

FILED

MAY 23 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 293491-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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JOHN R. BANGERT, et. al.,

Respondents

v.

STEPHEN B. SIPES, et. al.,

Appellants.

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BRIEF OF RESPONDENTS'

---

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## **ASSIGNMENTS OF ERROR**

Respondents Bangert and Alcock/Evans do not assign error to the Trial Court proceedings nor the Trial Court's Trial Findings of Fact, Conclusions of Law and Ruling entered July 26, 2010; Errata Changes entered August 16, 2010, Order Denying Motion for Amendment and Reconsideration entered August 18, 2010 and Declaratory Relief Reforming Easement; Reforming Deed/ and Granting Permanent Injunction Entered on August 18, 2010.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the 1982 Purchaser's Assignment of Contract and Deed operate to recreate the original easement or create an easement in the new access road? (Assignment of Error 1)
2. Was the original easement for ingress and egress extinguished by adverse use where it was blocked by gates, fences and other obstructions preventing passage, and where such activity was open, notorious and under a claim of right for more than 20 years? (Assignment of Error 6)
3. Was Bangerts' and their predecessors' use of the easement for grazing animals permissive so as to defeat adverse possession where such

activity occurred for over ten years before Keller/Sipes acquired their land and where Keller/Sipes never gave any permission for such use? (Assignment of Error 6)

4. Was rare pedestrian travel, for purposes of hiking or neighborly visits but not for purposes of ingress and egress, sufficient to overcome adverse possession and abandonment? (Assignments of Error 3 & 6)

5. Where a powerline was installed during the time when the easement was extinguished by merger, and that line later relocated outside the easement with the acquiescence of the subsequent owner, can the easement nonetheless be extinguished by adverse possession or abandonment? (Assignment of Error 2, 6, 7)

6. Where the original easement has not been used for more than 30 years, and where all landowners exclusively used the relocated road to access their properties, was the easement abandoned? (Assignment of Error 2, 3, 7, 9)

7. Where Stephen B. Sipes acquiesced in the relocation of the road, helped the Bangerts construct a home within the original easement while remaining silent as to any intention to reopen that road, blocked the

original easement with a berm, and improved and maintained the alternate relocated road as his exclusive access to his property, was Stephen B. Sipes estopped to assert the right to reopen the original easement road?  
(Assignments of Error 5 & 8)

8. Where the relocated road was the only existing road at the time Stephen B. Sipes quitclaimed a portion of his property in 1982, did the Trial Court properly reform the deed to match the relocated road?  
(Assignment of Error 10)

## STATEMENT OF THE CASE

### A. Title History

Starting in the mid-1970's through the mid-1990's Clark Lake Development (CLD), a Washington Limited Partnership, developed parcels for sale in the Clark Lake area of Stevens County. CLD owned 1789 acres, of which approximately 760 acres are adjacent to and generally South and East of Clark Lake off Bissell Road and subject to the easement at issue herein (CP 229; Ex. 3).

Appellants Stephen B. Sipes and Brenda L. Keller, husband and wife (Sipes/Keller), own and reside on two adjacent parcels at 4019 Bissell Road in Hunters, Washington. Brenda L. Keller acquired title to these parcels on September 21, 1993 (Ex. 118). Three years later, on September 19, 1996, she conveyed her interest to herself and Stephen B. Sipes by Quitclaim Deed (Ex. 119).

Respondents John R. Bangert and Connie L. Bangert, husband and wife (Bangerts) own and reside on two adjacent parcels at 4017 Bissell Road. The Bangerts acquired title from Robert B. and Myra E. Sipes (parents of Stephen B. Sipes and Connie L. Bangert), on March 3, 1987 as to one parcel and from CLD on December 16, 1992 as to another (Exs. 115 & 116).

Respondents Jerard Alcock and Patricia Evans (Alcock/Evans), husband and wife, own but do not reside on a parcel acquired on December 4, 1995, which is located between the Bangert and Keller/Sipes parcels (Exs. 120; 181 & 182). Alcock/Evans also own one parcel beyond the Keller/Sipes residence, further up the access road, which they have at one point listed with a Realtor (RP 460).

The Bangert, Alcock/Evans and Keller/Sipes lands were originally part of a larger 264 tract first purchased by Stephen B. Sipes in 1976 and 1977 from Clark Lake Development (RP 505-09; Ex. 6, green area; Exs. 105 – 108; 114). The original easement at issue herein was reserved by CLD and crossed the contiguous parcels of land now owned by Bangerts, Alcock/Evans and Keller/Sipes and was broad in terms, being

[a] permanent non-exclusive easement, for ingress, egress and utilities, 30 feet in width over existing road, from the County Road in Government Lot 3, running easterly to the Northwest corner of above described property.

(Ex. 105 & 106.)

Stephen B. Sipes owned these contiguous parcels for a six-year period between 1976 and 1982. During that time his parents, Robert B. and Myra E. Sipes, lived on his land in an apartment they created in the barn, off and

on while maintaining a residence in Western Washington (RP 789-91); they made the payments on the property even though Stephen B. Sipes was the purchaser of record (RP 165; 191-93; 196-97; 236; 528; 531; 820; Exs. 101 & 114). In 1979, Robert B. Sipes blocked off the original access road with fences and a gate at Bissell Road (the county road), and constructed a new, alternate access road which provided the exclusive access to the other CLD properties beyond Stephen B. Sipes' land (RP 63, 92-95, 154, 156, 185, 218-20, 247, 252-53, 262, 1254, 1277, 1298, 1319 & 1334).

In 1982, Stephen B. Sipes quitclaimed to his parents, by a Purchaser's Assignment of Contract and Deed, the parcel that the elder Sipes then later sold to the Bangerts (Exs. 113 & 115). The Purchaser's Assignment of Contract and Deed was "subject to a permanent non-exclusive easement for ingress, egress and utilities 30 feet in width, over, under and across the existing road from the County Road. . . ." (Ex. 113). Stephen B. Sipes lost his remaining property on June 30, 1986 to foreclosure and his titles returned to CLD (Exs. 109 – 112). After that date, he had no interest in any of the parcels developed by CLD.

On September 21, 1993, CLD sold parcels to Brenda L. Keller; the title documents were silent as to any access easement (Ex. 118). On May 17,

1996, CLD filed an Easement Clarification which clarified that it intended that all individuals with an interest in CLD parcels had

a permanent non-exclusive easement of 30 feet in width for the purpose of ingress, egress and utilities across the following described existing roads.

