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No.: 35120

**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-*Pro Se* Appellants.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE STATE
OF IDAHO

CV 2002 7671

RECEIVED
JUN 11 2002
DISTRICT COURT

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

APPELLANTS REPLY BRIEF

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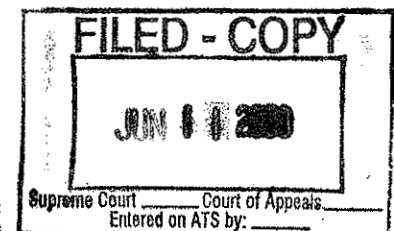


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APPELLANT'S REPLY TO RESPONDENT'S BRIEF

CAPSTAR'S EASEMENT IMPLIED BY PRIOR USE CLAIM

The crux of Capstar various easement arguments resides in a statement they set forth on page 4 of their response brief: “*At the time Funks purchased the property in 1969, the GTC easement road was the only existing road providing access to the Funks real property.*” This is a crucial element to their arguments and one of the principle issues this court is asked to decide.

Creation of easements by implication rests upon exceptions to the rule that written instruments speak for themselves, and because implied easements are contrary to that rule, the courts disfavor them. *Sutton v. Brown*, 91 Idaho 396, 400, 422 P.2d 63, 67 (1966); *Cordwell v. Smith*, 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct. App. 1983). An easement is implied because it is presumed that if an access was in use at the time of severance it was meant to continue. *Bob Daniels and Sons v. Weaver*, 105 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). The party seeking to establish the easement has the burden of providing the facts to establish the easement, *Cordwell v. Smith*, 105 Idaho at 77, 665 P.2d at 1087.

Capstar would have this court believe that Blossom Mountain Road was the only road providing access to Funk's real property in 1969. The only evidence they have provided are the affidavits that Capstar's attorneys prepared and sent to Harold Funk and John Rook to sign that contains statements that are not supported by deposition testimony and the record.

John Rook doesn't come into the scene until 1989, some twenty years after the Funks purchased the property. By his own testimony, John Rook cannot remember providing Capstar

an affidavit. He doesn't dispute signing the affidavit, he just doesn't remember providing one. He testifies that at the time he signed the affidavit, he was having severe medical problems and was under strong medication. Having admitted being under the influence of strong medication at the time and the fact that he does not remember providing an affidavit, invalidates any statement contained in his affidavit. His affidavit is not reliable testimony.

According to his own deposition testimony, John Rook cannot testify as to the route the Funks used to access their land, he wasn't there. He could not provide any first hand knowledge of the Mellick road access other than having seen it once from a helicopter. What little else Mr. Rook has to say about Mellick road amounts to nothing more than hearsay evidence, which is not admissible for establishing facts.

Because Rook referred to the Mellick access road as a goat trail, Capstar wants to use this testimony to help convince this court that this access route did not exist in 1969. All one can really draw from Mr. Rook's testimony is that in 1989, after some twenty years of neglect and overgrowth, and from 10,000 feet up in a snow storm, the Mellick access road looked like a trail. That is essentially, the whole and the short of Mr. Rook's testimony in regards to the Funk's access and the Mellick road access.

Capstar also has problems with the Funk affidavit as statements contained in this affidavit are not supported by Mr. Funk's deposition testimony, contradicted by other writings provided by Mr. Funk [R. Vol 1 p. 32], and more importantly, not supported by the record.

The record reveals that the properties the Radens and Marcoes conveyed to Funk were the same properties that the Raden and Marcoes had purchased from Pike Reynolds. In other words, the property Funk purchased was not the result of a separation or division at sale; the whole estate was conveyed. The easement the Radens and Marcoes enjoyed, would have been the same easement Raden and Marcoes conveyed to Funk at the time of sale. Yet, Capstar does not make any claim that the Raden and Marcoes used Blossom Mountain Road. So in determining which access easement the Radens and Marcoes conveyed to Funk in 1969, one must draw the most probable inferences from the record.

1. The 1907 survey of Mellick road does reveal that there was a public/county access road that extended into the estate in the Southwest Quarter of Section 15.
2. A Metsker map, dated March 1959, does illustrate a road extending from Mellick in the Southwest Quarter of Section 15, through the west half of Section 22, and around Blossom Mountain in the south half of Section 21.
3. Funk's deposition testimony collaborates the existence of the road as portrayed in the Metsker map. Funk further testifies that it was used as a logging road prior to his taking title to the property.
4. A 1987 district court finding that collaborates that Mellick road still existed in 1987 and the part of the road that was surveyed in 1907 had not changed since the survey.
5. The easement GTC negotiated with Glen and Ethel Blossom and Wilber and Florence Mead in 1966, establishes the placement of a *locked* gate across the GTC access road.

The easement GTC negotiated with William Ulrich establishes the placement of two gates along the GTC access road. One where Blossom Mountain Road enters Section 28 from the Southwest quarter of Section 21; and one where Blossom Mountain Road leaves Section 28 at the Southeast quarter of Section 21.

6. Mead's affidavit establishes that the GTC access road was gated and locked from 1966 through 1998. Prior to his conveyance of an easement to Funk in 1972, GTC was the only one who used the access route. [R. Vol 1 p. 273 ¶ 3]

7. When Funk bought the property in 1969, the property did not have a legal access across the Southwest quarter of Section 21 and it did not have a legal access across the Northeast quarter of section 28.

The only probable inference one can draw from the record is that when Funk purchased the property from the Radens and Marcoes in 1969, the property's only legal right of way and the property's only access was via Mellick road. As Capstar makes no claims as to the Radens and Marcoes access to the contrary, no other inference can be made. Therefore, the claim made by Capstar that at the time Funk purchased the property in 1969, the GTC easement road was the only existing road providing access to the Funk's real property is simply not supported by the evidence in the record.

In their Respondent's Brief on page 20, Capstar provides a map highlighting the Funk estate including Government Lot 3 in Section 15, Government Lot 4 in Section 22, the

Southwest Quarter of the Northwest Quarter of Section 22, and the Southeast Quarter of Section

21. They depict Mellick Road and a branch of Mellick road with red marks and argue:

“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 in the record shows that the logging road was not open all the way to Mellick Road at the time Funk purchased Section 22, and crossed property not owned by Funk.”

