use amounted to an adverse use. *Schultz v. Atkins, 97 Idaho 770, 554 P.2d 948 (1976).* There is absolutely no evidence in the record that indicates any decisive act on the part of Funk or Rook that would constitute an actual infringement of rights. On the contrary, both Funk's and Rook's deposition testimony evidences just the opposite. Both testify that they were given keys to the gate. Both testified that they believed they had permission to use the road. And, neither testified that they used the road adversely to anyone's rights or under any claim of right.

To establish an easement by prescription, the claimant must prove by clear and convincing evidence the following elements: 1) open and notorious; 2) continuous and uninterrupted; 3) adverse and with a claim of right; 4) with an actual or implied knowledge of the owner of the servient tenement; 5) for the statutory period. To establish an easement by prescription, a party must establish by clear and convincing evidence of <u>all of the elements</u> necessary for a prescriptive easement.

The Lawrences contend that not only has Capstar failed to provide clear and convincing evidence supporting all of the elements required for a prescriptive use, they simply cannot prove any one element. There simply is no evidence to support Capstar's prescriptive use claim. Capstar has simply failed to establish a Prima Facie case.

DISQUALIFICATION

Two of the issues the Lawrences raise on appeal is whether or not the trial court abused its discretion by refusing to disqualify itself for cause and whether or not the trial court abused its discretion by conducting an independent investigation. In support of these issues, the Lawrences establish twelve facts that they believe would certainly give cause to question the trial court's impartiality.

In its reply brief, Capstar devotes a single page in response, portraying the Lawrences as doing nothing more than taking umbrage with the trial court's rulings that the Lawrences disagree with. Capstar does not provide any argument regarding the twelve facts the Lawrences raise in their opening brief. Capstar simply glosses over the issues by ignoring the facts. Yes, the Lawrences do take umbrage with the trial court's ruling. The Lawrences have been fighting this litigation for nine years. In defense of this litigation, the Lawrences have taken depositions, acquired affidavits, searched court and county records, and have produced a body of evidence that clearly goes against Capstar's claims. All, for it to be simply dismissed by the trial court. It is simply too hard to rationalize how the trial court can simply ignore all the rebuttal evidence in this case. How could the trial court ignore the fact that Mellick road entered the Funk's land in Section 15? How could the trial court ignore the fact that the Funks were in legal title to the land

they supposedly prescribed an easement across? How could the trial court so misinterpret the directives of the Idaho Supreme Court on remand?

There can only be one of two answers. Either the trial court is completely incompetent or the trial court was simply going to find a way, any way, to rule in favor of Capstar and Tower. The Lawrences, no doubt, believes the latter.

FACT 1. *The trial court made a significant number of errors in material facts.* Because this issue was discussed at length in the Appellant's opening brief under a discussion of the evidence, the Appellants won't belabor the issue by reviewing the errors. But the fact is the trial court made at least twenty-four errors in findings of fact and each and every error was used to support a ruling in favor of the Respondents. And, they were not harmless errors as Capstar portrays, but fundamental errors.

FACT 2. *The trial court's clearly erroneous and contradictory findings made in the 2004 summary judgments for Tower and Capstar and denying Lawrences' timely motion for an extension of time to finish discovery prior to a summary judgment hearing.* Initially in Capstar, the Appellants were *Pro Se*. A hearing was held on Capstar's motion for summary judgment. Prior to the hearing, the Lawrences filed a timely motion to move the court to provide an enlargement of time because Capstar had not provided timely answers to defendants admissions, interrogatories, and demand for production. Furthermore, the answers Capstar did provide were vague and questionable. Rather than grant an enlargement of time to allow the Lawrences ample time to dispute the facts, the court just ruled on the issue of an express easement. The Lawrences presented good rebuttal facts concerning the express easement theory, all of which were summarily dismissed by the court with a total disregard to Lawrences' arguments. The court

granted summary judgment in favor of Capstar, in part by repeatedly finding that the sales agreement and deed were clear and unambiguous.

Facing a similar upcoming hearing on Tower's motion for summary judgment, the Lawrences retained John P. Whelan who represented them at hearing. Mr. Whelan explained to the court the doctrine of merger and presented good arguments against Tower's express easement theories. Lawrences' arguments were again, summarily overruled. The court granted summary judgment in favor of Tower, *this time* finding the deed to be ambiguous. The basic tenets of stare decisis dictate that the law shall be consistent and applied in an even handed and predictable way. Due process of law would seemingly require a similar result. Yet, in the present matter, the trial court reached seemingly arbitrary and capricious results. The Lawrences appealed both decisions and on appeal, the Idaho Supreme Court found in favor of the Lawrences, reversing the court's order and remanding it back for further proceedings. In a footnote in the Tower opinion, the Idaho Supreme Court even questions how the trial court could conclude the deed to be ambiguous in one case and unambiguous in another.

FACT 3. *Confining the initial summary judgment ruling on the express easement theory alone.* Obviously, the trial court would have had a harder time justifying the findings of a prescriptive easement and implied easement, together in the same decision, with a finding of an express easement. It is entirely reasonable for the Appellants to question *whether the trail court was attempting to offer the Respondents their best shot at all their easement theories* by disassociating the finding of an express easement from findings on the other easement theories. While this issue was not raised by the Appellants on their first appeal, the Idaho Supreme Court in Tower noted in part: *Final resolution of this case would have been expedited, had the district*

court not confined its inquiry to the express easement issue.... By confining its consideration to the express easement issue, justice in this case has been delayed.

FACT 4. *Summarily ruling in favor of the Respondents on each and every easement theory they put before the court and ultimately ruling in their favor on their express easement, easement by necessity, easement by implication by prior use, and prescriptive easement theories.* The Lawrences are being sued by both Tower and Capstar over *each and every* easement theory recognized by law and over the course of these proceedings, the trial court has determined that both Tower (or Tower's landlord **who is not** a party to this case) and Capstar have express easements, implied easements by prior use, easements by necessity, and prescriptive easements across the Appellants land. It begs the question, how could the trial court possibly find, in a summary judgment ruling, that ALL the legal elements necessary to establish ALL the various easement theories were present in essentially the Funk/Human Synergistics sales agreement, the Funk affidavit, and either the Rook or the Hall affidavit? And, it raises a host of other questions and issues: How can a party have an express easement AND an easement by necessity AND an easement by implication AND a prescriptive easement over another party's land? How could a party's use of an express or implied easement ripen into a prescriptive use? How could the element of necessity be satisfied if an express easement exists? While Funk sold the now Lawrence parcel to Human Synergistics in 1975 under a real estate contract, the title didn't convey to Human Synergistics until 1992. How could Funk create a prescriptive right across the land he was in title to at the time? How could there exist an easement to the Capstar's parcel in 1975, when Capstar's parcel wasn't created until 1989? Even on the surface, the ruling appears not to be a well thought out, well reasoned finding of fact and conclusion of law. It reads more

like a shot-gun blast where the lower court is just going to find reasons to rule in favor of the Respondents. It is entirely reasonable for the Appellants to question *whether the trail court was attempting to offer the Respondents their best shot* *at all* *their easement theories.*

FACT 5. *Seemingly dismissing and/or ignoring the summary judgment rebuttal evidence the Lawrences' put before the court.* Again, because this issue was raised earlier in this brief, the Appellants will not belabor the point other than to list it among those facts that the Appellants point to as why the court's impartiality might reasonably be questioned.