(Ex. 12). The Easement Clarification included an attached map which shows not the original access road, but the alternate access road (Ex. 12, Attachment). Thereafter, on September 19, 1996, Brenda L. Keller quitclaimed her parcels to herself and Stephen B. Sipes. Again, the document was silent as to any easement (Ex. 119).

**B. The Original Access Easement and New Access Road**

As of the mid to late 1970's, the original access easement road crossed what are now the Bangert, Alcock/Evans and Sipes/Keller properties (Ex. 6, Parcel Nos. 1600710, 1599685 & 1599600 respectively), passing within a few feet of a house foundation -- the remains of a fire ("abandoned road" or "driveway" on Exs. 184 & 185; RP 179). It was the only access road until 1979, when Robert B. Sipes constructed an alternate access road (RP 170; 244, 548) and blocked the original easement with fences and a gate (RP 63, 92-95, 154, 156, 185, 218-20, 247, 252-53, 1254, 1277, 1298, 1319 &

1334). At the time the new access road was constructed, no one lived beyond the Sipes property (RP 1282).

After constructing the new road, Robert B. & Myra E. Sipes began rebuilding the house on the original foundation; the door to the house was within 10 feet of the original easement road (RP 179, 257), and the back porch is within the easement (RP 144 & 773). Both Robert B. Sipes and Myra E. Sipes told their neighbors that they did not want traffic coming by their house (RP 1253, 1290-91, & 1300-1302). They installed a gate where the original access road intersected with Bissell Road (RP 92-93, 185, 247, 252, 262, 1254, 1277, 1298, 1319). They also installed fencing across the easement road to keep cows away from the house (RP 63, 94-95, 154, 156, 218-20, 253 & 1334). John R. Bangert first visited the property in 1978, and he testified that there were no tire tracks or evidence of the road being used beyond the fences at that time (RP 148, 150 & 159). The fencing and gate were in place when John R. Bangert purchased the property in 1986 (RP 92-95; 578). Bangert changed electric fences across the road to barbed wire ones in 1987 (RP 145-46), and installed a new metal pole gate at the end of his driveway at Bissell road in 1990-91 (RP 162; 417). While he owned all of the contiguous lots, Stephen B. Sipes never lived on the property (RP 781-

801) though he did put in a septic site and well on Lot 2 (current Keller/Sipes land) in 1977. He also installed underground power within the original road (RP 549-51).

Since the new access road was built in 1979, Robert B. Sipes, Stephen B. Sipes and the Bangerts took steps to discourage the use of the original road (see Exs. 184, 185 & 185). From 1979 to until he sold to the Bangerts in 1986, Robert B. Sipes erected and maintained fences and locked gates across the original road to keep livestock in and vehicles out (RP 92-95; 218-20; 253). John R. Bangert continued to maintain one fence across the original easement through 2007 and a second fence to the present day (RP 145-46, 156-57; 589); an old truck has blocked the road for many years (RP 105). In 1996, Stephen B. Sipes created a three-foot dirt and rock berm on the original access road, just before it met the new access road, to prevent use by vehicular traffic (RP 105; Ex. 186). After the new access road was put in, Robert B. Sipes began building a house on the original burned out foundation within a few feet of the old easement (RP 179, 244, 257).

After he bought in 1986, John R. Bangert, with help from Stephen B. Sipes (RP 88; 729-30), continued construction on that house and yard, including planting lawn, trees and bushes, giving no mind to the original

access road (RP 148-49; 729-30; 1120-22; Exs. 164 – 167, 184 - 186). During the time he helped John R. Bangert with the construction Stephen B. Sipes never mentioned he intended to reopen the road one day (RP 883); he never had a conversation with John R. Bangert about reopening the road (RP 909 & 914-15). John R. Bangert also pastured cows in the easement area beginning in 1991 (before Keller/Sipes purchased their land) until sometime in 2005 or 2006, keeping the cows away from the house with original and replacement fences that obstructed the easement road (RP 154-157; 731-32; 736). Since 1986, the original easement from Bissell Road to the Bangert house has been used as the Bangert driveway which terminates at the parking area by the Bangert house (Exs. 17, 141, 167, 173-176).

After Keller/Sipes acquired title to their current property in 1993 and 1996, they have exclusively used the new access road as their means of ingress and egress (RP 590). In 1996, Stephen B. Sipes brought in a CAT to smooth the new access road, widen it and install four culverts, anticipating the delivery of his 70-foot mobile home. He testified he chose this route, rather than the original easement, because he could not get through the original easement – it was blocked by a gate, fence posts set in concrete, and trees (RP 598 -602; 849-51). It was in 1996 that he also created a larger berm

blocking the old easement road where it intersected with the new easement road on the Alcock land. He personally installed his phone lines on the north side of the new access road in 1999 (RP 105, 814-87 & 851; Ex. 186). Keller/Sipes moved into their new home in 1998 (RP 603), and since that time Stephen B. Sipes has plowed snow to keep the new access road open in the Winter (RP 881).

Since the time it was built in 1979, the new access road has remained in the same location and substantially the same condition for more than 30 years. A number of the CLD purchasers testified at trial that they were not aware of and have not used the original road over the years; rather they made exclusive use of the new access road. Kelly Davis owns Parcel Nos. 1602400 and 160025 (Ex. 6). He is not aware of the original access road, and for 20 years has exclusively used the new access road (RP 321-22). Bill M. Hogan has owned Parcel No. 1599650 since 1992 (Ex. 6 & 189). He regards the new access road as his access and he is not aware of a different access road as it intersects the Bangert, Alcock/Evans and Keller/Sipes property. He uses the road seven to eight times a year, in the Summer months. (RP 357-59). Kathleen Ann Hogan, Bill M. Hogan's wife, also testified that she uses the new access road and understood that to be the road referenced in her deed.

She never used the original road nor was she aware of its existence (RP 381-82). Thomas T. Eardley owned Parcel No. 1599300 (Ex. 6) for over 10 years starting in 1979 (RP 394-95). He hunted his parcel along with Robert B. Sipes, Stephen B. Sipes and Myra E. Sipes, his friends. He used the new access road unless he was on foot (RP 396, 399 & 400-02). He testified the old access road was brushy and not passable (RP 404 & 407-08) and he never saw anyone use it (RP 401-02).