Capstar attempts to use this map to somehow contradict the road as portrayed in the 1959 Metsker map and to discount Funk's deposition testimony that the logging road extended from Section 22 to Mellick road in Section 15. Capstar wants this court to believe, that because their map doesn't show the logging road, the logging road couldn't have existed or provided Funk access to his property in Section 22.

However, there are a couple of problems with this argument and the use of this map. Capstar fails to lay the foundation for how this map supposedly illustrates the roads that were in existence in 1969. Using their logic and the same map, one would have to conclude that the Blossom Mountain road doesn't exist because it is also not depicted on this map. And, while we disagree with the way this map portrays Mellick road, even this map illustrates Mellick road providing access into the Funk estate in Section 15.

Capstar expands on this argument by arguing that since Mellick road extended beyond Section 15 and into the Northeast Quarter of Section 21, it was on someone else's property and another property owner told him he couldn't improve the road. However, Funk's testimony isn't so clear on this point. What Funk actually said was *“I'm thinking that somebody down here kind*

of told me I couldn't do that." Funk didn't identify the person as a property owner or whether the information conveyed to him was first hand information or hearsay. One simply cannot conclude from Funk's testimony, that the reason he didn't scrape the road was because someone told he couldn't. It is far more likely that Funk didn't have a bulldozer, the time, or the real inclination to begin with. Also, the owner of an easement generally has rights to make improvements to an easement that are not inconsistent with their use of the easement. Capstar simply has not established necessity.

It is also interesting to note the rational Capstar makes for claiming that Funk could not use the Mellick road access, "*because the road crosses someone else's property*" is relevant for claiming the lack of access. But, using a road that crosses someone else's property (Section 28) is not relevant to the claiming of an easement?

The map provided by Capstar on page 20 of their reply clearly depicts the properties in the Funk estate as being adjoining and contiguous properties with a legal access extending into the estate in Section 15. Funk had all the legal right and authority to build or improve roads that go anywhere on his property including from Section 15 all the way through Section 22 and into Section 21. He needed no one's permission. And, Capstar has made no claims whatsoever that the terrain or topography of the land would have prevented Funk from doing so. Capstar also fails to make the argument as to how or why Funk was prevented from improving the road when clearly, John Mack had no problems making improvements.

The image on page 10 is included for illustration purposes. It is a scan of Exhibit 2 from the Funk Deposition depicting the route Funk used when going to his property with call-outs and highlights added to illustrate the relevant details.

At Funk's deposition, the following exchange took place between Mr. Whelan and Funk regarding the Mellick road access. [R. Vol. 2 p. 360 (FD 15:6-16:9)]

Q. (By Mr. Whelan) Okay. You were saying Mr. Funk?

A. Now, I was going to use this road, but it seemed like at the time it was kind of in poor shape.

Q. You're referring to the logging road you just described?

A. Yeah. But it was a road.

Q. It was a road?

A. Um-hmm.

Q. And did that lead to Blossom Mountain?

A. Um-hmm.

Q. Sir, you have to say yes because she can only take down words.

A. Yes.

Q. Okay. And that logging road needed some work; it was overgrown?

A. Yes.

Q. But it was an existing road at the time you bought the property?

A. Would you repeat that? I'm sorry.

Q. That road was there when you bought the property, the logging road?

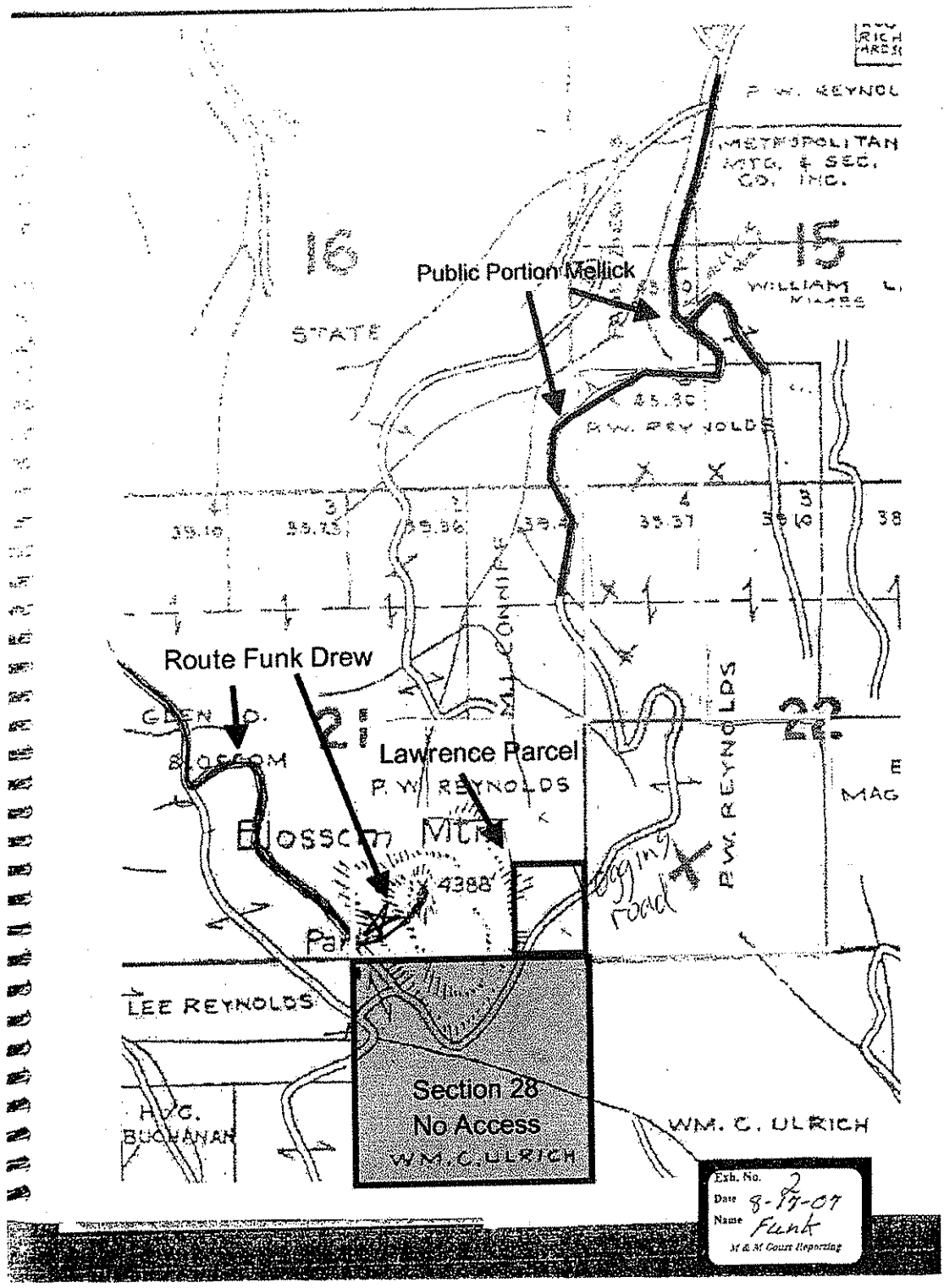
A. Yes.

