12-14-2015

Capstar Radio Operating Co. v. Lawrence Respondent's Brief Dckt. 42326

IN THE SUPREME COURT OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING COMPANY, a Delaware Corporation, **Plaintiff/Respondent,** **vs.** **DOUGLAS LAWRENCE and BRENDA J. LAWRENCE,** **Defendants/Appellants.**	**SUPREME COURT NO. 42326-2014** Kootenai County District Court Case No. CV 2002-7671

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
In and for the County of Kootenai
Honorable Steve Verby, Presiding

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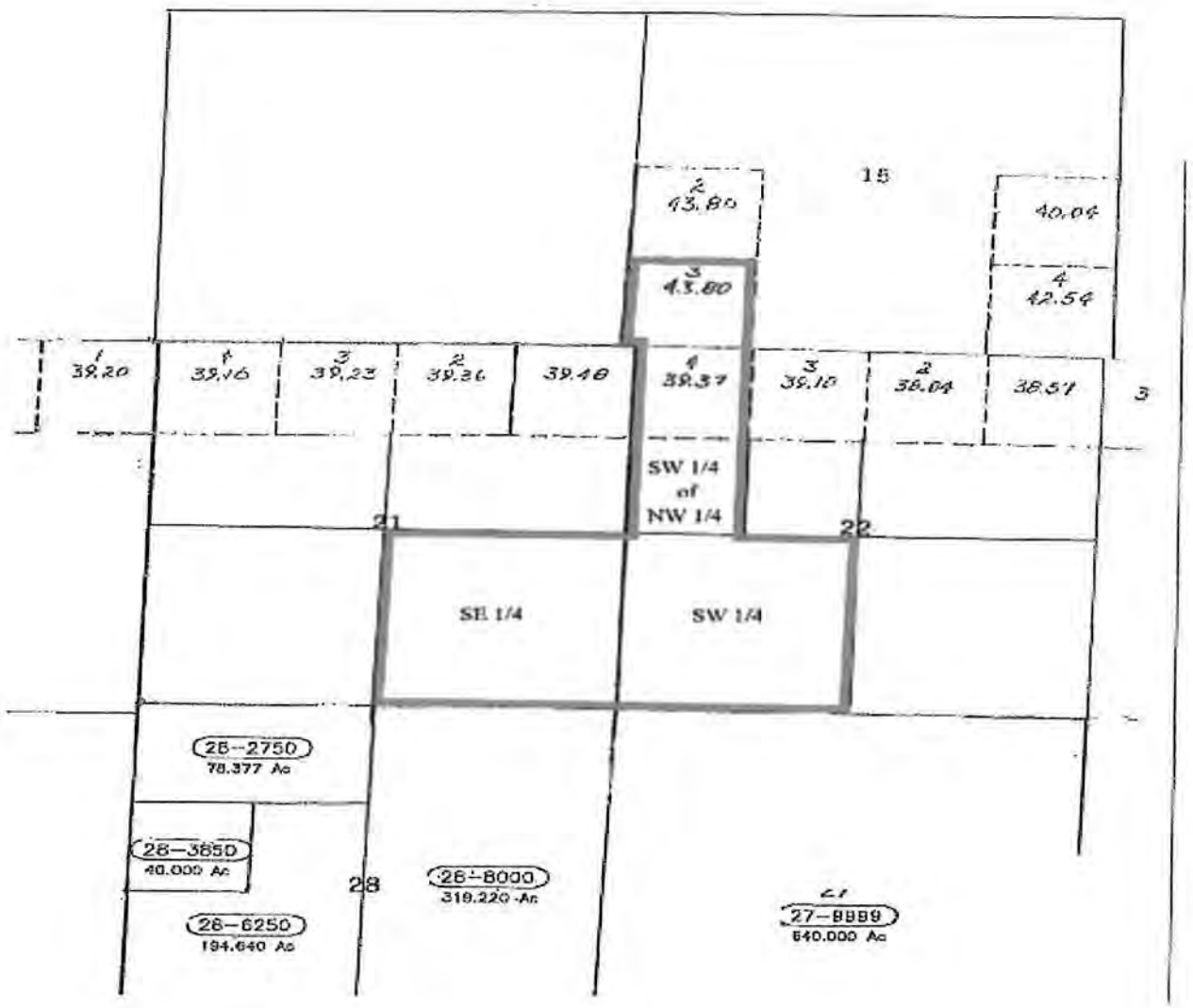
STATEMENT OF THE CASE

In their opening brief, the Lawrences do not discuss or contest the majority of the facts found by the trial court in its Memorandum Decision and Order. For ease of reading, Capstar's Statement of the Facts generally follows the same structure as the trial court's Memorandum Decision and Order. R pp. 136-169. Only those findings of facts contested by the Lawrences are supported by full citations to the evidence in the record. This response brief also contains depictions of the properties as required in I.A.R. 35(g).

Statement of the Facts

A. The Location of the Respective Parcels

The Lawrences do not dispute the trial court's finding that all the land encompassed in this case is located in Township 50 North, Range 5 West, Boise Meridian, Kootenai County, Idaho. Harold and Marlene Funk acquired a large parcel of property in 1969 which included property situated in Sections 15, 21 and 22. R. p. 138. The Funk property ownership is outlined in red on the following page as depicted in Trial Exhibit 57.

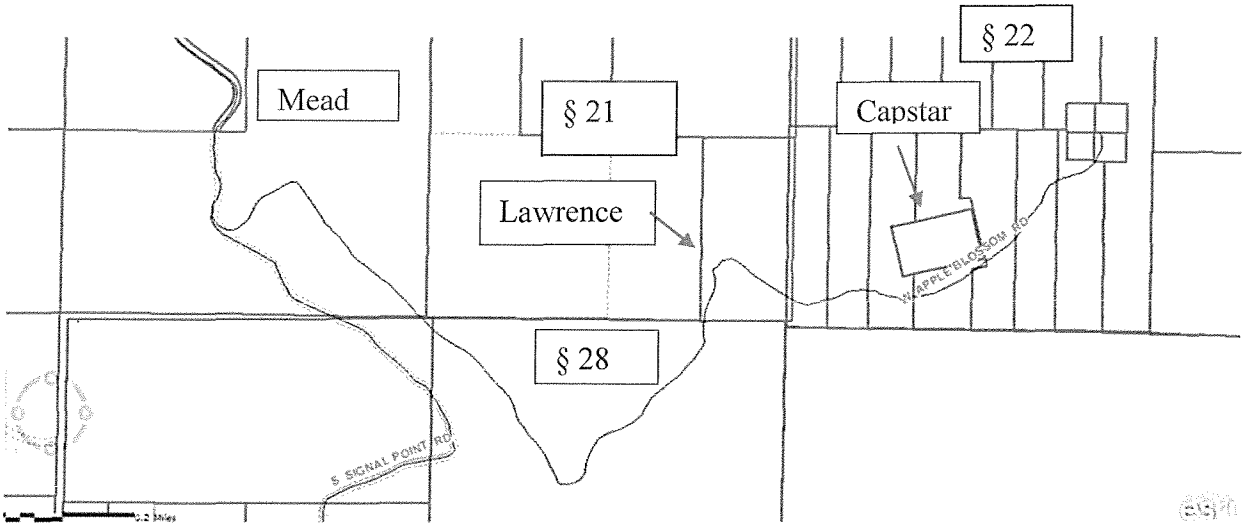


Capstar is the current owner of real property previously owned by Funk in the southwest quarter of Section 22, Township 50 North, Range 5 West, Boise Meridian, in Kootenai County south of Post Falls and the Spokane River. R p. 138. The Lawrence are owners of a parcel of land previously owned by Funk located west of Capstar's parcel in a portion of the southeast quarter of Section 21. R p. 138. These properties are either directly or tangentially located near "Blossom