According to Al K. Lang, who worked for the Department of Natural Resources (DNR) for 30 years and inventoried State land, including in the Clark Lake area, the State of Washington owns parcels that would be accessed by the access road. He also testified that the State has not claimed an actual access easement; and that there is no easement of record for the DNR (RP 1139-41). Darrell Harrison's brother, Charles Harrison, was a partner in CLD from its inception in the mid-1970's (RP 1183-84). Darrell Harrison was familiar with his brother's affairs and then in 1981, Darrell Harrison too became a partner in CLD (RP 1173, 1183). Darrell Harrison has lived in the Bissell Road, Clark Lake area since the 1980's (RP 1172-73). In the mid to late 1970's he had several conversations with Robert B. Sipes about the new access road and how the access road was a good idea, so

people won't have to drive by Sipes' house (RP 1189). Darrell Harrison remembers that everybody used the new access road after it was built (RP 1190). As a partner, he understood that once built, the new road provided exclusive access to the CLD properties (RP 1196 & 1198). He remembers the old access road was blocked off by rocks, dirt and logs (RP 1192, 1211 & 1214).

Numerous individuals also testified that they or others used the *new* road to access CLD properties: John R. Bangert (RP 66, 110 & 132), Robert B. Sipes (RP 210 & 212), Myra E. Sipes (RP 243-44 & 256), Bill Epoch, Douglas County Surveyor (RP 278), Joshua B. Bangert, John R. & Connie L. Bangert's son (RP 414); Stephen B. Sipes (RP 552, 802 & 886-87); Kaitlyn Sipes, Stephen B. Sipes' and Brenda L. Keller's daughter (RP 716); Charles F. Dunn, nephew of a Clark Lake landowner, beginning in 1992 to present (921-22 & 924-25); Robert Walker, neighbor (RP 1254 & 1284); Arnold H. Johnson, neighbor since 1967 (RP 1303 & 1318).

Numerous witnesses testified that they either *never* drove or used the original access road or *never* saw others use or drive the original access road beyond the Bangert driveway after the new access road was put in: Joshua B. Bangert (RP 415); Thomas T. Eardley (RP 400-02); Kaitlyn Sipes (RP 705

& 718); Charles F. Dunn (RP 1013); Brenda L. Keller (RP 1094-95); Robert Walker (RP 1254); Donna Walker (1292-93); and Arnold H. Johnson (RP 1318). The original access road was described as not usable, with a fence across it (RP 415, 589; 598, 694; 712, 802; 1034; 1039; 1211; 1214; 1334), filled with brush and overgrowth (RP 152, 404, 407-08, 515, 712; 714; 957-58), and after 1986-87 had trees planted in it near the Bangert parking area (RP 258-59, 561, 1120-22).

The parties agree that since 1986, there have been two incidents in which a vehicle used the old easement road (RP 121). One such use occurred when John R. Bangert asked a Caterpillar operator, who was doing work on Stephen B. Sipes' property, to remove some stumps from his land (RP 151-52, 753 & 1066). When the operator used the old road, Bangert told him he could not do so because he was trespassing (RP 112-13). This occurred after Alcock had removed the berm where the old road intersected with the new access road (RP 151-52). The second incident was in 2008, again after Alcock had removed the berm, when Charles F. Dunn rode his four-wheeler down the road on one occasion. John R. Bangert asked him not to do that because he had water pipes there and it was not his road (RP 753; 956-57).

Although for many years the parties herein, as family and neighbors, had been on friendly terms, they are now completely divided by the present road disagreement and previous litigation (RP 213, 214, 250-51, 254; 258, 865). In fact this suit was instituted after a prior lawsuit between the parties regarding a water well ownership was concluded in the Bangerts' favor (CP 236; Exs. 28 & 37).

### ARGUMENT

Appellants seek review of adverse findings and conclusions due to their "evidentiary insufficiency." In the present case, the trial court heard from 23 different witnesses, reviewed 109 exhibits and personally viewed the respective properties, including the roadways, and made its factual findings and legal conclusions based thereon (Trial, Findings of Fact and Conclusions of Law and Ruling, CP 228 at 229). Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982) (citing *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978)). Evidence is substantial if it is sufficient to persuade a "fair-minded person of the truth of

the declared premise." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987) (citing *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 82, 701 P.2d 1114 (1985)). When a trial court makes findings of fact from conflicting evidence and holds that they are supported by substantial evidence, the reviewing court will not disturb those findings. *Leonard v. Wash. Emp., Inc.*, 77 Wn.2d 271, 272, 461 P.2d 538 (1970); *cf. Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990) (stating that the rationale for deference to the factual findings of a trial court is based on the ability of the trial court to observe witness demeanor and evaluate credibility). As the following will illustrate, the Trial Court's Findings and Conclusions are more than amply supported by substantial evidence.

**1. The 1982 Purchaser's Assignment of Contract and Deed Did Not Recreate The Extinguished Easement But Rather Created An Easement In The New Access Road. The Trial Court Properly Reformed the Parties' Deeds To Reflect That Easement.**

**A. The Original Easement Was Not Recreated**

The Trial Court concluded, and Keller/Sipes concede, that the original easement at issue herein was extinguished by the doctrine of merger when Stephen B. Sipes acquired title to both the dominant and servient estates

(being the properties now owned by Keller/Sipes, Bangert and Alcock/Evans). Simply put, Stephen B. Sipes could not have an easement in his own property from 1976 when he acquired the 264 acre tract to 1982 when he severed the Bangert tract and sold it to his parents by quitclaim deed. *Schlager v. Bellport*, 118 Wn. App. 536, 540-42, 76 P.3d 778 (2003); *Radovich v. Nuzhat*, 104 Wn. App. 800, 16 P.3d 687 (2001); see 17 William Stoebuck, Wash, Prac., *Real Estate Law* § 2.12 at 118 (1995). Keller/Sipes contend that Stephen B. Sipes recreated the *original* easement when he severed the Bangert tract and quitclaimed it to his parents by a Purchaser's Assignment of Contract and Deed in 1982. Rejecting this contention, the Trial Court concluded that the 1982 document created an easement in the *new* access road (CP 239) because it was the then-existing access road.

Generally,

[w]hen an easement has been extinguished by unity, the easement does not come into existence again merely by severance of the united estates. . . . Upon severance, a new easement authorizing a use corresponding to the use authorized by the extinguished easement may arise. If it does arise, however, it does so because it was newly created at the time of severance. Such a new creation may result, as in other cases of severance, from an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance.