Q. It was just in poor shape?

A. Yes

Q. Okay. And did you have occasion to drive along that road?

A. No, I didn't. I didn't care to.



Funk's own testimony establishes the fact that in 1969, when Funk purchased the property, there was a logging road that extended from Mellick road, all the way to Blossom Mountain in Section 21, and that some years earlier, the road was used for hauling logs. [R. Vol. 2 p. 371 (FD 59:7-59:19)] And, contrary to Rook's definition of it as being a goat trail some twenty years later, Funk clearly describes it as being a road. The question why Funk would use the Blossom Mountain Road access over the Mellick road access is easily explained. At his deposition, Funk directed Mr. Whelan to mark in blue the route he would take to his property. [R. Vol. 2 p. 369 (FD 51:2-51:25)]

Q. Okay. And I'm going to mark that in blue. And I'd like to stop where the gate is, so if you could –

A. Right where the K is on ...

Q. Right where the K – right here (indicating)?

A. Yeah.

Q. So the gate stops right where the –

A. Whenever it meets the –

Q. Right at the point. Now, what I'm going to do is to put a star there; okay (Marking) There's a star.

A. Um-hmm.

Q. And that's where the gate was?

A. Um-hmm.

Q. Is that yes?

A. Yes.

Q. Okay, So I've marked in blue the route that you took up to the mountain.

A. Um-hmm.

Q. And I placed a star next to the gate that was on – was that on Wilber Mead's property?

A. Yes.

When Funk would drive to his property for picking huckleberries and target practice, he wanted to go the highest part of his property, that being the mountain top in the Southwest Quarter of the Southeast Quarter of Section 21. Some three years earlier, GTC made major improvements to the existing road across the Mead property, which may have included laying a gravel foundation. Not only was the Blossom Mountain road access, a shorter route to the mountain top. By all indications, it was a much better route. Funk chose not to use the Mellick road access. It was a choice. He opted to take a route in better shape and closer to his destination over a longer route and that was in poorer shape. This is also consistent with Funk's testimony as to why he acquired an easement from Wilber Mead, yet didn't talk to William Ulrich about an easement across Section 28. [R. Vol. 2 p. 370 (FD 53:20-54:16)]

Q. Okay. And then you parked at the top, typically.

A. Um-hmm.

Q. Is that yes?

A. Yes.

Q. Okay. Did you ever contact anyone in Section 28, who owned the property in Section 28 about an easement to cross their property as well?

A. His name was what again?

Q. I think it was – oh, there it is right there. Ulrich. It's on this old Metsker map. And, I think that's U-L-R-I-C-H. William maybe, William, Bill Ulrich?

A. I don't think so.

Mrs. Funk: Doesn't sound familiar.

Q. (By Mr. Whelan) Okay. So you never approached Mr. Ulrich to obtain an easement?

A. No, I figured that while I had the easement here (indicating) –

Q. From Mead?

A. – I could cut over.

Funk's property shared a common property line with the Meads where the two properties meet in Section 21. Funk did not attempt to acquire an easement across Section 28 because he typically went to the top of the mountain and didn't need to cross into Section 28. Funk's testimony here shows that: 1) he was aware that the road crossed into Section 28; 2) that he didn't have a legal access across Section 28; 3) that at some future point the road across Section 28 could be blocked to him; and, 4) that he could "cut in" a road in order to use the Blossom Mountain road access to get to his other properties.

By all indications, the Blossom Mountain road was a better route and a shorter route and it is easy to understand why Funk "*didn't care*" to use the Mellick road access. It was not necessity that caused Funk to use the Blossom Mountain road access, rather it was Funk's choice. Just as it was Funk's choice not to remove the overgrowth or maintain the only legal access to his properties. Furthermore, this court established in *B & J Development and Inv., Inc. v. Parsons*, 126 Idaho 504, 887 p.2d 49, Owner of a property cannot create necessity for easement by his or her own actions.

In determining the establishment of implied easements, the court's have held in *Davis* that only reasonable necessity is required and that reasonable necessity is something different than strict necessity. The record is clear that the element of strict necessity has not been established. The question now is, was the Blossom Mountain road reasonably necessary for Funk's use and enjoyment of his property?

In the present matter, Capstar *only* makes claims of “strict necessity.” They have not presented any real argument or established any real facts regarding “reasonable necessity.” In their brief, Capstar makes the following argument for reasonable necessity:

“Thus, the undisputed facts before the trial court were that Mellick Road did not provide access to Funk's Section 22 property at the time he purchased; nor did the logging road provide access, *nor did Funk have the right to extend the logging road to connect to the public right of way across property he did not own. To reach the conclusions Lawrence's urge, Funk would have had to bulldozed the road to open it; crossed property that wasn't owned by Funk and over which Funk had been told he better not do.*” [Respondent's Brief p. 21 L.20]

This whole argument, except for the part “*Funk would have had to bulldozed the road to open it*” is about strict necessity, not reasonable necessity. Further, Capstar presents no facts or argument showing how bulldozing a road is unreasonable. When deciding matters involving implied easements and reasonable necessity, this court generally considers problematic terrain topography and exorbitant costs as being the key factors differentiating reasonable necessity from strict necessity. Yet, Capstar makes no claims nor establishes any facts that would indicate problematic terrain topology or exorbitant costs. They simply state necessity in the strictest sense and have failed to prove the element of reasonable necessity.