FACT 6. *The trail court's final judgment that the plaintiff/tenant/lessee (of Hall) has an easement by prescription, an easement implied by prior use, and an easement by necessity.* At summary judgment in Tower, the Appellants argued that on first appeal in Tower, the Idaho Supreme Court established that title ownership is a prerequisite to quiet title an easement appurtenant in favor of a dominant estate. Furthermore, that Hall, who is not a party to this suit is the record owner of the dominant estate and as a result, Tower lacks standing to seek quiet title declaration in its favor. In its memorandum and decision, the trial court argues that the Appellants assertions *(in Tower)* that Tower lacks standing to pursue easement theories of implication or necessity is without merit and as a result, grants partial summary judgment in favor of Tower and declares that the plaintiff/tenant/lessee has easements by prescription, implication, and necessity.

Not only was the quiet titling of an easement in favor of the tenant wrong, it seemingly contradicts the trial court's own reasoning in its memorandum and decision when the court states *"the only issue remanded by the appellate court in this case was whether Tower Asset, as a tenant, has a legal right to benefit from the Blossom Mountain Road easement of its landlord,*

Halls....In the Tower Asset case, Tower Asset has proven they are entitled to injunctive relief, as their landlords, the Halls, have an easement over Lawrences land established by prior use, by necessity and by prescription..." Clearly, the trial court was going to find any reason whatsoever to grant Tower an easement across the Appellant's land. And, it is obvious that the trial court did not read the directions of Idaho Supreme Court on remand or most likely, the trial court simply rejected it. It is entirely reasonable for the Appellants to question the court's impartiality whenever the trial court so clearly disobeys the decisions and directives of the Idaho Supreme Court.

FACT 7. *The continued refusal by the court to disqualify itself for cause.* On June 6, 2007, the Lawrences properly file a motion for disqualification for cause together with the affidavit of John P. Whelan and the motion was heard on June 13, 2007. The affidavit and oral argument offered facts surrounding *Yovichin v. Bush*, CV-01-2116; a case involving both the court and the Appellant's attorney John P. Whelan and in which the court disqualified himself for unexplained reasons. Also offered were facts surrounding *Sauls v. Luchi*, CV-04-1616; *Straub v. Smith,* CV-04-5437 (Supreme Court No. 31955); *Krivor v. Rogers,* CV-06-6252; and *Metropolitan Property & Causality v. Allen*, CV-06-6358; all cases in which the Appellant's attorney believed establishes facts that demonstrates a particular bias the court has against Mr. Whelan and Mr. Whelan's representation of the Appellants.

Rather than determine the legal sufficiency of the motion for disqualification at the hearing, the court simply withheld judgment and adjured "to take a closer look." On June 27, 2007, the court published a rather detailed written decision in which the court simply refutes each and every fact or charge raised by the Appellant's attorney. In its memorandum of decision,

the only rational the court really gives for not disqualifying itself, is an argument that the court harbors no bias towards the Lawrences or their attorney. It certainly offered nothing that would convince the Lawrences of the court's impartiality. The memorandum and decision was simply nothing more than the trial court's attempt to defend it's interest in this case. In determining whether a trial judge should be disqualified, inquiry is not only whether there was an actual bias on judge's part, but also whether judge's conduct or words created "such likelihood of bias or an appearance of bias that judge was unable to hold balance between vindicating interest of court and interest of accused. U.S.C.A. Const. Amend 14. *State v. Garza, 865 P.2d 463, 125 Or.App. 385, review denied 876 P.2d 783, 319 Or. 81*

Clearly, a truly impartial court would be absolutely impartial as to whether or not it was the finder and trier of fact. It has no personal interest in the matter at all. It has no motive, no rational, and no reason to be involved – other than the administration of justice. Because the courts are the only institution in this country that the citizenry can turn to for the administration of justice, the court has to be exceedingly mindful, not only of its role, but also of its appearance. A truly impartial court would conclude that the appearance of justice is such an essential component of justice, that without it, justice cannot be served and for the sake of justice alone, the court has no other choice but to recuse itself. Even in the case in which a judge may be convinced of his or her own impartiality, the appearance of bias or prejudice can so undermine litigants confidence in proceeding or public's confidence in system as to require judges disqualification. *Comiskey v. District Court In and For the County of Pueblo 926 P.2d 539, Rehearing denied.*

It can be also argued that a court that it is unwilling to recluse itself, can no longer claim that is it truly impartial. Once the court defends its reasoning and rationale for refusing to recuse itself, it creates a self interest or personal stake in the matter and can no longer hold the balance between vindicating its interest and the interest of the party asserting impartiality. The court unconsciously becomes tainted in defending its role. In the present matter, the fact that the court put so much time and energy into refuting the facts raised by the Appellants' attorney and defending itself is a clear indicator that the court is no longer impartial. It clearly demonstrates that the trial court has a personal stake in the proceedings that it wishes to defend. In *Price v. Featherson, 64 Idaho 312, 130 P.2d 853*, this court states "*The truth of the filed affidavit charging bias or prejudice on the part of the judge is not what disqualifies the judge, but the affidavit itself.*" Supporting the notion that the appearance of bias or prejudice so undermines the confidence citizens have in the court as to render its administration of justice in a matter illegitimate. The commentary to Canon 1 (Idaho Code of Judicial Conduct) furthers this in part:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for violation of this Canon is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. [Emphasis added]

FACT 8. *The court conducted an independent investigation in to the case of the Estate of Diane Rothe.* Again, returning to Mr. Whelan's June 13, 2007 affidavit regarding *Yovichin v. Bush*, CV01 2116, Mr. Whelan raises questions surrounding the court's voluntary disqualification in that case [R. 35120 v.1 p.98-100] and questions whether the reasons the court voluntarily disqualified itself from that case, still exists today. In the court's memorandum and decision, the court speculates that a more likely reason the court voluntarily disqualified itself in *Yovichin*, may have dealt with the facts surrounding the *Matter of the Estate of Dianne Rothe*, Kootenai County Case No. SP 675. The court acknowledges that it reviewed the court file in that case. [R 35120 v.1 p.072] *The Matter of the Estate of Dianne Rothe* was not part of the Appellant's briefing, testimony, or oral argument. There was no evidence before the court relating to the Estate of Dianne Rothe. Rather, the court conducted an independent investigation of the motion before the court, produced findings regarding that investigation, and rendered those findings in support of the courts decision to deny Appellants motion. Beyond the fact that it was improper for the court to look outside the record in reaching a decision and to offer speculation rather than fact. The independent fact finding clearly illustrates the extent to which the trial court was compelled to reach in order to vindicate its interest in this case.