*Radovich v. Nuzhat*, 104 Wn. App at 805-06 (citing 5 *Restatement of Property* § 497, comment h (1944)) (original italics; underscore added). When the *Radovich* court declined to find a “heightened standard” to recreate easements extinguished by merger, it was referencing the fundamental requirements to create an easement (clear conveyance, purpose and scope of easement, legal description of the servient estate). It did not provide that “mere granting language” was sufficient, nor that less clarity is required in the description of that easement, as inferred by Appellants. 104 Wn. App. at 806. Rather, it concluded that the standards for creating an easement by express conveyance and recreating an easement are the same. *Id.* Thus, under *Radovich*, it is necessary to look at both the express language in the 1982 Purchaser’s Assignment of Contract and Deed as well as the circumstances of the severance to determine what easement was intended. Notably, *Radovich* is distinguishable because the conveyances therein were unambiguous and pertained to a parking lot easement on a vacant lot that included a complete legal description of the lot; and there was no question as to the location of the easement. In this case, the Trial Court concluded the “existing road” was the new access road because that was the only existing road at the time the 1982 conveyance was made (CP 239).

In pertinent part, the 1982 quitclaim provided that it was

**SUBJECT TO** a permanent non-exclusive easement for ingress, egress and utilities, 30 feet in width, over, under and across the existing road from the County Road near the North line, running to the Northeast corner of Government Lot 3, Township 31 North, Range 37 East of the Willamette Meridian.

(Ex. 113 (emphasis added)).

Keller/Sipes argue that by this clause, Sipes reserved the original easement road to himself. That is not clear. Generally, the words “subject to” are included in a deed to denote restrictions of record that the grantor intends to exclude from warranty of title. 7 G. Thompson, *Commentaries on the Law of Real Property* § 60.03(a)(7) (1994).

Washington case law provides little authority as to whether the words “subject to” can create an express easement. In *Beebe v. Swerda*, 58 Wn. App. 375, 377-78, 793 P.2d 442, *review denied* 115 Wn.2d 1026 (1990) the court construed a deed conveying property "SUBJECT to an easement for road purposes . . . and said easement shall constitute a covenant running with [the] land." *The deed also specified the intended beneficiaries and the precise location and extent of the easement and characterized the easement as "a covenant running with the land."* The court concluded that when

considered in conjunction with the foregoing provisions, the "subject to" language demonstrated an intent to create an easement. *Id.* at 382.

In the present case, the 1982 quitclaim deed did not specify that the easement in the "subject to" clause was a covenant running with the land. It did not specify the intended beneficiaries nor did it specify to which land the easement covenant was attached. In other words, it did not identify Sipes' remaining property as the land to which the easement was to be made appurtenant. It simply did not reserve *to Sipes* any right.

Assuming, *arguendo*, that the "subject to" clause was sufficient to create an easement, the question then becomes one of construction. What was the "existing road" intended by the 1982 conveyance? In construing a deed, the court is required to carry out the intentions of the parties and, if the deed admits of more than one construction, it must be construed most strictly against the grantor and most favorably to the grantee. *Beebe v. Swerda*, 58 Wn. App. at 379. Parol evidence may be used to explain an ambiguity in an instrument creating an easement. *Green v. Lupo*, 32 Wn. App. 318, 321, 647 P.2d 51 (1982); *see also Schwab v. Seattle*, 64 Wn. App. 742, 826 P.2d 1089 (1992).

The evidence in this case clearly supports the Trial Court's conclusion that the "existing road" referred in the 1982 conveyance was the new access road as that was the only existing road in use at the time (CP 239). When Robert B. and Myra E. Sipes first occupied the Bangert parcel, then owned by Stephen B. Sipes, the original road ran within a few feet of a burned out house foundation. This is the foundation they used when they began to rebuild the house on the property (RP 179, 257). Before beginning that construction, Robert B. Sipes, with the acquiescence of his son, constructed the new access road in 1979 (RP 170, 548) and blocked the original easement with fences and a gate (RP 63, 92-95, 154, 156, 185, 218-20, 247, 252-53, 262, 1254, 1277, 1298, 1319 & 1334). At the time, both Robert B. and Myra E. Sipes told their neighbors that they did not want traffic coming by their house (RP 1253, 1290-91 & 1300-1302). This new access road was built and the old road blocked during the unity of title period when the original easement was extinguished. By 1982, when Stephen B. Sipes severed the Bangert parcel and conveyed it to his parents, the new access road was the only "existing road" from Bissell Road to properties in the Clark Lake Development, including Stephen B. Sipes' retained lands; the original road served as a driveway terminating at the house the elder Sipes were

constructing. The fences and berm blocked further access (RP 63, 92-93, 154, 156, 185, 218-20, 247, 252-53, 262, 1254, 1277, 1298, 1319 & 1334).

Although Keller/Sipes describe the relocated road as a “firebreak” (Appellants’ Brief at 9), the Trial Court concluded that “while it might have served as a firebreak of sorts, it was in the wrong location – on a hillside – and not wide enough to be effective.” (CP 233, Finding of Fact G). That Finding is supported by the testimony of Al K. Lang, employed by the Department of Natural Resources for 30 years (RP 1139 -1162).

Keller/Sipes have an easement to access their property. That easement is in the new access road. Respondents have never sought to deny them that access, and it is the *only* road Keller and Sipes have driven for ingress and egress to their property. Keller/Sipes’ assertion that the original easement is crucial because the new road is “unacceptably unsafe and dangerous” (Appellants’ Brief at 13) stretches credibility since they have driven the new road, and only the new road, since 1993 and in 1996 brought their 70 foot mobile home into their property on the new road (RP at 667-68; 598-602; 849-851). They did not argue an easement by necessity, and thus such a theory has been waived. RAP 2.5.

## **B. Reformation Of The Deeds Was The Proper Remedy**

In the case of an easement, the conveyance does not have to establish the easement's actual location; only the servient estate must be described in sufficient legal terms. *Wilhelm v. Beyersdorf*, 100 Wn. App.836, 999 P.2d 54 (2000); *see Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995); *see also Kalinowski v. Jacobowski*, 52 Wash. 359, 100 P. 852 (1909) (if a right of way is entered upon and used, the way becomes definite and fixed even though it may have been indefinite in its description). A court has equitable power to reform an instrument if there is clear, cogent and convincing evidence of a mutual mistake or a unilateral mistake coupled with inequitable conduct. The party seeking reformation has to show only that the parties agreed to accomplish a certain objective and that the instrument was insufficient to execute their intention. *Wilhelm v. Beyersdorf, supra*, 125 Wn.2d at 843.

In *Wilhem*, the original lot purchasers negotiated an access easement to their landlocked property. The easement was generally defined by a described location and by reference to an

existing road commencing from the Northwest corner of grantors' property; thence south across gully on west line of parcel being an existing road; thence South across gully, thence West and exit on West line of parcel. Configuration of topography plus existence of old logging road fixes the location of the easement herein.