Mountain" which is approximately two miles as the crow flies from the City of Post Falls, Idaho. R p. 139. The Lawrence property lies adjacent to a subdivision known as Blossom Mountain Estates. Trial Exhibit 40. Blossom Mountain Road is designated as "Apple Blossom Road" and identified as the primary access road to the 14 platted lots. *Id.* The Capstar parcel is shown as surrounded by the subdivided lots. *Id.*

B. Access and History of Ownership

The Lawrences agree with the Court's finding that the property in Section 21 and 22 is accessed by a private easement road which connects to a public road known as Signal Point Road. R p. 139. The Lawrences do not contest the trial court's finding there was no evidence that any real property owner or lessee in Section 21 or Section 22 used any other road to access their real estate. R p. 139. The Lawrences agree that the private easement road has been referred to as Blossom Mountain Road, West Blossom Road, or Ski Hill Road R p. 139. It was also identified as "Apple Blossom Road" in the Blossom Mountain subdivision plat and a road survey of a portion of the road. Trial Exhibits 40 and 41. The Lawrences contest on appeal the trial court's finding that Signal Point Road was the only public road providing access to Blossom Mountain Road. They do not contest the trial court's finding that no testimony was presented at trial that any real property owner used any road other than Blossom Mountain road to access their property in Sections 21 and 22. The diagram below, derived from Trial Exhibits 24, 41 and 50, generally depict the access roads and parcels.



1. The General Telephone Property

The Lawrences agree with the trial court's finding that on July 14, 1966, the General Telephone Company ("GTC") obtained an easement to access an acre of land in Section 22 (not the Capstar parcel) over a private road owned by Glenn D. Blossom and Ethel Blossom which crossed the southwest quarter of Section 21 (Blossom's property), then moved south and entered the north half of Section 28 where it eventually turned northeast and entered the adjacent section in the southeast quarter of Section 21 (over what is now the Lawrences' parcel). It proceeded from Section 21 into the southwest quarter of Section 22 (near the Capstar parcel). The easement included a condition that GTC was to erect a swing gate on the property. R pp. 139-140.

Lawrence do not contest the trial court's finding that GTC's access through section 28 required they obtain an easement from William C. and Edna M. Ulrich, and the terms of the easement required GTC to construct "two steel swinging type gates." R p. 140. Lawrences do not dispute that a few months later, GTC bought real property in Section 22 for communications transmissions. R p. 140.

2. The Funk Property

Lawrences do not contest the trial court's finding that in 1969, Harold and Marlene Funk entered into a real estate contract to purchase Government Lot 3 in Section 15; the Southeast Quarter of Section 21; Government Lot 4 in Section 22; and the southwest quarter of the northwest quarter of Section 22, and the southwest quarter of Section 22. R p. 140, Trial Exhibit 3. This sale did not include the property sold to GTC in 1966. R p. 140, Trial Exhibit 3.

The Lawrences agree with the trial court's finding that on November 7, 1972, Wilber and Florence Mead and Ethel Blossom conveyed an easement for ingress and egress across the Blossom/Meads' real property in Section 21 for the benefit of all the land the Funks were purchasing. R p. 140.

Following the Funks' purchase in 1969, Harold Funk used Blossom Mountain Road 20-30 times to access Section 22 between 1969 and 1975. Trial Exhibit WW (Deposition of Harold Funk), Funk Depo Tr p. 323, L. 1-9. Blossom Mountain Road was the only way for the Funks to access property in Section 22. Trial Exhibit WW (Deposition of Harold Funk), Funk Depo. Tr p. 46, L. 18 – p. 47, L. 7; p. 58, L.8 – p. 59, L. 1; p. 60, L. 2-11; p. 126, L. 1 – p. 127, L. 9; p. 139, L. 13-25; p. 187, L. 8-22; p. 257, L. 11-19; p. 295, L. 6-14; p. 297, L. 3-11; p. 316, L. 1-13; p. 323, L. 11-15; p. 349, L. 22 - p. 351, L. 13; p. 352, L. 20-25; p. 479, L. 19 – p. 481, L. 6; p. 506, L. 20-25; p. 524, L. 5-22; p. 528, L. 1-14; p. 530, L. 20 – p. 531, L. 6; p. 540, L. 1-20; p. 595, L. 24 – p. 597, L. 22; p. 636, L. 17 – p. 638, L. 8; p. 647, L. 1-4; p. 663, L. 5 – p. 666, L. 11; p. 697, L. 1 – p. 698, L. 11; p. 707, L. 20 – p. 708, L. 4; p. 754, L. 17-25.

The Lawrences do dispute the trial court's findings that the Funks decided to sell the bulk of their real property to a company named Human Synergistics in 1975. R p. 140. The Lawrences agree on July 10, 1975, seven agreement were recorded which reflected the contracts for sale of

separate parcels of all of the Funks real property in Section 21 and Section 15 as well as most of the real property in Section 22 except for the Southwest quarter of Section 22.[1] R p. 141.

The Lawrences do not dispute on appeal the trial court's finding that each of the seven contracts the language set forth below was included:

> 5. Subject to and including an ingress egress easement over this and adjoining property, is said Sections 21 and 22 owned by the grantor and including an ingress egress easement over portions of Section 21 heretofore granted to the grantors. Said easement shall be over existing roads until such time as all record owners shall agree to the relocation, improvement and/or abandonment of all or any portions of any roads. This easement is also over similar lands in Section 15. R. p. 141, Trial Exhibits 5-11 at ¶ 5.

The trial court also drew the inference from the lack of evidence of any fulfillment deeds that none were executed at the time the agreements were signed. R. p. 141. Lawrences challenge this inference on appeal as being unreasonable.

Following the execution of the purchase and sale agreements Funk continued to access his property in Section 22 via Blossom Mountain Road. Trial Exhibit WW (Deposition of Harold Funk), Funk Depo. Tr P. 326, L. 10 – P. 328, L. 2. The Funks never returned to the property after 1981. Exhibit WW (Harold Funk Deposition), Funk Depo. Tr P. 325, L. 9 – P. 328, L. 2.

The Lawrences do not challenge the trial court's finding that in 1986, Harold Funk applied for a conditional use permit from Kootenai County to install and operate an F.M. broadcast transmitter and tower facility for radio station KCDA. R p. 141, Trial Exhibit 59. Lawrences do not contest the listed access was by means of Signal Point Road. Trial Exhibit 59. Lawrences do not contest that the Kootenai County Board of Commissioners approved the conditional use permit and found that the proposed tower would be 280 feet tall and that the legal requirements for notification of adjacent property owners had been made for the proposed use of Funk's segregated

[1] The trial court in its memorandum made a mistake and indicated the portion retained by Funk was the southeast quarter of Section 22 when it was the southwest quarter of section 22.

five acre parcel. *Id.* Lawrences do not contest the trial court's finding that in 1988, Funk requested another conditional use permit to build a 40-foot tower for microwave and cable television, listing the direction to the site as using Signal Point Road and then traveling over the gravel dirt road (Blossom Mountain Road). *Id.* Lawrences do not contest the trial court's finding that the site was a 50 feet by 200 feet site bordering the existing GTC site. R p. 141, Trial Exhibit 60. Lawrences do not contest the trial court's finding that the Kootenai County Board of Commissioners commented that access was by means of a private road off Signal Point Road and that the legal requirements for notice to the adjacent property owners was satisfied, and the demand for conditional use permits for Kootenai County microwave towers had increase substantially. *Id.* Funk's tenants continued to access Section 22 via Blossom Mountain Road. Trial Exhibit WW (Deposition of Harold Funk), Funk Depo. Tr. P. 145, L. 12 – P. 153, L. 4.

