

FILED

OCT 15 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 291260-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WILSON & SON RANCH, LLC,
a Washington limited liability company,

Appellant,

vs.

PHILLIP M. HINTZ AND SHANNON M. HINTZ,
husband and wife,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, Phil Hintz and Shannon Hintz, husband and wife (“Hintz”) own property located on the outskirts of Moses Lake, Washington. The property has naturally occurring springs that produce crystal clear water of the highest quality, and this water has created a mini-oasis.

To reach his property, Hintz must drive across an adjoining property. There is a meandering gravel road on the neighboring property. Hintz utilizes the meandering gravel road for ingress/egress.

A portion of the gravel road is located in an appurtenant, express, ingress/egress easement that benefits Hintz’s property; a substantial portion of the gravel road is outside of the easement.

From 1990 to 2001, Hintz operated a commercial fish hatchery on his property. His employees, his business invitees, his suppliers and vendors, and his customers traveled to and from Hintz’s property via the gravel road.

In 2001, Hintz decided to take advantage of the natural beauty of his oasis-like property. He ceased operating the fish hatchery and began hosting wedding receptions and other temporary outdoor events (e.g., weddings). The people attending the temporary outdoor events Hintz hosts on his property reach the event by traveling on the gravel road.

In 2007, Appellant purchased the property adjoining Hintz's property, i.e., Appellant purchased the servient estate. Shortly thereafter, Appellant installed a central pivot irrigation system in Hintz's express easement.

In 2008, Appellant commenced this litigation against Hintz, alleging that Hintz's use of the easement was outside the easement's scope and that Hintz was misusing the easement. Hintz counterclaimed, seeking a prescriptive easement to allow his continued use of that portion of the gravel road lying outside the boundaries of the express easement. Hintz also sought an order directing Appellant to remove from Hintz's express easement the center pivot of the irrigation system.

At trial, Appellant's legal counsel stipulated on the record that Appellant had installed the center pivot in Hintz's express easement. At the conclusion of the trial, the trial court rejected Appellant's claim that Hintz's use was outside the scope of the easement, and the trial court concluded that Appellant had failed to demonstrate Hintz was misusing the easement. The trial court also ordered Appellant to remove his center pivot from Hintz's easement.

There are two issues properly before the Court: 1) whether the trial court properly concluded that Hintz was entitled to a prescriptive

easement; and, 2) whether Hintz's use of the easement exceeds the easement's scope.

STATEMENT OF THE CASE

In the 1960s, Herman Jones ("Jones") purchased a parcel of property near Moses Lake. CP 70 (line 20-21). The western portion of the property contained natural springs and various fauna, which created a mini-oasis. CP 70-71.

In 1973, Jones sold to Larson the eastern portion of the property, which consisted of farm ground. CP 71 (line 23-24). Jones retained the western parcel, which contained the natural springs. CP 71-72.

When Jones sold the eastern portion of his property to Larson, Jones' only means of ingress/egress to the property he had retained was a gravel road. CP 71 (line 22). To ensure continued access to his property, Jones reserved a "non-exclusive easement for ingress and egress over and across a strip of land 20 feet in width." CP 71-72.

The entirety of the existing gravel road Jones was using for ingress/egress was not located within the 20 foot easement Jones had reserved. CP 72 (line 9-10). A substantial portion of the gravel road that runs east/west was located within the express easement Jones reserved, and a substantial portion of the gravel road that runs

northeasterly/southwesterly was outside the express easement. CP 72 (line 9-12).

At the time Jones reserved the ingress/egress easement for the benefit of the property he had retained, he did not include in the easement any language restricting or limiting uses that could be made of the easement. CP 72 (line 13-14); Trial Exhibit 2.

In 1978, Jones sold his property (the western parcel) to Colin Skane. CP 72 (line 24-25). At the time of the sale, Jones was aware that Skane intended to conduct a commercial fish hatchery on the property he was purchasing from Jones. CP 72-73.

When Jones sold the property to Skane, Jones believed the easement he had previously reserved was sufficiently broad in scope to allow Skane ingress/egress to use the easement for commercial purposes. CP 73 (line 3-6).