The Court's response to Mr. Whelan at hearing, that the Court simply wanted to figure out what was in the Court's mind back when the Court disqualified itself in Yovichin appears to be sincere and likely an honest mistake. However, regardless of how good the intentions may have been, they still don't justify the fact that the court looked outside the record to investigate facts relevant to a motion and an issue specifically before the court. What is more troubling is the fact that the court defends and justifies its actions by implying that the Court is not restrained from

looking outside the record, so long as it doesn't involve the central issue in the case, *i.e.,* the easement issue. [HT 49:8-11] The court's position on this issue certainly doesn't appear to be consistent with the Idaho Code of Judicial Conduct. The commentary to Canon 3 (Idaho Code of Judicial Conduct) specifically states: *"A judge must not independently investigate facts in a case and must consider only the evidence presented."* The commentary to Canon 3 certainly doesn't appear to provide exceptions to the rule, nor did the trial court cite an authority. The Appellants will argue that the Court's position regarding this issue is arbitrary and not supported by law. Therefore, it is entirely reasonable for the Appellants to question the Court's impartiality.

FACT 9. *The court is a personal friend of a senior partner in the law practice representing the Respondents and that same law practice was the second highest campaign contributor the the judge's re-election campaign.* The Appellants also offer the fact that the attorney for both Capstar and Tower, Susan Weeks, is a law partner of Leander James, a personal friend of the court which the court affirms in its decision. [R35120 v.1 p. 78]

The commentary on Canon 5 (Idaho Code of Judicial Conduct) also states that campaign contributions, of which a judge has knowledge, made by lawyers or others who appear before the judge may be relevant to disqualification under Section 3E. At the June 13, 2007 hearing on the Appellant's motion for Disqualification [HT 15:20 –16:3], the Appellant's attorney offered evidence obtained through the Sunshine law disclosure that Ms. Week's law firm was also the second highest contributor to the judge's re-election campaign. It is entirely reasonable for the Appellants to question whether or not this judge was influenced in part, either by his personal relationship with a partner in the opposing law firm, or by that firm's contribution to his re-election campaign.

FACT 10. *The trial court accusing the Lawrence's attorney for not being truthful to the court regarding the preliminary injunction.* On October 31, 2007, a hearing was held in the present case. Capstar moved for a motion to shorten time and application of a sixth access. At hearing, many issues were raised by John Whelan, specifically with regards to the motion including the lack of a supporting affidavit, failure to cite a rule, the lack of a bond posting, and in particular, the lack of a preliminary injunction order.[HT 123:2-125:6] Mr. Whelan argued that there was no preliminary injunction outstanding. That the preliminary injunction was superseded by a permanent injunction when the court granted summary judgment and which also resulted in the bond being exonerated back to Capstar. Later, when the Idaho Supreme Court vacated the district courts summary judgment and remanded the case back, that the permanent injunction was overturned. At no time did Mr. Whelan say that the Supreme Court overturned the Preliminary Injunction. Prior to making a ruling, the court recessed to review the language of the Supreme Court opinion and upon its return, the court accused Mr. Whelan for not being truthful to the court [HT 129:23-25] in making a claim that the preliminary injunction was reversed. The transcript of that hearing speaks for itself. The trial court completely misconstrued what Mr. Whelan stated and was in err in accusing Mr. Whelan of not being truthful to the court. The court's response to Mr. Whelan illustrates that the court does not believe Mr. Whelan to be credible or truthful and can be indicative of an underlying current of animosity and/or contempt either against the Appellants or Mr. Whelan.

FACT 11. T*he trial court granting Capstar prejudgment access across the Lawrence parcel on only three days notice, without an injunction in place, without an affidavit in support of the motion, without a motion that cites a rule, without the posting of a bond and without an*

application for a preliminary injunction or temporary restraining order. Referring back to the October 31, 2007 hearing in which Capstar sought an access across the Lawrence parcel, the court granted Capstar access to the Lawrence parcel over the Appellant's objections regarding the lack of statutory notice, the lack of an affidavit, the lack of a rule cited in the motion, the lack of an injunction in place, and the fact that there was no bond posted. [HT 123:3- 125:7]

FACT 12. *The complete disparity in the admittance of the Respondent's affidavit testimony as compared to the striking of the Appellant's affidavit testimony.* The trial court seemingly appeared to use a double standard in regards to the admission of affidavit testimony. The affidavits produced by Tower and Capstar, specifically the Rook, Hall, and Funk affidavits were all drafted and prepared by Tower and Capstar's legal counsel and subsequently sent to the affiant(s) to sign. Because they were drafted by legal counsel, they were not the words of the affiant, but the words of the attorney drafting them. John Rook testified in deposition that he not only didn't remember providing an affidavit, but that at the time he signed it, he was under heavy medication for medical reasons. Clearly, these statements alone completely impeached his affidavit (or should have). It is likewise obvious from Harold Funk's deposition, that Harold Funk did not understand the affidavit he was signing as his deposition testimony is not in alignment with his affidavit testimony. Because the Lawrences were unable to serve Robert Hall (after six attempts) to take his deposition, the Lawrences are left with unanswered questions regarding the facts Robert Hall can and will actually testify to.

On July 24, 2007, Appellant Douglas Lawrence submitted a twenty-six page affidavit [R. 35120 v.2 p. 146-292] in opposition to the Respondent's motion for summary judgment. Attached to this affidavit were an additional 121 pages of exhibits in support of the facts Mr. Lawrence

establishes in his affidavit. Those exhibits include (A) a certified copy of a 1907 Viewer's Report and Road Survey; (B & C) a court order and summary judgment signed by Judge Gary Haman in Case No. 65077; (D) the affidavit of Bruce Anderson, County Surveyor for Kootenai County; (E) a portion of a 1959 Metsker Map (the complete 1959 Metsker Map was made part of the record in 2004); (F) satellite imagery as produced by the Google Earth computer program illustrating the roads on Blossom Mountain and the places whereby the photography in Exhibit G were taken; (G) photography of the road taken by the Appellant; (H) various police reports; (I) the Nextel License agreement; (J-P) various documents; (Q) Great Northern Broadcasting License Agreement; (R-S) admissions and an invoice; (T) affidavit of Wilber Mead; (V) Kootenai Cable Lease Agreement; (W) Trinity Broadcast/John Rook Letter and lease agreement.

The Appellants are not attorneys and did not receive any direction, guidance, or suggestions from their attorney in producing that affidavit. And, they were not familiar with a lot of the legal concepts regarding affidavits. However, the words in that affidavit are the affiant own words and not the product of an attorney inventing or sculpting facts that best serve their interest and cannot be unsubstantiated by the record in this case. As testified to by the Appellant's exhibits, the Appellant has performed a lot of research on this road and simply set forth the facts the Appellant uncovered in research. And, in support of those facts, the Appellant attached 121 pages of supporting exhibits.