Lawrences do not attack the trial court's finding that more than 17 years after the sales agreement with Human Synergistics were signed, on October 22, 1992, the Funks sold their remaining interest in the southwest quarter of Section 22 on October 22, 1992 to John Mack. R p. 142. Lawrences express no disagreement with the trial court's finding that on October 29, 1992, the Funks signed a warranty deed in fulfillment of their contract and conveyed the southeast quarter of Section 21 to Human Synergistics. R. p. 141. Lawrences do not contest the trial court's finding that Funk's deed to Human Synergistics failed to reserve or except an easement for the benefit of the Funks, their successors, or assigns to provide access to the remaining property in Section 22. R. p. 142. Lawrences dispute the trial court's findings that all of the real properties owned by the Funks, their successors, or assigns located in the southwest quarter of Section 22 were landlocked with no recorded easement upon execution of the deed from Funks to Human Synergistics in 1992. R p. 142.

The Lawrences do not address the trial court's finding that on September 20, 1996, Arman and Mary Jane Farmanian entered into a "Mutual Agreement Grant of Easement and Quit Claim Deed" with John W. Mack. R. p. 142, Trial Exhibit 23. Lawrences do not dispute on appeal that the language in the agreement states: "AND WHEREAS, MACK and MACK'S predecessors in interest have used a preexisting private road traversing the most southeasterly portion of the FARMANIAN PROPERTY to gain access to the Mack property. This private road is sometimes known as Blossom Mountain Road (hereinafter referred to as the 'ACCESS ROAD.'" R p. 142, Trial Exhibit 23. This road was recognized as the historical access of Mack's predecessors in the agreement. Trial Exhibit 23.

3. The Lawrence Property

On appeal, the Lawrences do not contest the trial court's finding they reviewed and signed a preliminary title commitment. R p. 142. They do not contest this preliminary title commitment provided them notice there were at least three claimed ingress/egress easements across the real property they were purchasing. The Lawrences to not contest the trial court's finding that Doug Lawrence's testimony established he was aware of a private road on the property before buying it. R p. 142. The Lawrences do not dispute the trial court's finding that Doug Lawrence knew the access road he used did not stop at his property's eastern boundary. R. p. 143. Lawrences do dispute the trial court's finding that at the time the real property that eventually came into Capstar's possession was conveyed it was landlocked and had no recorded easement.

4. Chain of title.

The chain of title on appeal was not disputed by Lawrence for either parcel.

C. Mellick Road

Lawrences contest the trial court's findings of fact that Mellick Road in Section 15 did not provide access to Funks at the time of severance of the parcels. it in the body of their argument. Capstar will address the evidence that support the trial court's findings in its arguments.

ARGUMENT

I. STANDARD OF REVIEW

The burden of proof rests upon the party asserting an implied easement to show the existence of facts necessary to create by implication an easement. *Trunnell v. Ward*, 86 Idaho 555, 560, 389 P.2d 221, 224 (1964).This Court reviews factual findings made after a trial without a jury for clear error. *Machado v. Ryan*, 153 Idaho 212, 217, 280 P.3d 715, 720 (2012). Findings of fact will not be disturbed if they are supported by substantial and competent evidence, even if there is conflicting evidence. *Id.* "Substantial evidence is that which a reasonable trier of fact would accept and rely upon it in determining findings of fact." *Id.* This Court freely reviews the district court's conclusions of law. *Id.* This Court gives due regard to the district court's special opportunity to judge the credibility of the witnesses who personally appear before the court. *Hughes v. Fisher*, 142 Idaho 474, 479-80, 12 P.3d 1223, 1228-29 (2006).

II. THE DISTRICT COURT DID NOT ERR IN GRANTING CAPSTAR AN IMPLIED EASEMENT

Lawrences contend the district court erred in finding an implied easement because it misapplied the elements established by this Court for an implied easement. An implied easement is "based on the theory that when someone conveys property, they also intend to convey whatever is required for the beneficial use and enjoyment of that property, and intends to retain all that is required for the use and enjoyment of the land retained." *Bird v. Bidwell*, 147 Idaho 350, 352, 209 P.3d 647, 649 (2009). This Court set forth the elements to prove an implied easement as follows:

> In order to prove the existence of an implied easement by prior use, a party must show: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) that the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Akers v. Mortensen, 147 Idaho 39, 45, 205 P.3d 1175, 1181 (2009) (*Akers II*). It is undisputed by the Lawrences that Capstar proved the existence of the first element, unity of title. Appellant's Brief at 5; R p. 158. Lawrences contend that the trial court erred in applying the second element.

A. The District Court's finding that Funk intended to Reserve an Easement is supported by Substantial and Competent Evidence

Lawrences claim the trial court's finding that Funk intended to reserve an easement across the Lawrences parcel at the time the legal title was severed from the equitable title is not supported by substantial and competent evidence. Lawrences contend *Akers II* stands for the proposition that the *only* method of proving intent to reserve an easement is by evidence of apparent continuous use long enough before separation of the dominant estate to show the use was intended to be permanent. Lawrences argue on appeal that a trial court may not consider evidence of actual intent expressed in a sales agreement in its analysis of the grantor's intent to reserve an easement. Lawrence asks this Court on appeal to rigidly apply the second element in *Akers II* to exclude consideration of Funks' actual express intent to reserve an easement, and focus only upon actual use of the easement by Funk prior to separation. Lawrences conclude if the trial court is restricted to considering only the evidence of use prior to separation there was not substantial and competent evidence to support the trial court's finding that Funks intended to reserve an easement across Lawrences parcel at the time title was separated.

The district court concluded as a matter of law it could consider evidence of the actual intent of the grantor in determining whether the grantor intended to reserve an easement. The district court relied upon *Schultz v. Atkins*, 97 Idaho 770, 773-74, 554 P.2d 948, 951-52 (1976) that

creation of an easement may be implied in one of three ways: (1) presumed based on the circumstances existing before the separation; (2) implied by public policy; or (3) inferred often fictitiously through long continuous use of the easement. R p. 149. The district court also recognized that *Bird v. Bidwell*, 147 Idaho 352, 209 P.3d 647, 649, held that a necessary consideration related to the second element was the intent of the grantor at the time the dominant estate was separated. The district court also recognized the holding in *Bird* that because intent to grant or reserve the easement was a necessary element to an implied easement, there was no logical reason to base the decision solely upon the grantor's presumed intent from prior use and exclude other relevant evidence of that intent. *Id.* Based upon these case holdings, the district court concluded as a matter of law it was permissible to consider evidence of the actual intent of the parties at the time of separation of the parcels.

The second element for an implied easement by prior use as articulated in *Akers II* serves two purposes: First, it is a means of establishing the intent of the grantor at the time the dominant estate is separated. *Bird*, 147 Idaho at 352, 209 P.3d at 649. Second, it is designed to "ensure[] that the buyer of the servient property will have notice of the preexisting use." *Davis v. Peacock*, 133 Idaho 637, 641, 991 P.2d 362, 366 (1999) *overruled on other grounds by Spokane Structures, Inc. v. Equitable Inv., LLC*, 148 Idaho 616, 226 P.3d 1263 (2010). If the servient owner has notice of the preexisting use, it is then equitable to impose an easement on that buyer if that is what the grantor intended. *Id.* Thus, the district court did not err as a matter of law in considering evidence of the actual intent of Funks and actual knowledge of Human Synergistics in its analysis of this element.

Lawrence claims that even if the trial court could consider such evidence, the evidence before it was not substantial and competent. Despite the express language in the sales agreement,

Lawrences claim the only reasonable inference that can be drawn given the lack of a reservation in the warranty deed delivered to Human Synergistics 17 years later is that Funk did not intend to reserve an easement in 1975 at the time of severance.