After purchasing the property from Jones, Skane constructed and operated a commercial trout hatchery. CP 73 (line 7-8). Skane operated the fish hatchery business from 1978 to 1990 and then sold the property to Hintz. CP 73 (line 10).

Hintz operated the fish hatchery from 1990 until 2001, and during this time period Hintz used the gravel road for ingress/egress. CP 73 (line 11-14). From 1990 until 2001, Hintz had four to eight full-time

employees who made daily use of the gravel road. CP 73 (line 15-17). In addition, Hintz's business invitees used the gravel road for ingress/egress and large trucks used the gravel road to transport fish eggs, fish, water, and other items. CP 73 (line 20-23).

From 1995 until 2001, Mr. Randy Knopp owned the servient property over which the gravel road travelled. CP 73 (line 24-26). Knopp observed Hintz, Hintz's employees, and Hintz's business invitees using the gravel road. CP 74 (line 23-24). At no point did Hintz ask Knopp for permission to use the gravel road for ingress/egress, nor did Knopp ever give Hintz permission to use the gravel road for ingress/egress. CP 74 (line 5-7).

In 2001, Knopp sold his property to Mr. Tom Walters. CP 74 (line 8). Walters owned the property from 2001 to 2007. CP 75 (line 4).

In 2001, Walters observed Hintz, Hintz's employees, and Hintz's business invitees using the gravel road to travel to and from the fish hatchery. CP 74 (line 15-17). At no point did Hintz ask Walters for permission to use the gravel road for ingress/egress, nor did Walters ever give Hintz permission to use the gravel road for ingress/egress. CP 74 (line 18-20).

In late 2001, Hintz ceased operating the fish hatchery and began a new business on his property. CP 74 (line 21-22). Using the natural

springs on the property as a back drop, Hintz created a “desert oasis” and began marketing his property as a site for weddings and other temporary outdoor events. VRP 131-132.

Walters was aware Hintz had started a new business hosting temporary outdoor events on his property. CP 74 (line 20-23). From 2001 to 2007, Walters observed Hintz and the people attending the event on Hintz’s property using the gravel road for ingress/egress. CP 74 (line 26-28).

Hintz never asked Walters for permission to use the gravel road for his new business venture, nor did Walters ever give Hintz permission to use the gravel road to conduct his new business venture. CP 75 (line 1-3).

In 2007, Walters sold his property to Appellant. CP 75 (line 4). Shortly after Appellant acquired the property from Walters, Hintz sought a Conditional Use Permit (CUP) from the Grant County Board of Commissioners (“Grant County”) so that he could host more than four temporary outdoor events each year. CP 75 (line 9-10, 24).

Over Appellant’s opposition and objection, Grant County issued Hintz a CUP. VRP 56.

Thereafter, Hintz conducted eighteen (18) temporary outdoor events in 2007, nineteen (19) in 2008, and fourteen (14) in 2009. CP 75 (line 16-17). The people attending the temporary outdoor events used the

gravel road to travel to and from Hintz's property. CP 75 (line 17-18). An average of thirty to sixty vehicles used the gravel road for each event. CP 75 (line 18-19). For an occasional larger wedding, more than sixty vehicles used the gravel road to reach the property. CP 75 (line 18-20).

Appellant then commenced this litigation. CP 1-4. Appellant alleged in its complaint that Hintz's use of the express easement is "beyond the scope contemplated by the original parties and is imposing an unreasonable burden on [Appellant]." CP 3.

At the conclusion of a bench trial, the Grant County Superior Court concluded that Appellant had failed to meet its burden of showing that Hintz was misusing or overburdening the easement. CP 80 (line 24-26). The Court also concluded that the commercial use Hintz was making of the easement was within the scope of the easement. The Court further concluded that Hintz had acquired a prescriptive easement with respect to those portions of the gravel road outside of Hintz's express easement. CP 81 (line 5-8).

This appeal followed.