100 Wn. App. at 839. No survey was conducted.

The grantees constructed the road, expanding on a pre-existing logging road, and used that road on a regular basis. Later, grantees of the servient owner obstructed the easement by drilling a well in the middle of the roadway. The dominant owner filed suit for Declaratory Judgment regarding the right to use the easement. A survey was conducted and the surveyor concluded that the description of the easement may or may not conform to the physical location of the road easement on the ground; it was ambiguous. Id. at 840-41. The trial court granted reformation of the easement to conform to the road used by the servient owners:

Because the servient estate was adequately described, the ambiguous language in the Featherman easement was not, strictly speaking, insufficient to execute their intention. Even so, the ambiguity of the easement did not sufficiently reflect the parties' intent. Considering the undisputed evidence that the Dorseys and the Feathermans intended to create an easement along an existing road, the trial court's reformation of the document to reflect this intention was proper.

Id. at 844.

In the present case, the reformation by the Trial Court conformed the parties' easements to the existing road as it has been located and used for the past 33 years. Substantial evidence supports the decision of the Trial Court.

**II. Substantial Evidence Supports The Trial Court's Findings and Conclusion That The Dominant And Servient Owners, Including The Parties Herein, Agreed To Relocate The Access Road And Consequently Abandoned The Original Road.**

Keller/Sipes' reliance on out-of-state authority is unnecessary as there is on-point Washington authority supporting the Defendants' claim that the easement road was relocated and the original road was abandoned. Owners of the dominant and servient estate may mutually consent to relocate an easement. *Crisp v. VanLaeken*, 130 Wn. App. 320, 324-325, 122 P.3d 926 (2005). And, contrary to Keller/Sipes' assertion, no writing evidencing such an agreement is required. Although a deed conveying an easement must sufficiently describe the servient estate, a deed is not required to establish the actual location of an easement. *Berg v. Ting, supra*, 125 Wn.2d 544, 551,; *Smith v. King*, 27 Wn. App. 869, 871, 620 P.2d 542 (1980) ("A deed is not required to *establish the actual location* of an easement, but is required to *convey* an easement, which is an interest in land within the meaning of RCW 64.04.010.").

As a general rule, mere nonuse of a recorded easement coupled with the use of alternate routes of ingress and egress does not, *by itself*, support a finding of abandonment. *Heg v. Allredge*, 157 Wn.2d. 154, 137 P.3d 9 (2006) (record contained no other evidence that dominant owner or her predecessors intended to abandon the easement). The vast majority of cases

take the position that an easement, whether by grant or by prescription, cannot be lost by mere nonuse, however long continued, unless accompanied by an affirmative act on the part of the owner of the easement indicating an unequivocal intention to abandon it.

In the instant case, Bangerts and Alcock/Evans do not rely on mere nonuse alone to establish that the original easement location had been abandoned. The dominant and servient owners, by their conduct in relocating the road (RP 170; 244, 548), blocking access to and erecting fences across the old road (RP 63, 92-95, 154, 156, 185, 218-20, 247, 252-53, 262, 1254, 1277, 1298, 1319 & 1334), and thereafter using the relocated road as the exclusive means of access to Clark Lake properties, consented to the relocation of the road and evidenced their intent to abandon the old road. No writing was required.

Over thirty (30) years ago, Robert B. and Myra E. Sipes relocated the road; Stephen B. Sipes acquiesced therein (RP 170; 244, 548). Over thirty (30) years ago, Robert B. and Myra E. Sipes obstructed the old road with fences and a gate; Stephen B. Sipes acquiesced therein (RP 63, 92-95, 154, 156, 185, 218-20, 247, 252-53, 262, 1254, 1277, 1298, 1319 & 1334). Beginning in 1987 when they purchased the property, John R. and Connie L. Bangert maintained fences and gates obstructing the old road (RP 92-95; 145-

46, 162; 417; 578). Stephen B. Sipes did not own any interest in any of the property at that time. In 1996, after Brenda L. Keller acquired her property in 1993, Stephen B. Sipes, her husband, further obstructed the East end of the old road by bulldozing and widening the relocated road and depositing dirt, rocks and boulders across the junction of the relocated road and abandoned road; he created a three (3) foot berm rendering vehicle passage impossible (RP 105, Ex. 186). That berm stayed in place for ten (10) years until it was removed by Alcock/Evens so they could create a drive access to their lakefront entirely on their own property. Alcock/Evans, not Stephen B. Sipes, removed the berm in 1996 (CP 271).

For the past thirty (30) years plus, the relocated road has been exclusively used by all landowners in the Clark Lake development as the sole means of ingress and egress to their properties. Kelly Davis owns Parcel Nos. 1602400 and 160025 (Ex. 6). He is not aware of the original access road, and for 20 years has exclusively used the new access road (RP 321-22). Bill M. Hogan has owned Parcel No. 1599650 since 1992 (Ex. 6 & 189). He regards the new access road as his access and he is not aware of a different access road as it intersects the Bangert, Alcock/Evans and Keller/Sipes property. He uses the road seven to eight times a year, in the Summer months. (RP 357-59). Kathleen Ann Hogan, Bill M. Hogan's wife, also

testified that she uses the new access road and understood that to be the road referenced in her deed. She never used the original road nor was she aware of its existence (RP 381-82). Thomas T. Eardley owned Parcel No. 1599300 (Ex. 6) for over 10 years starting in 1979 (RP 394-95). He hunted his parcel along with Robert B. Sipes, Stephen B. Sipes and Myra E. Sipes, his friends. He used the new access road unless he was on foot (RP 396, 399 & 400-02). He testified the old access road was brushy and not passable (RP 404 & 407-08) and he never saw anyone use it (RP 401-02).

According to Al K. Lang, who worked for the Department of Natural Resources for 30 years and inventoried State land, including in the Clark Lake area, the State of Washington owns parcels that would be accessed by the access road. He also testified that the State has not claimed an actual access easement; and there is no easement of record (RP 1139-41). Darrell Harrison's brother, Charles Harrison, was a partner in CLD from its inception in the mid-1970's (RP 1183-84). Darrell Harrison was familiar with his brother's affairs and then in 1981, Darrell Harrison too became a partner in CLD (RP 1173, 1183). Darrell Harrison has lived in the Bissell Road, Clark Lake area since the 1980's (RP 1172-73). In the mid to late 1970's he had several conversations with Robert B. Sipes about the new access road and how the access road was a good idea, so people won't have to drive by Sipes'

house (RP 1189). Darrell Harrison remembers that everybody used the new access road after it was built (RP 1190). As a partner, he understood that once built, the new road provided exclusive access to the CLD properties (RP 1196 & 1198). He remembers the old access road was blocked off by rocks, dirt and logs (RP 1192, 1211 & 1214).