In *Hook v. Horner, 95 Idaho 657, 517 P.2d 554 (1973)*, this Court ruled that "*A landowner is a competent witness to the location of the boundaries of his own land if they are within his personal knowledge, and may testify to the same. His interest in the outcome of the litigation would affect the weight to be given to his testimony, but not its admissibility.*" Clearly,

the Appellants have spent many hours walking the properties on Blossom Mountain; many hours reviewing historical county and court records, deeds, titles, and easements; and spent time consulting with surveyors and other property owners. The exhibits themselves testify to that fact.

The Respondents moved the trial court to strike all the relevant portions of the Appellant's affidavit testimony and was entirely successful at getting the trial court to strike complete paragraphs over foundation, argument, or some other technicality. Much of the Respondent's motion doesn't even identify the words or phrases that created the technicality. The motion simply identifies a paragraph and moves that it should be stricken because it contains argument. The foundational issues in particular, should have been overruled as there were exhibits in support of the facts and court needed to look no further than the exhibits or the record itself for the foundation. While it would have been proper for the trial court to "weigh" the Lawrences testimony; it was improper for the court to strike it from the record.

Yet, even though the exhibits themselves were admitted, the trial court either ignored them or discounted them. In its memorandum and decision, the trial court cites the exact testimony it relies on in rendering its decision. The trial court cites Susan Week's affidavit twenty-seven times to establish the chains of title in the respective properties; the Rook affidavit six times; the Funk affidavit ten times; the Wenkler affidavit once; the Brownsberger affidavit twice; and the Rebor affidavit thrice. As far as the defense's testimony, the trial court cites the Lawrence affidavit four times; the Mack affidavit twice; the Anderson affidavit once; the Funk deposition thrice; and the Loudin v. Stokes case once. However, each time the court cited the defense's testimony, it did so only to use it against the defense.

It also seems somewhat egregious to strike a whole paragraph of testimony simply because the paragraph may contain some argument. The motions should have been overruled due to the fact the Respondent(s) failed to cite the words or phrases creating the argument.

The Appellants also moved the court to strike portions of the Hall, Rook, and Funk affidavit. And, in stark contrast to the Respondent's motions to strike, the Appellant's motion laid out the specific words and phrases in each paragraph that created the foundational or other problem with the statement. However, the Appellants were only successful at getting what amounts to a total of five words stricken from the Rook affidavit.

In a summary judgment ruling, all controverted facts are to be liberally construed in favor of the opposing party. In the present matter, the trial court simply ruled each and every fact on each and every easement theory presented by Capstar and Tower is uncontradicted. Therefore, the court does not have to construe anything in the Appellant's favor and can simply award each and every claim to Capstar and Tower. It is so terribly difficult (rather impossible) to rationalize how a one hundred and forty-seven page affidavit with one hundred and twenty-one pages of exhibits together with eighty-four pages of deposition testimony fails to create a scintilla of doubt on any one fact or issue. The only rational explanation is the that the trail court has turned a blind eye and deaf ear towards the Appellant's evidence and the Appellants are entirely reasonable to question the court's impartiality.

Due process, the appearance of fairness, and the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may reasonably be questioned. CJC 3(D)(1). *Wolfkill Feed and Fertilizer Corp. v. Martin, 14 P.3d 877, 103 Wash.App. 836*. "Bias" requiring change of judge connotes leaning of mind or inclination toward

one person over another. Rules Civ.Proc. Rule 40.1(b)(2) *Brown v. Avery, 850 P.2d 612, Wyoming 1993.*

In *Sherman v. State, 905 P.2d 355, 128 Wash.2d 164*, reconsideration denied and amended, the Washington Supreme Court held that the test for determining whether a judge's impartiality might reasonably be questioned, such that a judge should be recused, is an objective test that assumes that a reasonable person knows and understands all the relevant facts. The Appellants will argue: that they are reasonable person(s); they understand the facts of this case; and they are capable of rendering an objective test regarding the judge's impartiality.

The reasonable person is a legal fiction of the common law representing an objective standard against which any individual's conduct can be measured. The standard only requires that people act similarly to how "a reasonable person under the circumstance" would, as if their limitations were themselves circumstances. Factors external to the defendant are always relevant; so is the context within which each action is made. It is within these circumstances that the determinations and actions of the defendant are to be judged. There are myriad factors that could provide inputs into how a person acts; yet the level of care due is always what is reasonable for that set of circumstances.

The Lawrences will argue, that throughout these proceedings, that their actions and personal conduct are unblemished and have exceeded what would be reasonable for any other person under this set of circumstances. There is absolutely nothing in this record that would portray the Lawrences as being anything other than reasonable or given to extremes. The same argument can be made for the Lawrences' attorney J.P. Whelan who also was convinced that the trial court harbored a bias or prejudice. As Mr. Whelan explained at hearing:

> "I have had to consider this issue for a long period of time, great deal of depth, and my experience with this court now spans almost six years. This motion is made only because this counsel truly believes that after six years of appearances before this court that this court has a bias or prejudice against this counsel, a personality conflict of sorts... That bias or prejudice spills over to my representation of my clients, and I believe I would be remiss in my duties if I didn't make this motion because I believe, for my purpose, that the best thing I can do for my client is to try and get them a fair trial." [HT 16:20-18:7]

There can be no doubt, that Mr. Whelan considered this action for a long period of time before initiating the motion and only did so because he was absolutely convinced that his clients could not get a fair trial with that court. It would seem entirely reasonable for any attorney, given the same circumstances, to resort to the same actions.

The Appellants' Opening Brief, together with this brief, should be a testimony to this Court, that the Lawrences clearly understand all the relevant facts of this case. Their briefs were not written by attorneys or paralegals. They were authored by the Appellants themselves, without the assistance of anyone. In its reply brief, Capstar offers no argument that the Lawrences do not understand the facts of the case. Rather, they just argue that the Lawrences are merely taking umbrage with the trial court's adverse decisions.

Capstar doesn't make any argument nor cite any case law that would preclude a defendant from being capable of rendering an objective test regarding the judge's impartiality. The Lawrences are capable, both as a matter of law and as a matter of fact, of rendering an objective test regarding the judge's impartiality. They have correctly identified and argued twelve specific facts that they believe demonstrate why the trial court's impartiality might reasonably be questioned and why the Lawrences believe trial court abused its discretion by failing to recuse itself.

LATCHES AND STATUTES OF LIMITATIONS

In its reply brief, Capstar argues that it had no need to defend its legal rights to the road until the Lawrences began blocking the road. And, because of this, the Lawrences' defense using the doctrine of latches and statue of limitations does not apply. Capstar seemingly argues, that because no one challenged their use of the road prior to the Lawrences, that they (and their predecessors) simply bear no responsibility to legitimize any rights they claim to have on the road. They offer no case law in support of this claim; nor does Capstar provide any argument in support.