Harold Funk suffered a major illness (cancer) which he testified impacted his memory. Trial Exhibit WW (Harold Funk deposition), Depo. Tr. p. 23, Ll. 14-17; p. 31, Ll. 8-13, p. 35, Ll. 10-15. Given the express language of the sales agreement in 1975, the existence of the access road and its use for ingress and egress at the time of severance, Funks subsequent references in the 1980's to its use in support of his two conditional use permits, the continued use of the access road by Funks' tenants, the lapse of time between the sales agreement and the execution of the warranty deed, and Funks' illness which affected his memory, the trial court's inference was reasonable and was based upon substantial and competent evidence.

In *Donaldson v. Thousand Springs Power Co.,* 29 Idaho 735, 747, 162 P. 334, 388 (1916), our Supreme Court held that where real estate is agreed to be conveyed by an executory contract of sale ***without*** reservation, the equitable title passes at once to the vendee. (Emphasis added.) However, in *Bob Daniels & Sons v. Weaver,* 106 Idaho 535, 540, 681 P.2d 1010, 1015 (Ct.App.1984), the Court of Appeals recognized that the sale agreement could address access to a parcel, and could impose access as a requirement in the sale agreement. The trial court's inference is further supported by recognition that the sales agreements intended to reserve access and the right was lost by operation of the doctrine of merger, and not by affirmative action by Funks to release the reservation.

Lawrences also claim it there was no substantial and competent evidence for the trial court to find that Human Synergistics knew of the intent to reserve an easement at the time the sales agreement was executed. Lawrences claim since Human Synergistics did not testify at trial, the

trial court was prohibited from drawing any inferences regarding its knowledge at the time it executed the sales agreements. This argument is specious. The trial court had before it executed sales agreement, signed by Human Synergistics, the express terms of which proved it knew about the term at the time of the sale that Funks intended to reserve an easement. Thus, the trial court's finding was based upon substantial and competent evidence.

Even if this Court determines that the district court erred in finding that the purchase and sales agreements satisfied the second element for an implied easement, there is also substantial and competent evidence of apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent. "The time that is legally relevant to the question of 'apparent continuous use' is the time the dominant and servient estates were severed." *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 302, 127 P.3d 196, 205 (2005)(*Akers I*). In the case of real property sold by a sales contract, with subsequent conveyance of legal title upon complete payment, separation of the dominant estate occurs at the time of execution of the sales contract because that is when a possessory interest is created. *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 417, 283 P.3d 728, 734 (2012)(*Capstar III*).

The requirement of apparent continuous use has been satisfied by "farming use... consistent with the nature of the property" which was as infrequent as six times a year. *Akers I*, 142 Idaho at 302, 127 P.3d at 205. The reason apparent continuous use is required is to "show that the use was intended to be permanent." *Davis*, 133 Idaho at 642, 991 P.2d at 367. Thus, this Court has held that use can be apparent when viewing the property would provide evidence that a road provides access to neighboring land. *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.3d 392, 395 (2006). For instance, in *Thomas* , even though there was evidence that Thomas used his driveway about twice a day, this Court agreed with the district court that Thomas' use of the driveway was

apparent simply by viewing the property: "It is obvious to anyone going on the property of Madsen that the driveway provides access to the red brick house and Thomas' feed yard, stack yard, outbuildings and field." *Id.* Seasonal use consistent with the nature of the property can be considered continuous for purposes of the analysis of an implied easement. Similarly, use that is evident and obvious from the land itself is use that is apparent. The seasonal use combined with the apparent use of the access road to the neighboring property owned by Funk demonstrate Funks' use was intended to be permanent at severance as required by *Davis*.

The substantial and competent evidence was there was apparent and continuous use of the easement road by Funk consistent with the nature of the property at the time the dominant and servient estates were severed. The dominant estate was severed in 1975 by execution of the purchase and sale agreements. Trial Exhibits 5-11. Harold Funk testified that he used the easement road 20-30 times from 1968 to 1975. Exhibit WW (Harold Funk Deposition) Depo. Tr P. 323, L. 1-9. The nature of the use was for huckleberry picking and target shooting. Exhibit WW (Harold Funk Deposition) Depo. Tr P. 323, L. 1-9. This use was consistent with the nature of the undeveloped land. There was testimony that Blossom Mountain Road visibly extended from Lot 21 to Lot 22, making it apparent that the road provided access to Lot 22. Tr P. 266, L. 23 – P. 267, L. 4. While Funk's use of the road before severance was not frequent it was for a long enough period to show that the use was intended to be permanent.

The evidence provided the district court substantial and competent evidence to find that the second element for an implied easement was established by Capstar. Whether by the evidence of actual intent of Harold Funk to retain an easement and Human Synergistics' knowledge of that easement use, or whether by evidence of apparent and continuous use of the easement road at the time of severance, or a combination of both, the district court had evidence to find intent to reserve

an easement. Accordingly, the district court's determination that Capstar satisfied the second element for an implied easement is supported by substantial and competent evidence.

B. Reasonable Necessity was Proven

The district court's determination that the easement across Lawrence's property was reasonably necessary is supported by substantial and competent evidence. Reasonable necessity is not the same as strict necessity. *Thomas*, 142 Idaho at 638, 132 P.3d at 395. A landlocked dominant estate will always satisfy the requirement of reasonable necessity, but in the context of an implied easement by prior use, "there is no requirement that the dominant estate be landlocked. *Id.*; *Davis*, 133 Idaho at 637, 991 P.2d at 362.

Reasonable necessity is determined based upon the circumstances that existed at the time of severance. *Thomas*, 142 Idaho at 638, 132 P.3d at 395. A later change in circumstances is not relevant to the creation of the easement. *Id.* In determining whether there is reasonable necessity the court is to consider the facts and circumstances at the time of severance, including the convenience, inconvenience, and cost of obtaining an alternative access. *Id.*

An example of the standard of reasonable necessity is the case of *Davis v. Peacock.* In *Davis* the Court was presented with the argument that the Russell residence was not landlocked and that the use of the disputed road was neither necessary, nor provided the only usable means of access to the residence. 133 Idaho at 643, 991 P.2d at 368. The Court responded this argument would be persuasive if strict necessity were required, but not when only reasonable necessity was required. *Id.* The *Davis* Court noted that at the time of severance, the only means of access to the residence was the disputed road. *Id.* In fact, regarding the argument that another street could provide access with some further development, the Court noted that at all relevant times, Grove Street was "*undeveloped and unopened*, and therefore did not provide usable access to the

residence on the Russell property." *Id.* (emphasis added). Based on *Davis*, reasonable necessity can be found even if the parcel before severance contains undeveloped and unopened roads that could have been developed before the severance to prevent the need for an easement after severance.

In this case, the district court correctly found that at the time of severance there was reasonable necessity for the easement across Lawrence's property. At trial there was overwhelming evidence presented by multiple witnesses that in 1975 the tower sites, including the Capstar parcel, were only accessible by Blossom Mountain Road and otherwise landlocked due to the surrounding topography of Blossom Mountain.[2] Tr p. 185, L. 4 – p. 186, L.13; p. 188, L. 20 – p. 189, L. 2; p. 46, L. 18 – p. 47, L. 7; p. 58, L.8 – p. 59, L. 1; p. 60, L. 2-11; p. 126, L. 1 – p. 127, L. 9; p. 139, L. 13-25; p. 187, L. 8-22; p. 257, L. 11-19; p. 295, L. 6-14; p. 297, L. 3-11; p. 316, L. 1-13; p. 323, L. 11-15; p. 349, L. 22 - p. 351, L. 13; P. 352, L. 20-25; p. 479, L. 19 – p. 481, L. 6; p. 506, L. 20-25; p. 524, L. 5-22; p. 528, L. 1-14; p. 530, L. 20 – p. 531, L. 6; p. 540, L. 1-20; p. 595, L. 24 – p. 597, L. 22; p. 636, L. 17 – p. 638, L. 8; p. 647, L. 1-4; p. 663, L. 5 – p. 666, L. 11; p. 697, L. 1 – p. 698, L. 11; p. 707, L. 20 – p. 708, L. 4; p. 754, L. 17-25.