ARGUMENT

A. Appellant Is Attempting to Raise on Appeal a Legal Issue and Theory It Did Not Present to the Trial Court.

Appellate courts will not review an issue, theory, argument, or claim of error not presented at the trial court level. RAP 2.5(a); *Lindblad v. Boeing*, 108 Wn.App. 198, 207, 31 P.3d. 1 (2001); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wash.App. 290, 299, 38 P.3d 1024 (2002) (“Where the trial court had no opportunity to address the issue, we decline to consider it.”). This approach is well founded and routinely applied in the appellate courts. *Almquist v. Finley School District No. 53*, 114 Wn.App. 395, 401-02, 57 P.3d 1191 (2002)(footnote omitted). Issues cannot, with only limited exceptions, be raised for the first time on appeal. *Id.* at 402 (footnote omitted); see also, RAP 2.5(a). The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 527, 20 P.3d 447 (2001).

Appellant has made five assignments of error. Assignment of error number 1 and number 3 both concern the scope of the easement. Assignment of error number 2, 4, and 5 “concern whether the express easement was relocated to the existing gravel road by mutual consent of the owners of the servient and dominant estates.”

There is a fundamental problem with assignment of error 2, 4, and 5. Namely, the issue to which Appellant is assigning error was not before the trial court. The record unequivocally demonstrates that Appellant never raised at trial the issue of whether Hintz's express easement was relocated to the existing gravel road by mutual consent.

The first item in the record that the Court must examine is Appellant's complaint. CP 1-4. Noticeably absent from Appellant's complain is any allegation that Hintz's express easement had been relocated by mutual consent. The Court should also note how Appellant described its two causes of action (CP 3-4):

5.1 [Appellant] requests a declaratory judgment restricting the use of the easement to its original, intended use, and not for access to a commercial event center.

5.2 A permanent injunction preventing Hintzs [sic] from exceeding the original, intended use of the easement.

CP 3-4. The court must also note the relief Appellant requested:

6.1 For declaratory judgment enforcing the easement to its original, intended use.

6.2 To permanently enjoin [Hintz] from using the easement for commercial events.

CP 4. There was no mention, hint, or suggestion in Appellant's complaint that Appellant was raising for the trial court the issue of whether Hintz's

express easement had been relocated by mutual consent. At no point did Appellant request entry of an order declaring that Hintz's easement had been relocated. How can Appellant, in good faith, assign error to an issue the Appellant never presented to the trial court? It cannot.

Appellant's Trial Memorandum also illustrates Appellant's failure to put the issue before the trial court. CP 13-17. The Court must note how Appellant framed the issue that was to be resolved at trial: "Does the use of the express easement by [Hintz] violate the scope of the easement?" CP 15. Appellant concluded its Trial Memorandum with the following: "The [Appellant] respectfully request[s] the Court to grant an injunction preventing [Hintz] from further using the easement outside its original scope." CP 17.

The Verified Report of Proceedings further confirms that Appellant never raised the issue for the trial court's consideration. At no point during the trial did Appellant request that the trial court "relocate" Hintz's express easement.

It is inappropriate for any appellant to ask an appellate court to review an issue that was never raised at trial. In the instant case, Appellant's assignment of error is particularly egregious. What makes Appellant's assignment of error particularly egregious is the undisputed fact that Appellant's legal counsel **stipulated** on the record at trial that

Appellant had installed the center pivot of its irrigation system in Hintz's express easement, which Appellant now claims was actually "relocated" years ago.

Judge, one other thing that we're going to stipulate to, and it's actually in one of our photographs, is that a center pivot irrigation system was installed by my clients [Appellant] in the easement that was reserved.

VRP 19. This stipulation was legally significant because Hintz had alleged in his counterclaim that Appellant's center pivot was blocking his express easement. CP 8-9. Hintz had specifically requested that the Court enter an order directing Appellant to relocate its center pivot outside of the express easement. CP 12.