Capstar has also failed to prove the element of apparent continuous use. Apparent continuous use refers to the use before the separation of the parcels that would indicate the roadway was intended to provide permanent access to the parcels. *Cordwell*, 105 Idaho at 78, 665 P.2d at 1088. The party seeking to establish the easement has the burden of providing the facts to establish the easement. *Id.*, 105 Idaho at 77, 665 P.2d at 1087. No easement by

implication could arise as to lands that were never part of a former common owner's holdings.
Id., 105 Idaho 76, 665 P.2d 1081 (1983)

Funk purchased the properties in 1969. Funk testifies, that in the six years prior to the separation of what would later become the Lawrence parcel in 1975, Funk made approximately 20-30 trips to their property. On average, that amounts to 3-5 trips per year or one trip every 3-4 months. Being that this is wild, uninhabited, mountainous terrain, and the fact that Funk's use of the road occurred only once every 3-4 months, it is hard to conceive how the Funk's use on the road was apparent to anyone. Wilber Mead, who later granted Funk an easement across his land in 1972, testified in his affidavit, that to his knowledge, Funk did not use his gate prior to 1972. Evidently, Funk's use of the road was only apparent to Mr. and Mrs. Funk.

The only part of the Blossom Mountain road that Capstar can prove the Funks made use of, was the portion of the road as it crosses the Mead property in the Southwest Quarter of Section 21. Capstar has failed to establish apparent continuous use of the road as it crosses Section 28 and the *now* Lawrence parcel. More importantly, they have failed to prove how the use, before the separation of the parcels, would indicate the roadway was intended to provide permanent access to the parcels. Capstar argues:

“Lawrence contends that the GTC road passed through Section 28, and since Funk never had titled to Section 28, Capstar can not establish the unity of title necessary for an implied easement. Capstar does not seek to establish in this suit an implied easement over Section 28. This argument is not relevant to the issues before the trial court.

The fact that Funk never owned property in Section 28 and the fact that Funk never obtained an easement across Section 28 is entirely relevant to the present matter. Had Funk really intended for his property in Section 22 to benefit from a permanent access across Section 28 (and the Lawrence parcel), he would have obtained the necessary easement across Section 28. Knowing this to be a difficult argument to overcome, Capstar simply argues that access across Section 28 is irrelevant to the present matter.

Furthermore, Capstar's apparent continuous use element also fails in that the Capstar parcel wasn't created until 1989, some fourteen years after the creation of the Lawrence parcel. There was no road to what would later become the Capstar parcel, that was in existence in 1975. Prior to 1989, the Capstar parcel was just part of a larger tract of land that the Funks held in Section 22. The only legal ingress/egress access to that tract of land was via the Mellick road access.

On or about 1966, the General Telephone Company (GTC) purchased property in Section 22 and was granted easements across the south half of Section 21 and the Northeast quarter of Section 28. By all indications, GTC has used the easement as it crosses the Lawrence parcel openly and continuously, as it is their right to do. Neither Funk, nor Funk's successors, derive any legal right to use the Blossom Mountain road from GTC or GTC's use of the road. The fact that GTC made apparent continuous use of the road during the relevant time period does not and should not be used by Capstar to establish apparent continuous use of the road by Funk. Yet, Capstar submits an affidavit offered by Wynn Wenker from another case involving Verizon

Northwest, successor to the GTC parcel. And, the trial court uses this affidavit to establish the element of apparent continuous use:

“Apparent continuous use from no later than 1975 is also shown by the Affidavit of Wynn Wenker.” [R Vol. 3 p. 563 L.12-13]

The record shows that prior to the separation of the Lawrence parcel, there were only two parties using the Blossom Mountain road: the General Telephone Company and Funks. At deposition, Funk testifies that he typically drove to the mountain top to the west of the Lawrence parcel and did not typically drive across Section 28. And, GTC's use of Blossom Mountain road is not relevant to Capstar's claim of an easement by implication. Whatever claims, assertions, or assumptions that Capstar makes in reference to John Rook, are simply irrelevant to Capstar's implied easement theory as John Rook's use of the road doesn't begin until fourteen years later. John Rook simply cannot testify to anything prior to his use of the road which began in 1989.

Capstar wants this court to believe that Lawrences' counsel, John P. Whelan, somehow misled Funk at his deposition which is the reason for Funk's deposition testimony as being something different than the affidavit Capstar had him to sign.

However, there was a discrepancy at Mr. Funk's deposition regarding the location of Blossom Mountain as compared to the map exhibits being provided Mr. Funk during deposition. Mr. Funk indicated to Lawrence's counsel that the map he was being shown (Exhibit 1) was different than his recollection of the road and it wasn't drawn right, and that the mountain (Blossom Mountain) was “up here” and had a tower site. Lawrence's counsel response to this concern about the top of the mountain being “up here” was, “Yeah, you owned some land in 22, sure. Yeah Okay.” Supp R Vol. II, p. 368 (Tr p.45, L1. 7-25; p. 46, L1. 1-14). Later, Lawrence's counsel presented an enlarged portion of the map that Mr. Funk had indicated was not drawn right. In asking questions about the road, Lawrence's

counsel prefaced his statements with a representation that Blossom Mountain was in Section 21.”