There can be no doubt that Capstar is now seeking to assert rights they claim goes back thirty or more years. As Capstar states on page 44 of their reply brief "The origin of this easement is known. It commenced on purchase of the Funk property and continues to this day." Throughout these proceedings, Capstar has asserted the claim that when the Funks purchased their property, the only road providing access to Funks land is the GTC access road. Capstar furthers this claim by relying on the Funk/Human Synergistic Sale Agreement, asserting that the subject to and including language was the Funks putting everyone on notice that the Funks were claiming a right to use the road. It begs the question, if the Funks and their successors relied on this language, then why didn't they attempt to perfect their easement rights earlier?

As the Montana Supreme Court ruled in *Brabender v. Kit Mfg. Co. 174 Mont. 63, 568 P.2d 547 (1977)*, *"Latches is negligence in the assertion of a right. It exists when there has been an undue delay of such duration or character as to render the enforcement of an asserted right inequitable."* There can be no doubt that neither the Funks, nor Capstar, nor Tower, ever asserted any rights to the road prior to 2002.

Capstar argues that because the Lawrences were able to take the depositions of Funk and Rook, that they can't show prejudice. However, when it comes to the Funk/Human Synergistics Sale Agreement, Funk's testimony only presents one point of view. In order to challenge Funk's affidavit testimony regarding the sale agreement, it would be necessary to get the testimony of Human Synergistics so that the trial court could weigh what the real understanding was between Funk and Human Synergistics. Due to the lapse of time, the Lawrences could not take the testimony of Human Synergistics to challenge Funks affidavit testimony. This certainly did prejudice the Lawrences defense.

Kootenai Broadcasting, Idaho Broadcasting, AGM, and Capstar, all had actual and constructive notice of their possible access issues. There is nothing more indicative of a potential access problem than having to first pass through someone's private locked gate for ingress/egress to your parcel. Funk's successors to the Capstar parcel are all corporations. All are business entities who purchased the Capstar parcel as a business asset. All are required to perform due diligence. It is simply impossible to understand how each and every business in this chain title were not aware that the parcel was devoid of deeded access. Especially, given the fact, that the deeds they received did not convey any access rights across the neighboring lands. The warranty deed Kootenai Broadcasting received from Harold Funk specifically included a right of way to construct a road and right of way for utilities. This language evidences the fact that Mr. Rook had contemplated easement rights prior to his purchase of the Capstar parcel. He wanted to make sure he had the rights to bring utilities to his parcel and also that he had the rights to build a road across the land still retained by Harold Funk.

Mr. Funk testified that he did not approach the owners of the Section 28 parcel for an access. He recognized he didn't have an easement across Section 28 and did not have access rights to pass on to Mr. Rook. More importantly, Mr. Rook does not testify that he thought he had an easement to the county road. Rather, he had permission. The following exchange took place at Mr. Rook's deposition: [RD 53:6-22 R. 35210 v. 2 p 413]

> **Rook:** *"there was a ... an access agreement of sorts with GTE, I think, that gave us the right to use that road, and I have that in the files, I remember."*
> **Whelan:** Those are the files that are gone?
> **Rook:** *Yes*
> **Whelan:** Okay. So you think you had an access agreement with GTE that permitted you and your station to use that road for access?
> **Rook:** *Right.*
> **Whelan:** And that's the road that was created by GTE?
> **Rook:** *I don't know who created it. The one that came up from Signal Point through the gate we mentioned.*
> **Whelan:** Okay. And that was a permissive use, they told you to go ahead and use that access?
> **Rook:** *Yes*

Clearly, Mr. Rook knew that he did not have legal access to the county road when he acquired the parcel from Harold Funk. Otherwise, he would not have testified that he thought he had GTE's permission to use the road. Rook knew he didn't have access when he bought the property and did absolutely nothing to attempt to cure his access problems.

Capstar and its predecessors have simply sat on their hands. Just like they are doing in regards to their lack of access across Section 28. There can be no doubt that the Lawrences' predecessors, the Johnsons and McHughs, recognized that they did not have legal access across Section 28. In 1977, they negotiated an access agreement with Idaho Forest Industries that benefits the Lawrence parcel. They recognized the problem with their access and took the necessary steps to fix it. To this day, no one in the Capstar chain of title has taken steps to correct

this problem with their access. Using Capstar's logic, they wouldn't need to until such time as their access gets cut-off. And, this gets to the heart of the latches defense. That Capstar and all its predecessors, all had notice and the opportunity to assert their rights, but delayed in asserting those rights until after the Lawrences purchase their property. Now, they assert claims that go back 30 years or more and place the Lawrences at a disadvantage in defending the claim. Capstar's claims are now stale and should be barred due to latches and the statues of limitations.

ROOKS SCAVENGER INFERENCE

During his deposition, Mr. Rook relived painful memories of how Capstar (Clear Channel) [RD 45:14-15 R. 35120 v.2 p.411] ultimately came into ownership of the radio station he built. He explained that deregulation enabled some broadcasters to ignore the FCC. Companies like Clear Channel, who were not allowed to own more than six stations in a market, would hire "lawyer friends" of theirs to buy up stations and hold them until they (Clear Channel) could get federal approval. And, while on paper, it looked like the station was owned by someone else, it was really being run by the giant broadcaster. [RD 42:4-43:2 R. 35120 v.2 p.411] Mr. Rook just couldn't remember the name of these agreements that allowed broadcasters to run the radio stations purchased by their "lawyer friends" without getting sued for fraud. See [RD 43:7-44:2]

> **JP Whelan:** "Okay, so if I understand you correctly, somebody like AGM would come in, and on paper it was owned by AGM, but essentially it was being operated by Clear Channel?"
>
> **Rook:** Oh, yeah [RD 43:3-7]

It is terribly clear that Mr. Rook's bitterness is directed at Clear Channel. He offered "When deregulation came along, giant companies with public money can come in and tell you, 'get the hell out of the water. We're taking your station. If you don't want to take the price we're going to give you, we'll take it' and they did." [RD 20:20-25] When asked if Clear Channel was one of those big companies with public money, his answer: "***The biggest there is***" [RD 21:25-22:2] There can be no doubt that Mr. Rook views Clear Channel, AGM, and Capstar, all as being ultimately driven by the same individuals or the same controlling corporate structure. And, he portrays this driving corporate entity as nothing less than a corporate bully.

ATTORNEY FEES

Capstar argues, that while the Lawrences did offer argument in their opening brief relating to attorney fees, that attorney fees should not be awarded because the Lawrences either did not cite case law in support of their argument or a statute in support of its motion. Capstar then proceeds to cite Bream v. Benscoter, "This Court has repeatedly held it will not consider a request for attorney fees on appeal that is not supported by legal authority or argument."