Despite the overwhelming evidence that Blossom Mountain could only be accessed from Blossom Mountain Road via Signal Point Road, Doug Lawrence testified that he had once accessed Blossom Mountain in 1996 or 1997 through logging roads extending from Mellick Road and reaching the north face of the mountain. Tr. p. 167, L. 21 – p. 167, L. 12. This testimony is unpersuasive for two reasons: First, this testimony does not prove alternate access at the time Funk severed his property. Second, the trial court found Lawrence's testimony was not credible or trustworthy.

[2] There was also substantial testimony that even after 1975 the only access to the Capstar parcel was by Blossom Mountain Road via Signal Point Road.

Lawrence was unable to show the Court the route he claimed he traveled in Section 15 (the Mellick Road route). Tr. P. 167, L. 21 – 3; P. 279, L. 3-16. Furthermore, Lawrence's claim was inconsistent with his prior representations. For instance, in opposition to a conditional use permit for North American Cellular related to operations on Blossom Mountain, Lawrence represented to Kootenai County that the only access to the tower sites was by Signal Point Road and the easement road. Tr. P. 138, L. 21 – P. 140, L. 1; Trial Exhibit 77. Lawrence never represented to the county that the tower sites could be accessed from Mellick Road. Lawrence consistently asserted that the only access to the tower sites was over his property via Blossom Mountain Road. Tr. P. 187, L. 2-17; P. 257, L.11-19; P. 267, L. 7-23.

The district court recognized the inconsistencies in Lawrence's testimony and rightfully discounted it:

> Mr. Lawrence's testimony at trial was impeached by his previous testimony as well as by admitted exhibits. The bias shown by the way he testified was transparent. Mr. Lawrence was not a particularly credible witness.

R P. 144.

The district court was presented with a plethora of credible evidence there was no access via Mellick Road in 1975. Besides lay witnesses who lived in the area or were familiar with Blossom Mountain, Darius Ruen, a civil engineer specializing in roadways and highways, with 32 years of experience working with the Post Falls Highway District, testified at length utilizing multiple historical aerial photographs; surveys and maps to support his expert opinion that Mellick Road was never constructed in its entirety as laid out by the Viewer's Report, nor did any subsequent extension provided access to Funk's property or to Blossom Mountain until 2004. Tr P. 722, L. 10-20; P. 757, L. 21-25; P. 758, L. 10-22; Trial Exhibit 50. Ruen's opinions were based

on an extensive amount of historical data derived from numerous maps, aerial photos, and other reports. Tr P. 732, L. 21 – P. 733, L. 4; P. 735, L. 4-25.

Lawrences imply that the preparation of a Viewer's Report implies a public road was built along the dedicated alignment. This Court has recognized that such an inference is not required. In a case involving a viewer's report road laid out but not constructed, *Klosterman v. Stafford,* 134 Idaho 205, 208, 998 P.2d 1118, 1122 (2000), this Court held the following regarding construction of a laid out road:

> There is no evidence the county ever developed a roadway along the section line. Although the county may develop a public highway in the future, consistent with the reservation made in 1904, no public roadway developed or approved by the county exists at this time. There is no basis to conclude that any dedication of a right to develop a public road in 1904 created the type of right-of-way claimed by Klosterman in this action.

Mr. Ruen compared Mellick Road as laid out (surveyed) in the viewer's reports in the early 1900's, Trial Exhibit 53, and as actually. Tr P. 723, L. 1 – P. 725, L. 25. Mr. Ruen testified that in 1957 Mellick road was not developed within any of the property owned by Funk and only reached to a spot north of the halfway mark of Section 15. Tr P. 738, L. 1-8. Mr. Ruen testified that Mellick Road did not provide access to Funk's property or the tower sites in 1981. Tr P. 746 – P. 747, L. 13. Mr. Ruen testified that in 1981 the only road within the property owned by Funk that provided access to the tower sites was Blossom Mountain Road. Tr P. 754, L. 17-24. Mr. Ruen also testified of the impossibility of extending Mellick Road through the northern part of the land owned by Funk in Section 15 because of dangerously steep grades. Tr P. 760, L. 1 – P. 761, L. 21. That is why the road as it exists today turns west into Section 16 across land never owned by Funk. Tr P. 760, L. 1 – P. 761, L. 21.

The district court found Mr. Ruen's testimony to be wholly credible and based on his testimony, and the testimony of others, found that Mellick Road did not reach Funk's portion of Section 15 in 1975:

> After a review of the evidence presented, the court finds that the developed portion of Mellick Road did not extend to the Funk's real property in Section 15 in 1975. This factual/legal finding is based on the testimony of Darius Ruen, who was meticulous, precise, and inherently believable. Mr. Ruen's testimony was buttressed by other witness testimony. The court adopts Mr. Ruen's testimony as being wholly credible and finds that the facts to which he testified are controlling. The court further finds that those facts contradict the testimony of any defense witnesses as well as any facts testified to by Mr. Lawrence concerning access by way of Mellick Road.

R P. 144.

Kelvin Brownsberger, the road supervisor for the Post Falls Highway District, testified that Mellick Road was only maintained by the highway district for approximately 900 feet past Schilling Loop, nowhere near the property owned by Funk. Tr P. 773, L. 16 – P. 778, L. 8.

The district court also heard substantial and competent evidence from other witnesses that Mellick Road did not provide access to the tower sites, or even the Funk property in Section 15 at the time of severance. John Mack's testimony previously submitted in the litigation indicated he created access to Mellick Road by extending it across property not previously owned by Funks. Trial Exhibit 54 at ¶¶ 9-15. This extension went through the Fritz Heath Forest Tracts in east of property owned by Funk. Trial Exhibit 42. Thomas Loudin, a former resident of the area between 1968 and 1972, testified that Mellick Road was only maintained to their house which was a short distance from Schilling Loop in the northwest portion of Section 15 and from there the road did not extend to Funks property, even on a motor bike. Tr P. 342, L. 18 – P. 350, L. 25. John Rook testified that the logging road through Section 15 were nothing more than a bike/goat trail that did not provide access to the tower sites on the mountain. Tr P. 505, L. 1-25. John Bedini, an engineer

that worked for John Rook, testified that he once tried to exit the tower site on Blossom Mountain by what he thought was an exit on the north face of the mountain but was not able. Tr P. 538, L. 3-11; P. 541, L. 8-24. Wesley Hamilton testified there was no access to the mountain on the north side in 1981. Tr P. 698, L. 9-23. Robert Hall also testified there was no access to Blossom Mountain on the north face of the mountain in 1980. Tr P. 707, L. 20 – P. 708, L. 4.

The only testimony at trial of access to Blossom Mountain via a portion of Mellick Road was testimony of John H. Kinney, a surveyor, who prepared the plat of Blossom Mountain Estates. Kinney testified that in 1996 and 1997 he was able to access the mountain from Mellick Road via a road located east outside of the property owned by Funk. Tr P. 401, L. 24 – P. 405, L. 12; Trial Exhibit 104. In fact, not only was the path Kinney described outside of the property owned by Funk, it was all private roadway on property not previously owned by Funk. Tr P. 435, L. 1-18. Kinney's testimony does not support Lawrence's argument that the evidence shows that Funk had access to Blossom Mountain in 1975 through Mellick Road. The trial court's conclusion there was no alternative access in 1975 was supported by substantial and competent evidence.