It is unfortunate that Capstar feels compelled to impugn the credibility of Lawrences' counsel, by now suggesting that Mr. Whelan somehow misled Funk by presenting confusing maps or misrepresenting the lay of the land or the course of the road. Representing Capstar at Funk's deposition was Mr. Craig Vernon, a partner in the law firm representing Capstar. At no time during Funk's deposition did Mr. Vernon object to the use of any maps, line of questioning, or to anything for that matter. There are absolutely no comments in the transcripts by Mr. Vernon to suggest that he believed that Mr. Whelan was attempting to confuse, mislead, direct, or manipulate Funks testimony. Had Capstar believed that Mr. Whelan was misleading Funk, the proper time to go on the record would have been during the deposition, not two years later. Capstar has also raised an issue with Mr. Whelan's representation of Blossom Mountain as being in Section 21. While Capstar doesn't explain why they are raising this as an issue, their implication is that it is somehow wrong or was misleading. The fact is, the top of Blossom Mountain is located in Section 21 and to the west of the Lawrence parcel. This fact is clearly represented by the Metsker map that was used during the Funk deposition. This peak also shows up on Funk Deposition exhibit 6, which is a map provided by Capstar during the deposition. However, the map Capstar claims as being illustrative on page 20 of their brief does not show any topography at all.

By Funk's own testimony, the last time he was on his property was about 1981, some twenty years earlier. It is completely understandable that he wouldn't be as familiar with the lay of the land as he would have been had he been up there recently and he needed some time to get his bearings; to reconcile his memories with the maps he was being presented. Once that had taken place, Funk's confusion seemed to have evaporated.

When Funk was asked about the route he took to the mountain, he was asked to draw in the route he took. [R. Vol. 2 p. 370-371 (FD 56:5-57:5)]

Q. Can you draw it in for me, or do you want me to do it?

A. (Marking) That will work.

Q. Okay. So for the record, on Exhibit 2 you've drawn in a blue line going to the top of the mountain.

A. Um-hmm

Q. Is that a yes?

A. Yes.

Q. And that blue line represents the road that you would take to the top of the mountain?

A. Yes.

Q. So you weren't passing across Section 28?

A. Not then. I continued on here and went around there a number of times, but like I say, I assumed that we could build a road through there if we had to, if this turned out to be unavailable.

Q. You're referring to the road on Section 28?

A. Yeah.

Funk did not appear to be confused when he drew his route to the top of the mountain. To the contrary, his testimony demonstrates his clear recollection of road as it crosses into Section 28 and continues first to the east, and then, to the south as the logging road. [R Vol. 2 p. 371 (FD 58:1-59:6)]

Q. So this road to the east, was this the logging road; right?

A. Yes.

Q. Now, I'm going to write that on this Exhibit 2; okay?

A. Yeah.

Q. Write that right over the road: "Logging road." Now, I marked that correctly?

A. Yes.

Q. And where I wrote "logging road" in blue ink along this road on the east side of the mountain –

A. Yeah.

Q. – that was the road you referred to previously?

A. Yes.

Q. Okay.

A. I looked at this mountain here, and I had thought maybe on opening this up and using it. It was, like I say, overgrown a little – but I thought maybe I would take a bulldozer and go in and open that up again and come in that way, but ...

Q. But you never did?

A. I'm thinking that somebody down here kind of told me I couldn't do that, but

...

Q. Okay. Now, just to refresh your memory, this, I think is Government lot 3, right here.

A. Yeah.

Q. So this road went over across your Government Lot 3; is that true?

A. Yeah.

But, because Funk's testimony is inconsistent with Capstar's easement claims, rather than acknowledge the fact, Capstar opts instead to discredit Mr. Whelan and the answers Funk provides Mr. Whelan. Capstar expects this court to place a higher weight on the affidavit Capstar's attorney personally prepared and sent to Funk for signature, over the answers Funk provided at his deposition.

Capstar has not only failed to prove the elements of apparent continuous use and reasonable necessity, they have completely failed to prove the claimed implied easement ever existed. The Lawrences ask this court to deny their claim of an easement implied by prior use.

CAPSTAR'S EASEMENT BY NECESSITY CLAIM

Easement by necessity arises where part of a tract is conveyed and, as a result of severance, the part conveyed or the part retained is deprived of legal access to public road. *Roberts v. Swim*, 117 Idaho 9, 784 P.2d 339. When lands have been severed, grantee or his successor in interest, cannot, by subdividing, create new and different "necessity" for rights of way, where no such necessity existed before severance. *Cordwell v. Smith*, 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct.App. 1983) Owner of property cannot create necessity for 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). It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. *Burley Brick and Sand Co. v. Cofer*, 102 Idaho 333, 335, 629 P.2d 1166, 1168 (1981)

The key element to the creation of an easement by necessity arises when the conveyance of land created a separation from the highway for either the part retained or the part conveyed. An easement by necessity is a question of law. Did the separation of the Lawrence parcel, separate the Funk's land in Section 22 from the highway? The answer is an unquestionably and a resounding "no".

Capstar argues that there is no evidence in the record that Mellick road provided access to Funk's Section 22 property and therefore necessity for the easement existed at the time of severance. The record disagrees. The record clearly demonstrates that Mellick road provided access to Funk's land in Section 15. The only professional opinion offered in the case by a licensed and certified surveyor, was offered by the Kootenai County Surveyor, Bruce Anderson who is of the opinion that, after reviewing the applicable legal maps and records, found that

Mellick road did extend into the Funk's land in Section 15 and did provide access to the Funk's lands [R Vol. 2 p. 195 L. 16-18]. Capstar incorrectly argues that because Mellick road wanders off Funk land into Section 21, before extending back into Funk's land in Section 22, that it deprives Funk's land in Section 22 of a legal access, giving rise to the element of necessity. However, whether or not Mellick road extended all the way into Section 22 is really immaterial to the question of necessity as Funk's lands in Section 22 were contiguous with his lands in Section 15 and Funk needed no other easement to have an access to his Section 22 property. Funk had all the legal power and authority to build and construct a road anywhere on his property and Capstar does not recite any law to the contrary. And, as was earlier stated, Capstar does not present any evidence that would offer proof that Funk was prevented from using the Mellick road access that lay beyond his legal authority and control to rectify. Capstar simply states that the logging road was overgrown and would have required a bulldozer to open it up. This argument, however, doesn't give rise to strict necessity in the legal sense. Furthermore, the conveyance of the Lawrence parcel did not separate the lands Funk retained from the Mellick road access. Also problematic for Capstar is the fact that Funk never obtained an easement across Section 28. Since Funk never obtained an easement across Section 28, the Funk lands were and are separated from the highway along the Blossom Mountain road access beyond the Lawrence parcel. Clearly, the predecessors to the Lawrence parcel, Don Johnson and John McHugh recognized the lack of a legal access across Blossom Mountain Road and eventually, were able to obtain an easement across Section 28. The record is clear, neither Funk nor John Rook nor

Capstar ever obtained an easement across Section 28. Rather, Capstar simply asserts that their access across Section 28 is irrelevant to the present matter and they seek only an access across the Lawrence land. What good does an access across the Lawrence parcel do if Capstar doesn't have an easement across Section 28? It certainly doesn't get them to the highway... legally. All it does is to establish a precedent they will use to get what they want in Section 28 without ever having the owner's rights heard.