Numerous individuals also testified that they or others used the *new* road to access CLD properties: John R. Bangert (RP 66, 110 & 132); Robert B. Sipes (RP 210 & 212); Myra E. Sipes (RP 243-44 & 256); Bill Epoch; Douglas County Surveyor (RP 278); Joshua B. Bangert; John R. & Connie L. Bangert's son (RP 414); Stephen B. Sipes (RP 552, 802 & 886-87); Kaitlyn Sipes; Stephen B. Sipes' and Brenda L. Keller's daughter (RP 716); Charles F. Dunn; nephew of Clark Lake Landowner, beginning in 1992 to present (921-22 & 924-25); Robert Walker, neighbor (RP 1254 & 1284); and Arnold H. Johnson, neighbor since 1967 (RP 1303 & 1318). And, numerous witnesses also testified that they either *never* drove or used the original access road or *never* saw others use or drive the original access road beyond the Bangert driveway after the new access road was put in: Joshua B. Bangert (RP 415); Thomas T. Eardley (RP 400-02); Kaitlyn Sipes (RP 705 & 718); Charles F. Dunn (RP 1013); Brenda L. Keller (RP 1094-95); Robert Walker (RP 1254); Donna Walker (1292-93); and Arnold H. Johnson (RP 1318).

The original access road was described as not usable, with a fence across it (RP 415, 589; 598, 694; 712, 802; 1034; 1039; 1211; 1214; 1334), filled with brush and overgrowth (RP 152, 404, 407-08, 515, 712; 714; 957-58), and after 1986-87 had trees planted in it near the Bangert parking area (RP 258-59, 561, 1120-22). Taken together, these facts constitute more than mere nonuse, and are clear evidence of the parties' intent to abandon the original road easement.

Bangerts and Alcock/Evans have not sought to extinguish Keller/Sipes' easement of ingress and egress to access their property. Rather, the issue is the *location* of that easement. It is the *location* of the original road that is abandoned; the easement in the relocated road is recognized.

*Barnhart v. Gold Run, Inc*, 68 Wn. App. 471, 843 P.2d 545 (1993) is an analogous case which supports this point. In *Barnhart*, three neighboring lots shared a common platted 30-foot right of way for a private road adjacent to the northern perimeter of the tracts. In the 1940s, the three lots came into ownership of Mrs. Marie Harris, who built a "jeep road" north of the platted right of way, having already built a house encroaching on it. The Barnharts purchased the easternmost of the three lots, and after having it surveyed, commenced an action to determine their interest in the platted right of way. The trial court ruled the defendant had acquired title to the platted right of

way through adverse possession. 68 Wn. App. At 418. The Barnharts appealed, and Division III of the Court of Appeals affirmed the trial court, holding that "[t]he undisputed evidence supports a finding the location of the platted road right of way shifted to the existing road, due to a long period of use which predated the parties' ownership." *Barnhart*, 68 Wn. App. at 420-21, relying on *Curtis v. Zuck*, 65 Wn. App. 377, 829 P.2d 187 (1992).

In *Curtis v. Zuck*, a gravel road was built North of the platted street location. Plaintiffs bought property North of the platted street; defendants bought the property to the South. Defendants built a home encroaching on the platted street, having been advised the gravel road marked the Northern boundary of their land. The trial court refused to eject the defendants from the platted street or to quiet the plaintiffs' title to the portion of their land encroached upon by the gravel road. The appellate court affirmed, noting that the private easement the parties shared had simply shifted due to a period of long use which predated both parties' ownership. *Curtis*, 65 Wn. App. at 382.

Keller/Sipes acquired their interest in their current Clark Lake property in 1993. Like the situation in the *Barnhart* and *Curtis* cases, prior to the Keller/Sipes' acquisition, the easement had simply shifted due to a period of long use (nearly sixteen (16) years) of the relocated road in lieu of the old road. This exclusive use, coupled with the encroachment of the

Bangerts' improvements and the obstruction of the original road for a period of nearly thirty (30) years, supports the Bangerts' and Alcock/Evans' claims that the easement for ingress and egress is established in the relocated road, not the original road.

Although reliance on authorities from other jurisdictions is unnecessary in light of the foregoing on-point authority in Washington, out-of-state cases nonetheless also support the Bangerts' and Alcock/Evans' argument that the facts of this case – nonuse of the easement and use of an alternative road coupled with obstruction of the easement by buildings, trees, fences, gates and berms -- evidenced the intent to abandon the original easement location. *See, e.g. Bolduc v Watson*, 639 A2d 629 (Me. 1994) (dominant estate owners had abandoned a private easement over abutting property by failing to object to the construction of a garage upon the right of way); *Chase v Eastman*, 563 A2d 1099 (Me. 1989) (acquiescing to the construction of a cottage partly on the path of a right of way amounted to a partial abandonment of the easement); *Sindler v William M. Bailey Co.*, 348 Mass 589, 204 NE2d 717(1965) (evidence that for over 35 years the easement holder permitted an adjoining landowner to use the easement area in a manner inconsistent with its use as a way, including the erection of fences to enclose the way, established the easement holder's intent to forfeit his rights);

*Comeau v Manzelli*, 344 Mass 375, 182 NE2d 487 (1962) (abandonment of an easement was warranted where evidence showed that the old way had been closed for over 20 years and was obstructed by a fence with no gate, trees in the easement area, and iron posts on the street); *United Parking Stations, Inc. v Calvary Temple*, 257 Minn 273, 101 NW2d 208 (1960) (an easement holder abandoned his rights by failing to clear the entrance to a claimed driveway easement of debris, rubbish, and natural obstructions and by failing to object to the servient landowners' construction of permanent barriers including a wall and building on the easement area which rendered use of the way impossible); and *Hickerson v Bender*, 500 NW2d 169 (Minn App 1993) (more than two decades of nonuse of an ingress-egress easement combined with the dominant estate owners' failure to object to the servient tenement owner's construction of numerous permanent improvements interfering with its use, including a garage, patio, stone barbecue, and retaining wall, amounted to an abandonment of the easement).

Appellants misstate, in Assignment of Error No. 4, that “the Trial Court concluded that Clark Lake Development had the ability to affect the easement location after it had no ownership interest in the properties it previously owned” (Appellant’s Brief at 1). In fact, the Trial Court concluded that the clarification did not extinguish or create an access

easement, since it was not consented to by all parcel owners with an interest in such an easement, but it did admit the map for illustration purposes (CP 231 Finding of Fact D, fn. 1). At trial, Sipes/Keller argued that other landowners were not parties to the suit, and that the opinion of a non-party landowner as to whether he wanted to have the route changed back to the abandoned road was “irrelevant” (RP 359). Thus, they waived any assertion of rights on behalf of other Clark Lake Development owners.