The district court was correct in granting Capstar an implied easement across the Lawrence parcel because there was substantial and competent evidence of reasonable necessity for that easement in 1975. The Court had substantial evidence there was no access through Funk's property. The Court also had reliable testimony that developing the old logging road Funk's property was not possible or safe because of the topography.

Lawrence asks this Court to conclude as a matter of law that the easement was not reasonably necessary in 1975 because Funk could have built another access road on the property he retained. Appellant's Brief at 9. For an implied easement all that is required is reasonable necessity. Lawrence asks this Court to require something beyond than that standard. The mere

fact that there may have been logging skid trails on the property does not negate reasonable necessity based upon the *Davis* standard. Much like the facts of *Davis* , the substantial and competent evidence is that in 1975 the only useable access to the tower sites was the easement road.

Lawrence further argues, citing to this Court's opinion in *Capstar III* that Funk's failure to develop the undeveloped and unopened logging roads in Section 15 prohibits Capstar from establishing reasonable necessity. Appellant's Brief at 9. In *Capstar III* this Court stated "[a] property owner cannot create a necessity through his or her own actions." 153 Idaho at 418, 283 P.3d at 735. However, that statement is inapplicable in this analysis because Funks' reasonable necessity was a result of the severance of title not some later actions by Funks.

The rule that a property owner cannot create her own necessity originates from the Idaho Court of Appeals in *Cordwell v. Smith*, 105 Idaho 71, 79-80, 665 P.2d 1081, 1089-90 (Ct. App. 1983). That case is distinguishable because it involved a claim of implied easement by necessity, not by prior use. An implied easement by necessity requires satisfying the much stricter standard of strict necessity and real present necessity. *Id.* The analysis between the two theories is different and the Court's suggestion that Funk created his own necessity by failing to build an alternate access before severance is incompatible with an implied easement by prior use.

Lawrence has not provided this Court with any authority that would require a grantor to first develop an alternate access to a portion of his property before he conveys the portion currently used to access the property to be retained. Instead Lawrence makes wild assertions about Mr. Funk's state of mind not supported by the record: "Mr. Funk knew he could access the property from Mellick Road." Appellant's Brief at 10. Requiring a property owner to first create an alternative access to property to be retained before severing property would be completely

contradictory to the rationale of implied easement by prior use. The reason implied easements by prior use are recognized is because the grantor intends to retain an easement, but fails to do so. *Bird*, 147 Idaho at 352, 209 P.3d at 649. If the grantor was first required to develop alternate access, there would be no reason to reserve an access easement. Accordingly, Lawrence's argument that Funk cannot get an implied easement because he did not develop a logging trail must be rejected. The district court did not err in granting Capstar an implied easement across the Lawrence parcel because there was substantial and competent evidence of reasonable necessity for that easement in 1975.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING CAPSTAR A PRESCRIPTIVE EASEMENT

The district court did not err in granting Capstar a prescriptive easement because there was substantial and competent evidence of each and every necessary element presented at trial. In order to establish an easement by prescription, a claimant must prove by clear and convincing evidence use of the subject property that is (1) open and notorious, (2) continuous and uninterrupted, (3) adverse and under a claim of right, (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period of five years." *Hughes*, 142 Idaho at 480, 129 P.3d at 1229. In order to establish a prescriptive easement, a claimant may rely on use by a predecessor for the prescriptive period, or may "tack" to combine the claimant's and predecessors' use. *Akers II*, 142 Idaho at 303, 127 P.3d 196 at 206.

Lawrence's opening brief does not allege any error by the district court with respect to elements 4 and 5 above. Because this Court "will not consider assignments of error not supported by argument and authority in the opening brief" those elements were conceded by Lawrence and will not be addressed by Capstar. *See Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008).

A. Capstar Proved Open and Notorious Use of the Easement Road

Use to support a claim of prescriptive easement is open and notorious when it is sufficient to give the "servient landowner maintaining a reasonable degree of supervision over his premises" knowledge of the use and an opportunity to assert his rights. *Backman v. Lawrence*, 147 Idaho 390, 396, 210 P.3d 75, 81 (2009). Evidence of open and notorious use must be clear and convincing to support a claim of prescriptive easement. *H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 679, 339 P.3d 557, 664 (2014).

At trial substantial testimony was presented that Capstar's predecessors in interest used the easement road in an open and notorious fashion providing Lawrence's predecessors in interest with knowledge of that use. John Rook and his entities, Kootenai Broadcasting and Rook Broadcasting, bought the parcel on the top of Blossom Mountain known as the Capstar parcel from Harold Funk in 1989. Tr P. 475, L. 8 – P. 479, L. 4. Mr. Rook visited the tower site via Blossom Mountain Road two to three dozen times from 1989 to 1998, when the property was sold to AGM. Tr P. 479, L. 5 – 481, L. 6; P. 482, L. 9-22; P. 495, L. 19 – P. 496, L. 16; R P. 143. Shortly after Rook's purchase of land in Section 22 there was a three month period where his engineer Bill Ward visited the Capstar parcel daily via Blossom Mountain Road while a 90 foot tower was constructed on the mountain. Tr P. 497, L. 10-24. Because of the poor condition of the easement road as it branches off of Signal Point Road it took three days to transport the tower along that road to avoid damaging the tower. Tr P. 495, L. 4-18. John Rook also had a large satellite dish on the mountain used by one of his lessees, Trinity Broadcasting. Tr P. 494, L. 1-10. John Rook also had a 12x12 foot cement building built on top of the mountain he had dug down 12-15 feet. Tr P. 491, L. 6-25. The easement road via Signal Point Road was always the access that John Rook and his agents used to access the tower site. Tr P. 540-541 Another engineer, Bill Gott, accessed the

tower site via Blossom Mountain Road every two to three weeks to perform maintenance. Tr P. 498, L. 6 – P. 500, L. 2. John Bedini, an audio engineer working for Mr. Rook, frequently accessed the tower site via Blossom Mountain Road. Tr P. 500, L. 3-20; P. 540-541. Mr. Bedini even accessed the road daily and nightly during various periods of time to perform maintenance and repair of Mr. Rook's facilities. Tr P. 543, L. 19 – P. 544, L. 25; P. 545, L. 1-18; P. 546, L. 2-24. Mr. Bedini's use of Blossom Mountain Road also continued after Mr. Rook's ownership of property in Section 22 as he continued to work for Trinity Broadcasting who was a tenant of Rook and later AGM. Tr P. 548, L.17 – P. 549, L. 10. Use of Blossom Mountain Road by Rook and his agents was less frequent in the winter months because of the difficulty in accessing Section 22 in winter conditions. Tr P. 496, L. 20 – P. 497, L. 4.

Rook and his agents never asked Human Synergistics for permission to use Blossom Mountain Road to access Section 22. Tr P. 504, Ll. 19-25; P. 579, L. 19 – P. 580, L. 4; P. 584, L. 17-20. Only those with a key to a gate at the beginning of Blossom Mountain Road could use the road. Tr P. 487, L. 1-9; P. 560, L. 7 – P. 561, L.1; P. 82, L. 16 – P. 83, L. 10. Rook and his agents were provided a key by Idaho Forest Industries. Tr P. 483, L. 8 – P. 484, L. 11.

The district court was presented with substantial testimony of constant and frequent use of the easement road by John Rook and his agents. This testimony alone is clear and convincing evidence that the road's use was open and notorious. Additionally, the location and placement of the road with respect to the tower sites support the conclusion that a servient landowner maintaining a reasonable degree of supervision over his premises would have knowledge of the use and an opportunity to assert his rights. For instance the towers on Blossom Mountain are visible from the nearby I-90 and surrounding areas. Tr P. 101, L. 4-15; P. 531, L. 7-19. Also, the easement road that travels over Lawrence's property visibly extends past his property's boundary

in such a way that the servient landowner would have knowledge of its use to access Section 22. Tr P. 60, L. 2-11. The road was in plain view and the towers were in plain view.