Lawrence's argument relating to attorney fees cannot be characterized as the same request in Benscoter. In their brief, the Benscoters request for attorney fees on appeal consisted of one brief sentence i.e. "Benscoter seeks attorney fees and costs on appeal pursuant to I.A.R. 41." In its ruling, this Court explained that Idaho Appellate Rule 41 is not the authority for the awarding of attorney fees on appeal. It simply provides, "Any party seeking attorney fees on appeal must assert a claim as an issue presented on appeal in the first appellate brief filed by such party as provided in Rules 35(a)(5) and 35(b)(5)." Those rules both provide that the party claiming

attorney fees on appeal must include that claim as an issue or additional issue on appeal, and the party must "state the basis for the claim." Idaho Appellate Rules 35(a)(6) and 35(b)(6) provide that the argument portion of the brief must contain the contentions of the party "with respect to the issues presented on appeal, the reasons therefore, with citations to the authorities, statutes and parts of the transcript and record relied upon."

Rule 35 does not require that the party seeking attorney fees is required to cite a legal authority in its opening brief. Rather, it simply provides that the party seeking attorney fees must state the basis for the claim in their brief. Clearly, Benscoter's request for attorney fees was deficient, not because they didn't cite a legal authority, but because they didn't offer any argument in support. Our reading of this Court's ruling in Benscoter leaves us with a different interpretation. That this Court will consider awards of attorney fees, provided the brief states the basis for the claim. And, the Appellants opening brief does state the basis of the claim i.e. that Capstar is using this litigation *frivolously* to pressure the Lawrences into acquiescing property rights. And, that Capstar has interfered with the License agreements the Lawrences entered into with Great Northern Broadcasting and Nextel, resulting in both agreements being breached.

As testified to by the Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment, the Appellant did have a meeting with Kosta Panidis [R. 35120 v.2 p.160 ¶'s 53 & 54], who identified himself to be the General Manager of Clear Channel and the owner of the Capstar Tower Site. In that meeting, Mr. Panidis did concede to the Appellant that Clear Channel **did not** have a legal access across the Lawrences' land. And, in a very arrogant and condescending manner, only becoming of one who believes he holds all the power, told the Appellant that "he didn't care." This fact is uncontroverted because Capstar has never denied Mr.

Panidis making that statement and has never presented any rebuttal evidence to the contrary[1]. They have remained totally quiet regarding the conversation between the Appellant and Kosta Panidis.

In their reply brief, Capstar does not deny the Lawrences' allegations that Capstar intentionally interfered with the license agreements they entered into with Capstar's tenant Great Northern Broadcasting and Nextel. Their entire response to the charge is: "*Regarding the claim on the license agreement, while disputes with Capstar's tenant may have brought the matter to a head, it is not frivolous to resort to a court of law for resolution of the dispute.*" Clearly, this is no denial, but rather, a rationale justifying their actions.

Mr. Lawrence's affidavit also testifies that Mr. Lawrence did discuss his intentions to enter into a licensing agreement with Great Northern Broadcasting, directly with Kosta Panidis prior to the execution of the license. Wiping his hands clean of the matter, Mr. Panidis told Mr. Lawrence that it was up to his tenants to work out the access issues with us. At no time did Mr. Panidis ever express any reservations or concerns. Quite to the contrary, he gave all appearances of being both agreeable and quite supportive of the proposition.

---

[1]The trial court had stricken the Appellants testimony (above the Appellants objections) regarding this meeting as containing heresy. Neither Capstar, nor the trial court, identified which part of the testimony contained heresy. Rather, the trial court simply had the whole paragraph stricken. The Appellant's testimony in this matter was not heresy, but a first hand account of the meeting he had with the General Manager of Clear Channel. It was improper for the trial court to strike this testimony.

The Great Norther Broadcasting license agreement provides terms for terminating the license agreement. Those terms offered that the License may be terminated at any time upon the giving of 30 days notice and providing that the Licensee vacates its interest in Blossom Mountain. Similar to the Nextel agreement, Great Northern Broadcasting has not provided notice that it intends to terminate the license agreement. Rather, it just quit making its monthly payments as agreed to in the license agreement. [R. 35120 v.2 p. 161 ¶56]

The Lawrences had grown to rely on the income they were generating from the Nextel and Great Northern Broadcasting license agreements. Capstar's intentional interference into these license agreements was to induce further financial pressure on the Lawrences with the sole intent of making a long and protracted litigation a very difficult proposition for the Lawrences to defend. And, it worked. They made it such a costly proposition in the first few years, that the Lawrences could no longer afford legal representation and had to take up a Pro Se stance.

CONCLUSION

Capstar is certainly willing to offer a share of the blame for this tediously, protracted litigation on the Appellants by pointing to our enlargement of time to conduct discovery and J.P. Whelan's premature appellate filing. Certainly, no one was more shocked than the two Pro Se Appellants to discover that their appeal had been dismissed because their attorney (who withdrew soon after) filed the appeal prematurely. The timing of the filing wasn't something discussed. The Lawrences just assumed he knew what he was doing with their best interest at heart. We're not attorneys and we can honestly claim ignorance.

On the other hand, it seems terribly hard to imagine that the dismissal came as a complete surprise to Capstar's attorney. Ms. Weeks certainly wasn't under any obligation to point the defect out so that the Pro Se Appellants could pursue their appeal. It's no fault of hers. But it does seem somewhat disingenuous of her to accuse a couple of Pro Se Appellants for a delay that she really could have prevented.

Ms. Weeks cautioned the Appellant Douglas Lawrence early in this lawsuit saying that "*This kind of litigation could take years to wind its way through the courts.*" While Ms. Weeks didn't pitch her statement as a threat, the inference was certainly unmistakeable and undeniable. After all, what other purpose could there possibly be for offering such a statement to a Pro Se Defendant? Mr. Lawrence certainly didn't interpret it as an expression of genuine concern. It was intended to be an ominous innuendo of what the Appellants should expect from this litigation, a long, drawn out, and expensive affair.

At deposition, John Rook describes a very similar experience he had with Clear Channel. When asked if they (Capstar) like to sue people and drag them into court and do all that sort of thing? His answer: "*They find a way to get what they want.*" Mr. Rook is speaking from his first hand experience with Clear Channel. According to him, Clear Channel's attorneys made it obviously clear, that if they were to loose the action he brought against them, they would just appeal. "Because they said, we'll appeal even if we lose, and he'll be dead. He won't live through it." [RD 44:14-16]

Capstar certainly found "a friend of the firm" in the district court and for nine years benefited from the favoritism of the district court. Now, in front of this Court, they plead that Capstar is not entitled to any less careful consideration because they are a corporation and their

property rights are just as important as the Lawrences. Capstar never acted like the Lawrences' rights were equal to theirs. Capstar didn't have any moral reservations in wrongfully enjoining the Lawrences. Nor, did they have any reservations in trying to steal the Lawrences' property rights or ruining the Lawrences' dream of raising their children on the 80 acres they purchased specifically for that purpose. And, they certainly didn't have any reservations in financially and emotionally squeezing the Lawrence family for more than nine years. Capstar intentionally interfered with the license agreements the Lawrences made with Great Northern Broadcasting and Nextel; and are principally responsible for those companies breaching those agreements. And, there can be no doubt, that Capstar is the only party in this litigation that benefits from a long and protracted litigation. The characterization that "this has been frustrating for them too" simply reeks from the stench of mendacity.