Clearly, substantial evidence supported the Trial Court’s finding that the original road has been abandoned and the easement road relocated to the new access road.

**III. Substantial Evidence Supports The Trial Court’s Determination That The Original Access Road Was Extinguished By Adverse Use.**

An easement may be terminated by adverse use for the prescriptive period by the owner of the servient tenement. *Burkhard v. Bowen*, 32 Wn.2d 613, 203 P.2d 361 (1949). The elements required to do so are the same elements that must be found in order to obtain an easement through adverse possession. To establish prescriptive rights by adverse possession, the claimant must show use which was open, notorious, continuous, uninterrupted, and adverse to the owner for the statutory period. *Beebe v.*

*Swerda, supra*, 58 Wn. App. 375, (citing *Mood v. Banchemo*, 67 Wn.2d 835, 841, 410 P.2d 776 (1966)). It is the objective acts of the claimant, rather than subjective intent, that determines the hostility or adversity element, and open and notorious use need only be the character that a true owner would assert in view of the property's nature and location. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

The court in *Barnhart v. Gold Run, Inc., supra*, 68 Wn. App. 471, recognized that a right to use a road in a particular location can be lost by adverse possession without extinguishing the dominant owner's right to an easement in an alternative location. The *Barnhart* court relied on *Curtis v. Zuck, supra*, and distinguished *Burkhard v. Bowen*, 32 Wn.2d 613, 203 P.2d 361 (1949) and *Van Buren v. Trumbull*, 92 Wash. 691, 159 P. 891 (1916), which upheld the rights of owners of unopened easements against adverse possession challenges. The court reasoned that in *Burkhard* and *Van Buren* the litigants "attempted to extinguish the private easements of adjoining landowners by affirmatively excluding them from their right to use the platted alley or street," whereas in *Curtis* "there was no such attempt." *Barnhart*, 68 Wn. App. at 422. Thus, the continued access by an alternative route is significant.

Keller/Sipes attempts to portray their failure to object to the road relocation and the obstruction of the abandoned road as “permission” for such activities. However, acquiescence is one element that indicates hostility for purposes of establishing a prescriptive right. *See Smith v. Breen*, 26 Wn. App. 802, 805, 614 P.2d 671 (1980) (“[a]n adverse use will not ripen into a prescriptive right unless the owner of the servient estate knows of, and *acquiesces in*, such use, or unless the use is so open, notorious, visible, and uninterrupted that knowledge and acquiescence on his part will be presumed”). This hostility/claim of right element requires only that the claimant treat the land as his own as against the world throughout the statutory period. *Chaplin v. Saunders, supra; Roy v. Cunningham*, 46 Wn. App. 409, 731 P.2d 526 (1986). That is precisely what the Bangerts have done here.

Keller/Sipes also claim to have given permission for Bangerts to graze their cattle and maintain fences across the road. At trial, Stephen B. Sipes admitted that it was nothing more than a “tacit” understanding on his part, and that he had no conversation with the Bangerts in which he gave permission to graze cattle within the easement (RP 909 & 915). Nonetheless, permission was not Keller/Sipes’ to give since Stephen B. Sipes had already lost his land in 1986 to forfeiture and owned no legal interest in any Clark

Lake property when Bangert moved on to his property in 1987 and began grazing cattle within the fenced-in easement.

Moreover, even if Sipes' claimed acquiescence in the Bangerts' maintenance of a fence could be interpreted as "permission," such after-the-fact and unsolicited permission is insufficient to interrupt the initial adverse and hostile use. To interrupt adverse possession there must be actual cessation of the possession. A mere protest, or unsolicited consent, will not interrupt possession that is hostile at its inception. *Huff v. Northern Pacific Ry. Co.*, 38 Wn.2d 103, 113, 228 P.2d 121 (1951) ("[w]here the entry has been adverse and hostile, its character as such could not be interrupted or destroyed by the property owner's unsought consent"); *Lingvall v. Bartmess*, 97 Wn. App. 245, 982 P.2d 690 (1999) (same).

From 1987 when the Bangerts acquired title to their land, through 2007, the Bangerts' exclusive use of the original easement was open, notorious, continuous, uninterrupted, and adverse. The Trial Court so found and ample evidence supports this conclusion (CP 240, Conclusion D). The road was blocked by fences without gates and impassable to vehicles (RP 92-95; 145-46; 156-57; 162, 417; 578; 589). Parts of the house encroached in the roadway. After he bought in 1986, John R. Bangert, with help from Stephen B. Sipes (RP 88; 729-30), continued construction on the house and

yard, including planting lawn, trees and bushes, giving no mind to the original access road (RP 148, 729-30; 1120-22; Exs. 164, 165, 166, 167 184, 185, 186). An old truck blocked the road for many years (RP 105). The Bangerts left the berm, placed at the junction of the old access road and relocated road by Stephen B. Sipes, for more than ten (10) years (CP 271; RP 157). The use was open, notorious, hostile and under a claim of right. No one interrupted Bangerts' exclusive use from the time of their purchase in 1987 to the date of the current dispute in 2008.

Although Keller/Sipes assert that they frequently used both roads, they *never* drove the original easement road after the new access road was created, but always used the new access road on a daily basis (RP 667-68). Their assertion that "vehicular traffic began to flow" after Alcock/Evans and Bangert removed pasture fences in 2006 (Appellant's Brief at 13) again strains credibility. They cite the two single incidents referenced *supra*: Once when John R. Bangert asked a Caterpillar operator, who was doing work on Stephen B. Sipes' property, to remove some stumps from his land (RP 151-52, 753 & 1066). When the operator used the old road, John R. Bangert told him he could not do so because he was trespassing (RP 112-13). This occurred after Alcock had removed the berm where the old road intersected with the new access road (RP 151-52). The second incident was in 2008,

again after Jerard Alcock had removed the berm, when Charles F. Dunn rode his four-wheeler down the road on one occasion. John R. Bangert asked him not to do that because he had water pipes there and it was not his road (RP 753; 956-57). The only occasion Stephen B. Sipes actually used the old road was with his tractor, when Alcock gave him permission to take some rocks from his field (RP 913). That single permissive use was confined to the Alcock property.