Lawrence cites to the fact that Mr. Rook at some point negotiated a license agreement to cross over GTC's property as factor that negated Rook's open and notorious use of the easement road as it crossed Lawrence's parcel. Appellant's Brief at 11-12. This argument is flawed. GTC was not the owner of the disputed portion of the easement road now owned by Lawrence. Tr P. 515, L. 8 – P. 516, L. 13; R P. 143. Therefore, a license agreement between Rook and GTC for a different segment of the road further east has no bearing on whether Rook's use of the easement road as it crossed Human Synergistics' property was open and notorious with respect to Human Synergistics' ownership. The district court's finding of open and notorious use was based on clear and convincing evidence and should be affirmed by this Court.

B. Capstar Proved Continuous and Uninterrupted Use of the Easement Road

The determination of continuous and uninterrupted use to gain a prescriptive easement does not require daily or even monthly use. *Beckstead v. Price*, 146 Idaho 57, 63, 190 P.3d 876, 882 (2008) *citing* 25 Am.Jur.2d *Easements and Licenses* § 61 (2004). In fact, seasonal use of an easement may be sufficient because this determination focuses on the nature of the claimant's use and the claimant's need of the easement. *Id.* Accordingly, this Court has recognized use as continuous and uninterrupted when a claimant only used an easement six times in a year during the farming season. *Akers II*, 142 Idaho at 302, 127 P.3d at 205. In *Akers II*, this Court recognized that based on the nature and character of the land in dispute, farming was a consistent use and use of the easement six times within a year was "consistent with the nature of the property." *Id.* Therefore, whether use is continuous and uninterrupted depends on the nature of the property and the use of the claimant.

In the present case, the district court was presented with substantial and competent evidence of continuous and uninterrupted use of the easement road by Capstar's predecessors in interest for over 10 years, as well as Capstar's continued use of the access road. John Rook testified to used easement road to visit the tower site 2-3 dozen times from 1989 to 1998. Tr P. 475, L. 8 – P. 479, L. 4.; P. 479, L. 5 – 481, L. 6; P. 482, L. 9-22; P. 495, L. 19 – P. 496, L. 16.

There was testimony that the use of the road for building, repairing, and maintaining the tower and its equipment was as frequent as multiple times per day when there were serious problems or every 2-3 weeks for routine maintenance when the equipment was performing well. Tr P. 497, L. 10-24; P. 498, L. 6 – P. 500, L. 2; P. 479, L. 19 – P. 481, L. 6; P. 540-541; P. 543, L. 19 – P. 544, L. 25; P. 545, L. 1-18; P. 546, L. 2-24. This regular access via the easement road continued after Rook sold to AGM because one of Rook's tenants, Trinity Broadcasting, continued to lease tower space on the mountain after the sale to AGM and still had its engineer access the site regularly to perform maintenance. Tr P. 548, L.17 – P. 549, L. 10.

Despite the overwhelming evidence of continuous and uninterrupted use by Capstar's predecessors in interest, Lawrence claims "[t]he facts clearly show that from 1981 to 1989 there was an eight year gap where no predecessor in interest to the Capstar property was accessing the property via the private road in dispute." Appellant's Brief at 12. Capstar's parcel did not come into existence until 1989. At that time, the adverse use began. The record is replete with clear and convincing evidence that John Rook and his agents continuously accessed the easement road to build and maintain a radio tower and other communication facilities during that time period.

The nature of John Rook and his agents' use of the easement road was for radio broadcasting and facility maintenance. There was testimony this use was less frequent in the winter months because access to the mountain was more difficult due to snow. Tr P. 496, L. 20 –

P. 497, L. 4. However, Rook's and Capstar's This seasonal use is consistent with the location of the easement, the nature of the easement use, and the seasonal realities of the area. Therefore, the district court's finding of continuous and uninterrupted use of the easement road was supported by clear and convincing evidence presented at trial.

C. Capstar Proved Adverse Use Under a Claim of Right of the Easement Road

Adverse use under a claim of right is use that constitutes an actual invasion of or infringement on the rights of the owner. *Hughes*, 142 Idaho at 480, 129 P.3d at 1229. "The state of mind of the users of the alleged easement is not controlling; instead, the focus is on the nature of their use." *Backman*, 147 Idaho at 398, 210 P.3d at 83. Use by permission of the *land owner* is not adverse to the rights of the owner. *Hughes*, 142 Idaho at 480, 129 P.3d at 1229; *H.F.L.P.*, 157 Idaho at 681, 339 P.3d at 566. Permission to use the land by someone other than the land owner does nothing to rebut evidence of adverse use. Similarly, mere inaction and passive acquiescence is not a sufficient basis for proving that the use of the claimed right was with the permission of the owner of the servient estate. *Backman*, 147 Idaho at 398, 210 P.3d at 83. Such passivity is "equally consistent with recognition of the users' claim of right." *Akers I*, 142 Idaho at 304, 127 P.3d at 207.

If a claimant successfully establishes the first two elements of a claim of prescriptive easement, namely 1) open and notorious, and 2) continuous and uninterrupted use of the claimed easement, the claimant is entitled to the presumption of adverse use. *Id.* at 303, 127 P.3d at 206. At that point the property owner has the burden of overcoming that presumption by evidence that the use was permissive, or by virtue of a license, contract, or agreement. *Id.*; *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998). If use begins as permissive it cannot become adverse unless the user makes "some new and independent act that would put the owner of the

servient property on notice that the use was no longer permissive." *Backman*, 147 Idaho at 398, 210 P.3d at 83.

There is also a presumption that use of land that is open to the general public is permissive. *Hall v. Strawn*, 108 Idaho 111, 113, 697 P.2d 451, 453 (Ct. App. 1985), *overruled on other grounds by Cardenas v. Krupjuweit*, 116 Idaho 739, 779 P.2d 414 (1989).

1. Rook's Use was Properly Presumed to be Adverse and Under a Claim of Right

The district court did not err in finding Rook's use of the easement road was adverse and under a claim of right because Capstar established open, notorious, continuous and uninterrupted use of the easement road. As set forth above, Capstar proved the first two elements of a prescriptive easement by clear and convincing evidence. With those two elements satisfied, Capstar is entitled to a presumption of use that is adverse and under a claim of right.

Even if Capstar was not afforded this presumption, the facts at trial were enough to satisfy this element of the prescriptive easement claim. Use that is adverse and under a claim of right must be "an actual invasion of or infringement on the rights of the owner." *Hughes*, 142 Idaho at 480, 129 P.3d at 1229. There was clear and convincing evidence of frequent use of the easement road by Rook and his agents, as frequent as multiple times per day for maintenance and operation. Tr P. 479, L. 5 – 481, L. 6; P. 482, L. 9-22; P. 495, L. 19 – P. 496, L. 16; P. 497, L. 10-24; P. 498, L. 6 – P. 500, L. 2; P. 546, L. 2-24. There was testimony that Rook's engineer even used the road nightly for a 2-week stretch. Tr P. 545, L. 1-18. There was testimony that the road was used continuously for three consecutive days to transport a 90 foot radio tower to Blossom Mountain. Tr P. 494, L. 21 – P. 495, L. 3; P. 495, L. 4-18. This use was an actual invasion of and infringement of Human Synergistics' rights.

2. **Rook's Use Was Not Permissive**

There was no evidence that Rook's use or the use of his agents was permissive. Rook was never told that he was not allowed to use the road or asked to pay for access. Tr P. 504, Ll. 19-25. Mr. Bedini testified that he never asked permission of any of the property owners along Blossom Mountain Road for permission to use the road. Tr P. 584, L. 17-20.