CAPSTAR'S PRESCRIPTIVE EASEMENT CLAIM

Capstar, itself, makes no claim of any sort that it has used the Lawrence parcel openly, notoriously, continuously, and in a hostile manner for the statutory period. No prescriptive claim has been established by Capstar. Rather, Capstar is claiming that the Funks established the prescriptive easement and Funk's successor, continued to use the easement under a claim of right.

Apart from submitting some conclusionary statements about a prescriptive easement, Capstar has failed to provide little else. They certainly have failed to provide "clear and convincing" evidence to establish any one of the elements required to establish a prescriptive claim.

The trial court noted on page 19 of Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment [R. Vol 3 p. 570 L. 15-22].

An easement by prescription was not raised in Capstar's initial Memorandum in Support of Motion for Summary Judgment filed March 9, 2004, nor did Lawrences discuss the theory in their pro se Defendant's Lawrences Reply in Opposition to Plaintiff's Motion for Summary Judgment, filed March 23, 2004. Capstar did not raise the theory in its Reply Brief in Support of Plaintiff's Motion for Summary Judgment filed April 6, 2004. The first time the issue of prescriptive

easement was raised was in Capstar's Memorandum in Support of Renewed Motion for Summary Judgment, pp. 11-12.

Capstar's Memorandum in Support of Renewed Motion for Summary Judgment sets out Capstar's prescriptive easement argument. Capstar's whole prescriptive easement argument is contained on a little over one page and is stated below.

When the road providing access to the Funk's Section 21 and Section 22 parcels was established is unknown. It is known that it was there as early as 1966. It is undisputed that Funks were using the road for access to both their Section 21 parcel and their Section 22 parcel prior to segregating the parcels. When Funks sold the Section 21 parcel to Human Synergistics, they included in the sales contract language that gave notice that they intended to continue to use the road for ingress and egress to their retained Section 22 parcel. This language provided notice they were claiming a right to use the road in the future for ingress and egress to their retained lands. It is undisputed that Funks and their predecessors then proceeded to use the road openly, continuously, without interruption, under a claim of right for the statutory period. Farmanians (a predecessor of Lawrence) granted an express easement for ingress/egress to a portion of Section 22 to Funk's predecessor, Mack, recognizing Mack had a right to the easement because it was the historical access to Section 22. Thus, there is also a prescriptive easement across this road. [R. Vol. 1 p. 7 L. 16-27]

The primary evidence that Capstar offers to support their prescriptive easement claim is language that was contained in a sales agreement between the Funks and Human Synergistics. Language which this court had earlier reviewed and determined that "*the language in the sales agreement is insufficient to create an easement.*" Because they failed to get a ruling in their favor on this language the first time, they changed their argument in an attempt to get a ruling in their favor on this language the second time.

Capstar has the burden of proving, *with clear and convincing evidence*, that Funk and/or Funk's successor Rook, used the claimed easement under a claim of right with the actual

knowledge of the owner of the servient tenement. Yet, they have not produced any evidence whatsoever. Rather, they point to some sales agreement language that was recorded in the County Recorder's Office, and try to make the argument that every predecessor to the Lawrence parcel had actually read the Funks and Human Synergistic sales agreement and after reading said language, would have immediately recognized that Funk was claiming a right across the land. They offer no argument as to how or why these people would have knowledge of such document; let alone offer any evidence that any of these people actually read the sales agreement, and/or understood what they could have read. No where in Funk's deposition did he say he was using any road under a claim of right and no where in the Rook Deposition did John Rook say he was using the road under any claim of right. Both offered that they had permission to use the road and were using it in a manner consistent with a permissive use. Neither Funk nor Rook offered any testimony that: 1) any predecessor to the Lawrence parcel had any notice or knowledge of their use of the road; 2) that they performed any act inconsistent with the owner's use of the road; 3) that they used the road in a manner that was hostile and notorious to the owner's use of the road; 4) they were using the road under a claim of right.

In the recent case *Hughes v. Fisher*, 124 Idaho 474, 129, P.3d 1223 (2006), the Idaho Supreme Court created an exception to the general rule that the regular crossing of another's property is presumed to be adverse.

Where a landowner constructs a way over the land for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of permission.

Because Capstar cannot offer any evidence of adverse use, they hope to shift the burden to the Lawrences of proving that the use was permissive by claiming the use of the road began with the Funks. Capstar claims in their Respondent's brief, that "*The original use of the easement is known. It commenced on the purchase of the Funk property and continued after severance.*" This is contrary to what Capstar said in their Memorandum in Support of Renewed Motion for Summary Judgment where they said: *When the road providing access to the Funk's Section 21 and Section 22 parcels was established is unknown.* And, it is also contrary to what the record reveals. Lawrences submitted a Metsker map clearly dated from March 1959, which shows the course of the road as it existed in 1959. It can also be determined that the road existed prior to 1966 from the easement granted to GTC by Glenn and Ethel Blossom. The easement reads in part:

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.

Harold Funk also testified that the road was there when he first visited the property. Since the evidence of the road predates Harold Funk and GTE for that matter, and the fact that there is no evidence offered to the contrary, one can only presume that the road was constructed by the *then owner* of the property (Lawrence's predecessor) and that it was constructed for his own use and purpose. The road clearly predates John Rook by thirty years. Therefore, the rule of law as it applies to the Blossom Mountain Road is that its use is presumed to be permissive and Capstar has the burden of proving adverse use.