Capstar didn't need to sue the Lawrences for access. The Lawrences were more than willing to negotiate an arrangement with them. But, Capstar was to have no part of any negotiation. They had decided, they were bigger; they had more money; and they had lawyers. They could just make this litigation so costly and drag it on for so long that the Lawrences would simply give in.

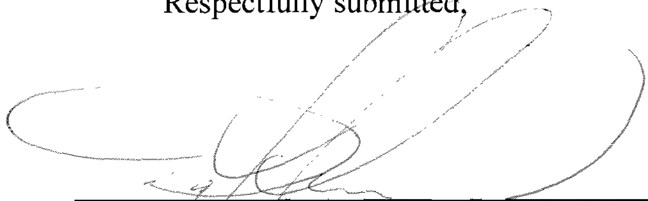
Capstar suggests that we're just playing to this Court's sympathies and passions. No, what we are trying to do is to appeal to this Court's sense of justice. *Big corporations simply should not be allowed to use the judicial system to threaten and bully private citizens. Nor should big corporations be allowed to use the judicial system as a financial and emotional vise, simply to squeeze individuals into acquiescing their property rights.* They do it because they can get away

with it. Big corporations know it is a very difficult thing to prove and an even harder argument to make, especially for untrained litigants.

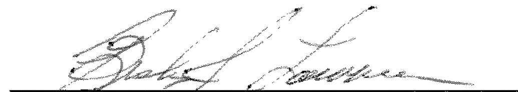
Capstar simply believes that this Court will be more motivated to rule in their favor in an effort to avoid creating a land-locked parcel, than ruling on the legal sufficiency of their theories. What Capstar doesn't want this Court to consider is the fact that Capstar does not have a legal access from the Lawrence parcel to the county road. It is undisputed that they do not have access across Section 28. Granting Capstar access across the Lawrence parcel would not cure their lack of access to the county road. The parcel will still be equally devoid of legal access.

We ask this Court to overturn the summary judgment and put a final end to their complaint. We ask for an award of attorney fees. We also ask for an award of all fees, penalties, damages, sanctions, and fines that the Idaho Supreme Court deems to be just, equitable, and within the law and jurisdiction of the Idaho Supreme Court to grant for: 1) Nine years of wrongfully enjoining the Lawrences; 2) Nine years of trespass; 3) Wrongful interference in our license agreements; 4) Nine years of denying the Lawrences their constitutional right to life, liberty, and the pursuit of happiness; and 5) Irreparable harm to the Lawrences in denying them their dream of raising their children on the property they purchased specifically for that purpose.

Respectfully submitted,



Douglas P. Lawrence
Dated: 8/18/11



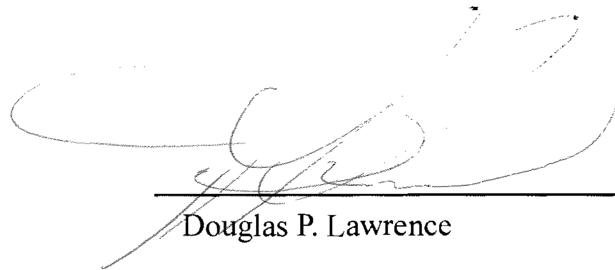
Brenda J. Lawrence
Dated: 8/18/11

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of August, 2011, I caused to be served two (2) true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

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

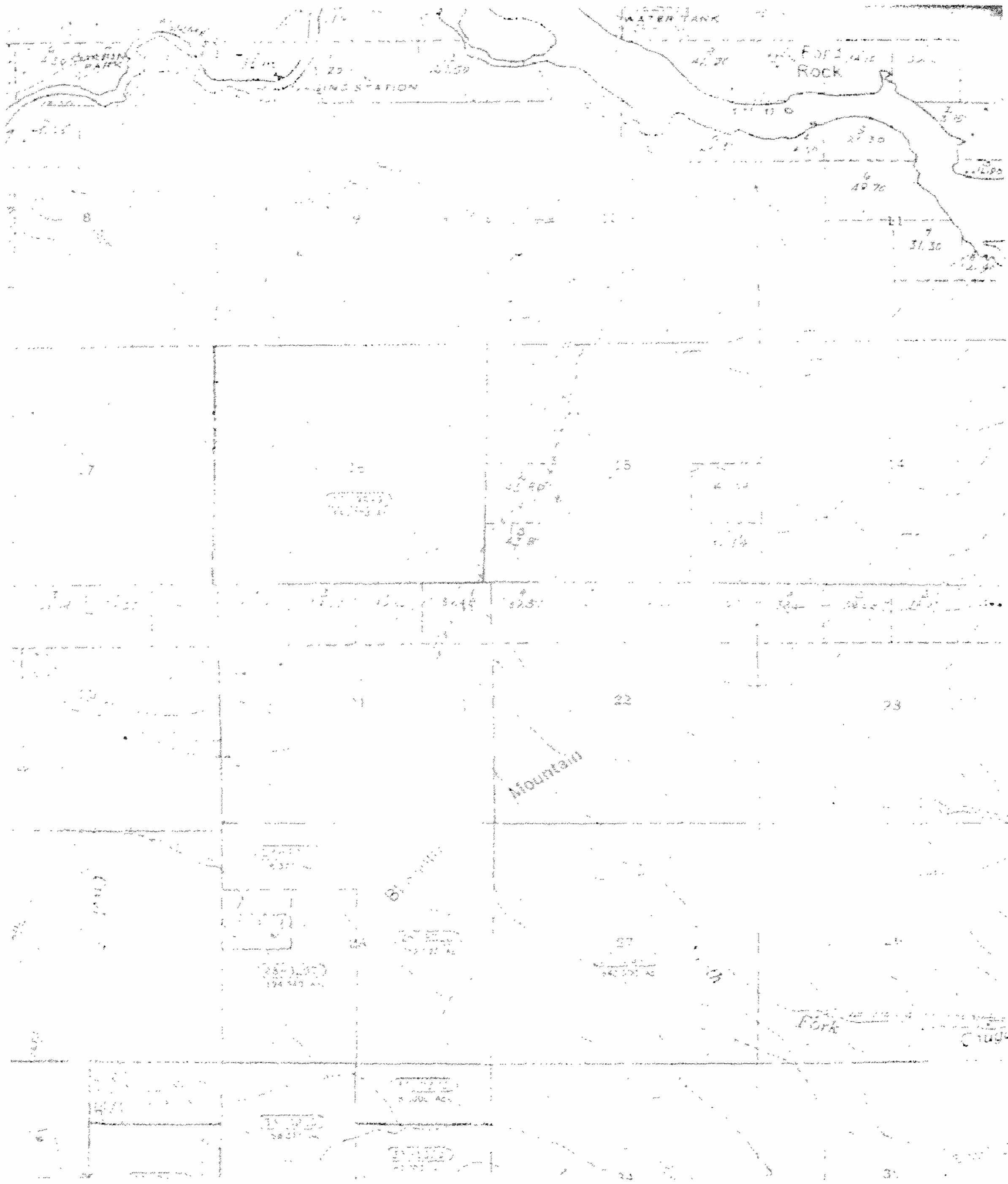
Via: __X__ US Mail, postage prepaid
______ Facsmile: (208) 664-1684
______ Personally served