Lawrences argue Rook's use of the road was permissive for two reasons: First, Lawrence maintains the purchase and sale agreement between Funk and Human Synergistics was equivalent to a grant of permission to Funk to continue using the road following separation. Second, Lawrences contend since Idaho Forest Industries and GTC granted Rook permission to use the road as it crossed their parcels, this permission made use of the road across neighboring parcels permissive. Appellant's Brief at 13. Neither of these arguments are supported by law, nor are they persuasive or correct.

Turning to the first argument, the sales agreement between Funk and Human Synergistics did not grant permission to Funk to use the road, nor did it grant a license to Funk to use the road. The sales agreement set forth Funk's contractual claim of a right to continue use the road after severance. Trial Exhibits 5-11 at ¶ 5. An easement reservation is not permission or a license. Accordingly, there is no basis for argue the purchase and sale agreements constituted permission from Human Synergistics to Funk to use the road.

Turning to the second argument, Lawrence provides no evidence he gave anyone permission to use the road. To the contrary, soon after Lawrences purchased their property in 1996, Doug Lawrence posted no trespassing signs and took the position that only General Telephone had a right to access that road. Tr p. 74, L. 4 – P. 75, L. 11.

Further, permission from neighboring landowners to cross their land is not permission to cross Lawrence's parcel. John Rook testified that he had been given permission from Idaho Forest Industries (IFI) and General Telephone Company (GTC) to access portions of the road on their property. Tr P. 513, L. 18 – P. 514, L. 25. IFI provided Rook a key to access the first gate at the beginning of the dirt road (Blossom Mountain Road) as it branched off from Signal Point Road (across the Mead property). Tr P. 513, L. 24-25; P. 483, L. 8 – P. 484, L. 7. There are no facts in the record that IFI or GTC were acting as agents of the owner of the Lawrence parcel when they granted Rook permission to cross their parcels. Likewise, Lawrence has this Court with no law holding permission by neighboring landowners to cross their land constitutes permission to cross a neighbor's land. There are no facts in the record that would suggest Rook's use of the road as it crossed Lawrences' parcel was permissive.

3. Blossom Mountain Road was not a Common Driveway

Lawrence contends that Capstar was not entitled to a presumption of hostility because "all witnesses who traversed across the Lawrence property testified that they received a key to the first locked gate that was located on the Mead property." Appellant's Brief at 13. However, Lawrence's statement of law is not accurate and this does not rebut the adverse use presumption.

"In Idaho, the adverse use presumption has been rebutted by evidence of '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." *Beckstead*, 146 Idaho at 64, 190 P.3d at 883 (emphasis added). A key that limits use of the road to specific users negates use in common with the general public.

The record is devoid of any facts that Blossom Mountain Road was open to and used by the general public. To the contrary, the record indicates that the road was only accessible to those

who were given a key to access the first gate, just off of Signal Point Road. For instance, John Rook testified "that area was basically controlled by Idaho Forest Industries and that we had to go through them to get a key...and no one else could have that key." Tr P. 483, L. 8 – P. 484, L. 11. Rook testified that Wilbur Mead controlled the main gate and although Rook had been given a key he wasn't allowed to make a copy of it. Tr P. 485, L. 5 – P. 486, L. 1. Rook testified that the gate was always locked. Tr P. 487, L. 1-9.

John Bedini testified that the first gate on Blossom Mountain Road was always locked. Tr P. 560, L. 7 – P. 561, L.1. Doug Lawrence testified that the first gate was continuously locked until 1998. Tr P. 82, L. 16 – P. 83, L. 10. The district court summarized this testimony, finding: "In this case, there is a locked gate just off the public road. The existence of the locked gate on the easement road shortly after turning off the public road demonstrates that the road was not available to anyone who had occasion to use the road." R P. 166. Lawrence has presented no evidence that the trial court's finding was not supported clear and convincing evidence as previously discussed in this brief.

The facts at trial are clear and convincing evidence that Rook's use of the road was adverse and under a claim of right. Lawrence has failed to present this Court with any facts that would rebut the presumption of adverse use or facts that prove Rook's use was permissive.

IV. THE DISTRICT COURT DID NOT ERR IN DETERMINING THE SCOPE OF CAPSTAR'S IMPLIED EASEMENT

The district court did not err in determining that Capstar's implied easement across the Lawrence parcel was for unlimited reasonable use because this scope is consistent with the intent of Harold Funk. The scope of "an easement granted or reserved in general terms, without any limitations as to its use, is one of unlimited reasonable use." *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991). Easements reserved in general terms are "not

restricted to use merely for such purposes of the dominant estate as are reasonably required at the time of the grant or reservation, but the right may be exercised by the dominant owner for those purposes to which that estate may be subsequently devoted." *Id.*

Whereas easements created by reservation may have a scope of unlimited reasonable use, an easement created by prescription has a scope "fixed by the use made during the prescriptive period." *Beckstead*, 146 Idaho at 65, 190 P.3d at 884. "A person using the land of another for the prescriptive period may acquire the right to continue such use, but does not acquire the right to make other uses of it." *Gibbens v. Weisshaupt*, 98 Idaho 633, 638, 570 P.2d 870, 875 (1977).

In this case the district court did not err is determining that Capstar's implied easement is for unlimited reasonable use because its implied easement was a result of an easement intended to be reserved in general terms. As discussed in Section II. A. above, Funk intended to reserve an easement with general terms corresponding with Blossom Mountain Road. Because the district court correctly concluded that Capstar had met the elements required for an implied easement by prior use based on Funk's intent to reserve a general easement, the scope determined by the district court was appropriate. Lawrence's contention that any easement in favor of Capstar should be limited to egress and ingress for radio tower maintenance ignores Capstar's implied easement and the intent to reserve a general easement upon which it was based.

Assuming arguendo this Court concludes that the evidence does not support Capstar's implied easement, but does support its prescriptive easement, the scope of the prescriptive easement would be limited to its use during the prescriptive period. The testimony showed the easement was used for ingress and egress for operation and maintenance of the equipment on Capstar's parcel, including its tenants' operation and maintenance.

V. THE DISTRICT COURT DID NOT ERR IN ENJOINING LAWRENCE FROM INTERFERING WITH CAPSTAR'S USE OR MAINTENANCE OF THEIR EASEMENT

The district court did not err in granting Capstar a permanent injunction, enjoining Lawrence from interfering with Capstar's use of the easement. R P. 167. This Court has been clear that it will not consider arguments within an appellant's opening brief not supported by authority: "We will not consider assignments of error not supported by argument and authority in the opening brief." *Jorgensen*, 145 Idaho at 528, 181 P.3d at 454 (emphasis added). Idaho Appellate Rule 35 requires an appellant's opening brief to contain an argument section with citations to authority:

> (6) Argument. The argument shall contain the contentions of the appellant 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.

I.A.R. 35(a)(6).

Failure of an appellant to include both argument and authority in the opening brief results in a waiver of any argument made in that opening brief because this Court will not search the record for error. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745, 9 P.3d 1204, 1211 (2000). "Error is never presumed on appeal and the burden of showing it is on the party asserting it." *Id.*

Lawrence included the grant of a permanent injunction as an issue on appeal in their opening brief, but failed to set forth any argument or authority. Accordingly, this issue should be dismissed

CONCLUSION

For the reasons stated above Capstar respectfully requests this Court affirm the district

court's Amended Final Judgment.

SUBMITTED this 9th day of December, 2015.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

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Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December, 2015, I caused to be served a copy of the foregoing by the method stated below, and addressed to all counsel of record :

W. Jeremy Carr	☑	U.S. Mail
CLARK and FEENEY LLP	☐	Hand Delivered
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Christine Elmore