Harold Funk entered into a sales agreement to sell the original Lawrence parcel to Human Synergistics in July 1975. And, according to Funk's deposition, that same year he moved to the Aberdeen/American Falls area. Between 1975 and 1981, a period of six years, Harold Funk only returns to his parcel 2-3 times. He also testifies that after 1981, he never returns to his property on Blossom Mountain. Irrespective of how many trips Funk made to his property after 1975, the fact of the matter is that Harold Funk didn't convey the deed to the original Lawrence parcel until November 1992, and as such, could not have prescribed an easement across the land under his possession.

The only other successor to the Capstar parcel, prior to Capstar itself, would have been John Rook or the corporations under John Rook's ownership. And, Capstar has failed to produce any evidence or make any claims regarding John Rook's use of the road; other than the fact that John Rook used the road. Capstar has not produced any evidence that John Rook's use of the road was open, hostile, notorious, or that John Rook's use of the road somehow interfered with Lawrences or Lawrences' predecessors' use of the road.

In Capstar's brief, Capstar recites language in an easement that Arman and Mary Jane Farmanian granted to John Mack claiming that this language proves that "*Farmanian and Mack recognized the GTC easement road as the historical access road being used by Funk and his successor Mack.*" Capstar's brief also notes that National Associated Properties conveyed the Lawrence parcel to the Farmanians in July 1996. Being that the Farmanians, purchased the property some fifteen years after Funk made his last trip to Blossom Mountain and some four

years after Funk sold to Mack, the Farmanians could not have possibly known what road Funk used. This document certainly does not establish any foundation as to how the Farmanians would have such knowledge.

Also noted in Capstar's brief is that fact that the Farmanians were only in possession of the Lawrence parcel from July 1st until October 1st, a period of three months. The only first hand information the Farmanians could testify to, spans a period of only three months.

Furthermore, Mack's affidavit establishes the fact that he recognized he did not have a legal access over the Blossom Mountain road. Mack also recognized the fact that Funk had sold off the land laying to the north of Section 22, thus land-locking his parcel. And, he purchased Funk's land from Fred Zuber, the then current owner. Mack also testified that when he purchased the land from Funk, there was a road on the north face. And, *“Over the years, the road had been completely abandoned”* and *“It did not appear that anyone had used the road for nearly twenty years.”* Mack's testimony regarding Mellick Road and Blossom Mountain road is certainly consistent with all the other facts the Lawrences have established regarding Mellick Road and Funk's access. Had Mack believed he had a right to use the Blossom Mountain road, he would have had no need or reason to purchase land from Fred Zuber in order to provide himself a legal access. Capstar has not established the elements necessary to support a prescriptive easement theory.

PREJUDGMENT ACCESS TO LAWRENCES' PROPERTY

The Lawrences ask this court to find that the trial court abused its discretion by allowing Capstar prejudgment access across the Lawrence parcel and cited I.R.C.P. Rule 65 (c). In their Respondent's brief, Capstar cites *Miller v. Board of Trustees* and argues that the trial court was justified because the trial court made a specific finding, based upon competent evidence, that no such costs, damages, or attorney fees will result to the restrained party as a result of a wrongful issuing.

The matter of the sixth access was taken up on only three days notice and the Lawrences did not have proper notice or enough notice to put on a defense or post a written objection. At hearing, the Lawrences objected to the motion and the court's ruling on the motion.

The court took this matter up over and above the Lawrence's objections to the lack of proper notice, lack of a standing preliminary injunction order, and I.R.C.P. Rule 65 (c) which requires the posting of a bond or undertaking. At no time did the court ever consider evidence in order to make a specific finding that the Lawrences would not incur costs, damages, or attorney fees. *Miller v. Board of Trustees* simply does not apply and Capstar offers no other defense of the trial court.

GENUINE ISSUES OF MATERIAL FACT

The Lawrence's are asking this court to decide if Summary Judgment was proper, based on the pleadings, affidavits, depositions, and other evidence in the record. The Lawrence's argue that the record overwhelmingly contains enough evidence to show that there exists real and

genuine issues that contradict Capstar's version of the facts and that the Lawrences were in opposition to a Summary Judgment finding. We further contend that the court did abuse its discretion by entering a Summary Judgment against the Lawrences.

We ask this court to note that Capstar did not provide a brief to this issue as this issue is indefensible and uncontroverted.

DISQUALIFICATION

The facts are, both Capstar and Tower sue the Lawrences over every easement theory conceivable and the trial court simply dismissed any evidence to the contrary and liberally favored every argument the Plaintiffs made. From a pragmatic and rational viewpoint, it is difficult to conceive how the trial court could find that the Plaintiff has an express easement, an easement by necessity, an easement implied by prior use, and a prescriptive easement. From a legal standpoint, its even harder to understand. Especially given the facts that there is no writing creating an easement and the only real evidence Capstar can produce are the two affidavits prepared by Capstar's attorneys; which of course, could not be supported by deposition testimony or other hard evidence.

It is simply hard to understand how the trial court could simply ignore the existence of Mellick road and in particular a Metsker map from 1959, an affidavit from a licensed surveyor, a prior court finding, Harold Funk's deposition testimony, the Lawrence's affidavit, photography, satellite imagery, etc. In a summary judgment ruling, the facts are to be liberally construed in favor of the party opposing the motion and he is to be given the benefit of all favorable

inferences which might reasonably be drawn from the evidence. And, it is quite clear that the trial court did not liberally construe the facts in favor of the Lawrences.

Over the course of these past seven years, the Lawrences became increasingly convinced that they could not and would not receive a fair and impartial trial from the trial court. There comes a point when you realize that a person has simply closed their eyes to the facts, has quit listening to reason, and there is absolutely nothing you can say or do that is going to overcome or change a preconceived bias or prejudice. With the trial court, the Lawrences reached that point some years ago and were totally unable to do a single thing about it.

A judge's impartiality in a matter can be determined. It can be determined simply by asking the question, "Is the court willing to recuse itself?" If the answer is yes, then the answer is obvious. The court is impartial. If the answer is no, then the answer is obvious as well.