Douglas P. Lawrence

EXHIBIT 1

Page 20 from Respondent's Brief in Docket # 35120



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

EXHIBIT 2

Blossom/GTC Easement

194343

RIGHT OF WAY EASEMENT

For One Dollar ($1.00) and other valuable consideration, receipt of which is hereby acknowledged, GLEN D. BLOSSOM and ETHEL M. BLOSSOM, husband and wife, hereinafter called "Grantors" do hereby grant, bargain, sell and convey unto the GENERAL TELEPHONE COMPANY OF THE NORTHWEST, a Corporation, called "Grantee", a perpetual right of way and easement across the following described property:

> The Southwest Quarter (SW¼) of Section Twenty-one (21), Township 50 North, Range 5, W.B.M., Kootenai County, Idaho.

TO HAVE AND TO HOLD said premises unto the Grantee and its assigns and successors forever for the purpose of access by the Grantee and its equipment to and from its microwave tower and station which is located on what is generally known as Blossom Mountain.

It is understood that the Grantors are leasing said premises over which this easement is granted to WILBUR MEAD and FLORENCE MEAD, husband and wife, and the Mead's will sign this instrument as proof of their acceptance and approval of this easement.

Grantee shall construct a steel swing

STATE OF IDAHO
COUNTY OF KOOTENAI } ss.
MAR 0 9 2004
EXHIBIT W
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE IN BK208 PG329 R/W Easement
DANIEL J. ENGLISH By Carrie Phillips
Clerk/Recorder Deputy

RECORDED

type gate across said right of way easement at a point to be determined by the parties herein which shall then become the property of Grantors, but Grantors shall not use it to deny Grantee access.

Grantee is granted the right to make all necessary improvements and minor relocations on the present road site in order to facilitate moving its equipment and machines to and from the site of said microwave tower.

This shall be binding on the heirs, assigns and personal representatives of the parties herein.

DATED this 14th day of July, 1966.

Wilbur Mead
WILBUR MEAD

Florence Mead
FLORENCE MEAD

Glen D Blossom
GLEN D. BLOSSOM

Ethel M. Blossom
ETHEL BLOSSOM, Grantors

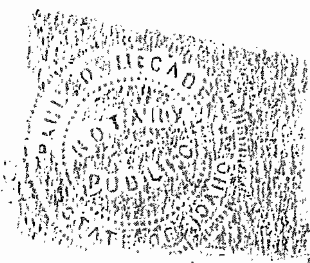
STATE OF IDAHO)
ss.
County of Kootenai)

On this 14 day of July, 1966, before me, the undersigned Notary Public in and for the

County and State aforesaid, personally appeared WILBUR MEAD and FLORENCE MEAD, husband and wife, and GLEN D. BLOSSOM and ETHEL M. BLOSSOM, husband and wife, to me known to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Paul D. McCabe
Notary Public for Idaho.
Residing at Coeur d'Alene.
My Commission expires: 1-15-69



Filed and recorded at the request of Paul McCabe at 10^55 o'clock A.M. this 31st day of Aug 1966
HAROLD E. PETERSON
Ex-Officio Auditor-Recorder
Kootenai County, Idaho
By Deanne Lermer, Deputy
Fee $ 1.75
Return to Box 1000 Ola

EXHIBIT 3

Ulrich/GTC Easement

494344

RIGHT OF WAY EASEMENT

For valuable consideration, WILLIAM C. ULRICH and EDNA M. ULRICH, husband and wife, hereinafter called "Grantors", do hereby grant, to the GENERAL TELEPHONE COMPANY OF THE NORTHWEST, a Corporation, called "Grantor", a perpetual right-of-way and easement across the following described property:

> The N½ of NE¼, Section 28,
> Township 50 North, Range 5,
> W.B.M., Kootenai County, Idaho.

TO HAVE AND TO HOLD said easement across said premises unto the Grantee and its assigns and successors forever for the purpose of access by the Grantee and its men and equipment to and from its proposed microwave tower and station which is located on what is generally known as Blossom Mountain.

Grantee shall pay to Grantor and the Grantor shall accept $60.00 per year payable on September 1, 1966 and a like sum on the 1st day of September of each year thereafter in full therefor.

In the event Grantee shall abandon the use of its Blossom Mountain Microwave station at

STATE OF IDAHO
COUNTY OF KOOTENAI } ss
MAR 09 2004
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE IN BK208 PG 332 R/W Easement
DANIEL J. ENGLISH
Clerk/Recorder
By [signature] Deputy
3pgs

Filed and recorded at the request of Paul McCabe
at 10:56 o'clock a.m. this 31st day of Aug 1966
HAROLD E. [illegible] by [signature]
Ex-Officio Auditor-Recorder Deputy
Kootenai County, Idaho
Fee $2.25
Return to Box 1000 [illegible]

EXHIBIT X

its proposed or alternate sites so that it no longer has need of this easement, then said easement and all rights automatically revert to Grantors.

Grantee shall construct two steel, swinging type gates across said right-of-way easement at a point to be determined by the parties which shall then become the property of the Grantors, but Grantors shall not use it to deny Grantee access. Provided, however, that ~~Grantor~~ GRANTEE shall at all times during the existence of said easement, maintain said gates and keep them in good repair.

Grantee is granted the right to make all necessary improvements and minor relocations on the present road site across said premises in order to facilitate moving its equipment and machines to and from the site of said Microwave tower.

Grantee shall indemnify Grantors for any damages occasioned by the negligence of Grantee in the use of said easement, provided, however Grantee shall not be responsible to the Grantors any damages resulting from actions of third parties who may have any access to said

right-of-way by reason of leaving said gate open or unlocked or any other willful or negligent conduct regarding the use of said gates or right-of-way not the conduct of the Grantee.

This shall be binding on the heirs, assigns and personal representatives of the parties herein.

DATED this 18 day of August, 1966.

William C Ulrich

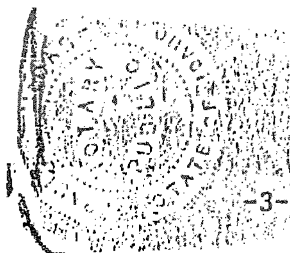
Edna M. Ulrich

Grantors

STATE OF IDAHO)
ss.
County of Kootenai)

On this 18 day of August, 1966, before me, the undersigned Notary Public in and for the County and State aforesaid, personally appeared WILLIAM C. ULRICH and EDNA M. ULRICH, to me known to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Paul D McCabe

Notary Public for Idaho.
Residing at Coeur d'Alene
My Commission expires: [illegible]