Keller/Sipes' assertions as to the utilities does not alter the showing of adverse use. The original powerline was installed during the period of unity of title while the easement was extinguished. It was relocated in 2001 to the new road by the power company (RP 135-36; 596); Keller/Sipes have never complained about this relocation nor have they sought, by this action, to have the powerline relocated back. Stephen B. Sipes personally installed his telephone line along the relocated road in 1999 (RP 814-17). The Bangerts' waterline is within their property, or else within specifically deeded easements for that purpose (RP 128, 134). Utilities are not an issue.

Some intermittent pedestrian use was shown, such as for hiking when Robert B. Sipes and Myra E. Sipes owned the land (RP 246) or when the Keller/Sipes children occasionally walked down through the fields to visit the Bangerts (RP 694), but not for the easement purpose of ingress and egress.

Keller/Sipes lived in Canada from 1996 – 1998, and did not even move onto their land until 1998 (RP 806-07). By that time, more than 10 years of adverse use had passed. Even their notice letter written by their attorney on November 6, 2008, claiming the right to use the original easement, illustrates that they had not previously used the road: it states that Brenda L. Keller and Stephen B. Sipes will “begin” using the easement (Ex. 28).

Substantial evidence supports the Trial Court’s conclusion that the old access easement was extinguished by adverse possession.

**IV. Substantial Evidence Supports The Trial Court’s Finding That That Keller/Sipes Are Estopped From Claiming The Access Road Should Follow The Route Of The Original Easement.**

The elements of equitable estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *City of Seattle v. St. John*, 166 Wn. 2d 941, 215 P.3d 194 (2009). Silence can lead to equitable estoppel—“[w]here a party knows what is occurring and would be expected to speak, if he wished to protect his interest, his acquiescence manifests his tacit consent.” *Peckham*

v. *Milroy*, 104 Wn. App. 887, 892, 17 P.3d 1256, *review denied*, 144 Wn. 2d 1010, 31 P.3d 1184 (2001).

Contrary to Appellants' assertion that "there is no conduct by Plaintiffs or Plaintiff's predecessors that Bangerts relied on in building their home or landscaping their yard" (Appellants' Brief at 49), the Trial Court's Conclusion of Law regarding estoppel notes Robert B. Sipes' actions in building the alternate access road and in telling the Bangerts future access would be by the new access road (Conclusion of Law E, CP 240-41). More importantly, other findings support the Trial Court's conclusion that Keller/Sipes was estopped to assert a right to reopen the old easement road. Specifically, the Trial Court found that "Stephen B. Sipes acquiesced to his father building the new access road, and then over the years made use of it.... Robert B. Sipes and Stephen B. Sipes, father and son, also helped the Bangerts when they built on the old foundation which put Bangert's home only a few feet off the old access road." (Finding of Fact F, CP 232-33; *see also* Finding of Fact H, CP 234).

Again, ample evidence supports the conclusion that Keller/Sipes are estopped from claiming the access road should now follow the original access easement, and all elements of estoppel were shown:

1) While he owned the property on which it was located, Stephen B. Sipes acquiesced in the relocation of the road and he and his family used the relocated road as the exclusive means of access to their property (RP 63, 92-95, 154, 156, 185, 218-20, 247, 252-53, 262, 667-68, 1254, 1277, 1298, 1319 & 1334);

2) Robert B. Sipes and Myra E. Sipes, Bangerts' predecessors, began building their house in reliance on the road relocation and not wanting traffic to come by their house; Stephen B. Sipes sold them the property after the road had been relocated (RP 144, 179, 257, 1253, 1290-91 & 1300-02; Ex. 113);

3) Bangerts purchased from Robert B. Sipes and Myra E. Sipes in reliance on the relocated road as the sole easement (Ex. 115);

4) Bangerts invested substantial sums of money and labor over many years completing the construction of their home in reliance on the relocated road as the sole easement (RP 148-49; 729-30; 1120-22; Exs. 164 – 167; 184 – 186).

5) Stephen B. Sipes, by his conduct acquiescing in the road relocation, using the alternate road as his exclusive means of access, maintaining and improving the alternate road, assisting Bangerts to complete their home, and blocking the road with the berm, without ever asserting a claim in the

abandoned road, led the Bangerts to believe the relocated road was the sole easement (RP 105, 598 - 602, 774, 849 – 51; 883, 909, 914-15; Ex. 186)

It is important to remember that ALL work on the new home occurred AFTER the new access road was put in. That Robert B. Sipes and Myra E. Sipes would construct their house in the easement, and locate its door so that users would step directly into a road, defies logic. Stephen B. Sipes held title to the property occupied by his parents at that time and consented to the relocation of the road. He observed and acquiesced in the construction of the house in the old easement. Title passed from Stephen B. Sipes to Robert E. Sipes and Myra E. Sipes in 1982. At no time during his parents' occupation and ownership of the tract did he assert a right to reopen the abandoned road, nor did he demand that the obstructions in the roadway be removed.

John R. Bangert and Connie L. Bangert purchased that land in 1987 in reliance on the existence of the relocated road as the access easement for Clark Lake property owners. *Peckham v. Milroy, supra*. They completed work on the partially constructed house with the assistance of Stephen B. Sipes, who, at the time, was on good terms with his sister and brother-in-law. Again, Stephen B. Sipes never gave any indication that he claimed any right whatsoever in the abandoned roadway until he lost his case in the water dispute with the Bangerts. Had they known that their home encroached onto

an active roadway or that Stephen B. Sipes would claim the right to drive next to their house, the Bangerts never would have purchased the land.

The estoppel is not based on the conduct of Robert B. Sipes alone, but rather on the conduct of Stephen B. Sipes. The Trial Court properly concluded that Keller/Sipes are estopped to reopen the old access road; substantial evidence supports that conclusion.

#### **ATTORNEYS FEES AND COSTS**

Pursuant to RAP 18.1, the Bangerts and Alcock/Evans request attorney fees and costs. The Respondents have endured countless hours and great expense pursuing their legal remedies at trial and, once again, in defending this appeal. Pursuant to RCW 19.86.010; RCW 19.06.090 and RCW 4.84.185 the Bangerts and Alcock/Evans are entitled to recover attorney's fees from Sipes/Keller for this appeal. In addition, the Bangerts and Alcock/Evans request that they be awarded their costs on appeal pursuant to RAP 14.2 and 14.3.

## CONCLUSION

In view of the foregoing arguments and legal authorities, Respondents Bangert respectfully request that the decision of the Trial Court be affirmed and this appeal be dismissed. Respondents also request attorneys fees and cost.

**DATED** this 20<sup>th</sup> day of May, 2011.

Respectfully submitted



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