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. A truly impartial court would conclude that the appearance of justice is such an essential component to the courts position in the proceeding, that without it, the administration of justice has not been served.

On the other hand, a court that does not recuse itself, can no longer claim that it is truly impartial. For the giving of *any* reason shows that the court has a reason, a rational, or a motive to stay in the matter. It is irrespective what that reason is. The court has a personal interest or a personal stake in the matter that the court is intent on seeing through.

The appearance of justice is not an element that is separate and distinguishable from the administration of justice. If the “product” of the court is the administration of justice. It is the appearance of justice that allows the losing party to accept the court's decision. And, it is the appearance of justice that gives the courts the respect by which to work within society and communities.

In its memorandum of decision, the only rationale the court 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 and it certainly did nothing to further the administration of justice in this matter.

There are two other issues closely related to the Lawrence's concerns over how the court's impartiality might reasonably be questioned. One issue deals with an independent investigation the court conducted and the other deals with how the court handled the admission of affidavit testimony.

Capstar provided no response in its brief relating to the issue of the court's independent investigation. The trial court conducted an independent investigation into the Lawrence's motion for disqualification by looking at files and records not related to the present matter and not offered in as evidence. The court abused its discretion. And, Capstar has not offered any rebuttal or defense of this issue.

Capstar's claims that the trial court also struck portions of Capstar's affidavits and referenced Supp R Vol. III, p. 349-351 as evidence of the fact. We were unable to locate such evidence.

CONCLUSION

Capstar is the party that pursued the summary judgment ruling. They pursued this action with the absolute confidence that the trial court would rule in their favor; just as the Lawrences knew with absolute confidence the trial court would rule against them. That is why the Lawrences pursued a motion for disqualification and why John P. Whelan filed a formal complaint with the Idaho Judicial Council. There was little doubt how the trial court was going to rule on any motion Capstar placed before the trial court.

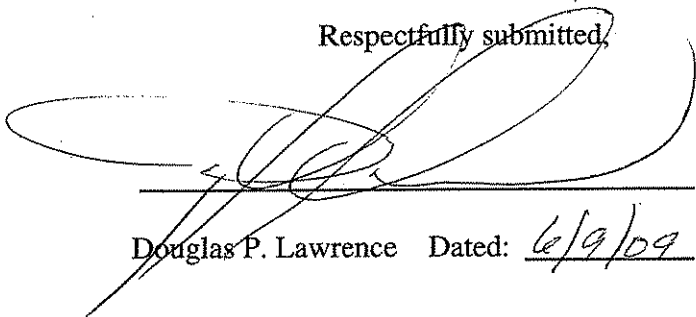
The tactics large corporations use to get what they want is no secret. As John Rook replied in his deposition when asked if Capstar likes to sue people and drag them into court, "*They find a way to get what they want.*" It is clear from the access license agreements in the record that the Lawrences have negotiated with Nextel, Great Northern Broadcasting, Adelphia, and Switzer Communications, that the Lawrences own property that is in demand; not unlike the properties these companies typically lease from others for the location of tower sites.

Capstar decided they could *force* the Lawrences into accepting *their terms* by making the litigation a too costly and too time consuming proposition. And, they conspired with Nextel to file a similar lawsuit, thereby increasing the financial pressures on the Lawrences. And it worked. The Lawrences could no longer afford legal representation and were faced with one of

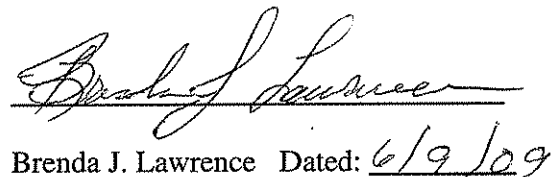
two difficult prospects: either relinquish to Capstar under pressure or take the appeal up themselves, recognizing their lack of education and experience will probably hurt them.

Capstar is using this complaint, solely, to pressure the Lawrences into acquiescing property rights to them. In a meeting prior to the filing of this litigation, Douglas Lawrence met with Clear Channel's general manager Kosta Panidis to negotiate a license agreement. Mr. Panidis admitted to Douglas Lawrence that they (Clear Channel) did not have an easement [R. Vol 2 p. 160 L.8-18 (¶ 53 & 54)]. Yet, Clear Channel sues the Lawrences regardless. This complaint is not about resolving a question of law. This complaint is nothing more than a tool of a large corporation to get what they want. This is why the Lawrences claim this complaint, as well as this motion, were frivolously filed. This is why the Lawrences ask this court to enjoin Capstar's use of the Lawrence property and for a monetary award for all lost revenue and all fees and damages the Lawrences have had to incur defending this action.

Respectfully submitted,



Douglas P. Lawrence Dated: 6/9/09



Brenda J. Lawrence Dated: 6/9/09

CERTIFICATE OF SERVICE

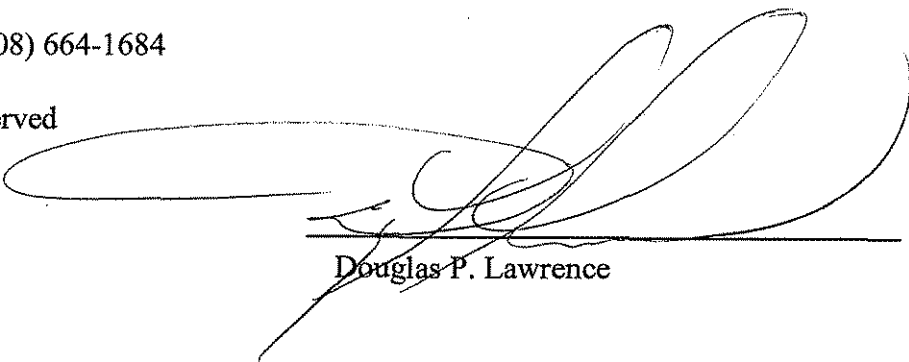
I hereby certify that on this 7 day of June, 2009, I caused to be served two (2) true and correct copies of the foregoing document by the method indicated below, and addressed to the following:

Susan P. Weeks
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 Personally served



Douglas P. Lawrence