Appellant is improperly asking the court to review an issue the trial court was never presented because Appellant is attempting to circumvent the trial court's decision. To wit, Appellant does not want to move its center pivot, which it stipulated it had placed squarely within Hintz's express easement, because moving the center pivot will cost Appellant substantial sums of money and moving the center pivot will cause Appellant to lose farmable acreage. That Appellant wants to avoid the trial court's "move your pivot" order can be easily gleaned by review of Appellant's "Conclusion" in its brief. Here is the relevant language:

If this Court rules that the express easement was partially relocated as necessary to conform to the route of the gravel road, there will be two further impacts on the issues before the Court. First, it will mean that the trial court decision finding a prescriptive right in the gravel road should be reversed. Rather than a prescriptive right, Hintz has an express easement in the gravel road Second, it means that the center pivot is not located within [Hintz's] express easement because [Hintz's] easement has been relocated to the as built gravel road. Accordingly, the trial court decision allowing Hintz to force the removal of the center pivot should be reversed.

The Court must decline to address Appellant's argument that the trial court erred in failing to conclude that Hintz's express easement had been relocated by mutual consent because the trial court never was given the opportunity to address the claim. As Appellant failed to raise the issue at trial, there is nothing for the Court to review.

If for some reason the Court chooses to consider Appellant's argument, what the Court will find is a record devoid of evidence supporting Appellant's claim.

Appellant is well aware the record is barren, which is why Appellant did not ask the court to examine the record for evidence of "mutual consent." Instead, Appellant asked the Court to infer that "mutual consent" occurred. According to Appellant, the Court can infer "mutual

consent” from the fact that Herman Jones did not use the entirety of his express easement.

This argument has zero merit, as evidenced by Appellant’s failure to cite a single case that stands for the proposition a court can infer mutual consent to relocate an express easement based on nothing more than the easement owner’s decision to not utilize the full width of the easement.

Appellant’s failure to cite any authority is not surprising because Appellant’s argument that an express easement can be relocated as a result of non-use disregards two of the most basic axioms of property law. One, mere non-use of an easement does not constitute abandonment no matter how long the period of non-use¹. Two, easements are valuable private property rights. Private property rights do not evaporate (and are not “relocated”) simply because the owner of the right fails to make full use of it.

The Court should summarily reject Appellant’s request for review of the trial court’s alleged failure to conclude that Hintz’s express easement had been “relocated.”

¹ *Thompson v. Smith*, 59 Wn.2d 397, 367 P.2d 798 (1962)

B. The Trial Court Properly Concluded Hintz Acquired a Prescriptive Easement Burdening a Portion of Appellant's Property.

Appellant's argument that the trial court erred in granting Hintz a prescriptive easement is predicated entirely on Appellant's erroneous supposition that Hintz already had a right to utilize the entirety of the gravel road because Hintz's express easement had been "relocated" long ago to include only the as-built gravel road. According to Appellant, Hintz did not establish an "adverse use" because he had the right to use the gravel road. Appellant's argument, for the reasons discussed above, is meritless.

Hintz had a right to use only that portion of the servient estate burdened by his express easement. It is undisputed that a substantial portion of the gravel road lies outside of Hintz's express easement. Findings of Fact 10, which Appellant did not challenge², states that "a substantial portion of the gravel road . . . is outside of the express easement Jones reserved."

² Findings to which error has not been assigned are verities on appeal. *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611 (2002).

To establish a prescriptive easement that would authorize Hintz's use of the gravel road outside the express easement, Hintz had to prove that his use of the gravel road was: (1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the land sought to be subjected, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." Kunkel v. Fisher, 106 Wn.App. 599, 602, 23 P.3d 1128 (2001) (citing Mountaineers v. Wymer, 56 Wn.2d 721, 722, 355 P.2d 341 (1960)).

The following Findings of Facts are verities for purposes of this appeal:

- Skane, Hintz's predecessor-in-interest, used the gravel road for ingress/egress from 1978 until 1990. CP 72 (Finding of Fact 14); CP 73 (Finding of Fact 16 and 17).
- From the time Hintz acquired the property in 1990 to current Hintz has used the gravel road for ingress/egress. CP 73 (Finding of Fact 18); CP 74 (Finding of Fact 23 and 30).
- No one has ever given Hintz permission to use the gravel road located outside the easement, and Hintz has never asked anyone for permission. CP 74 (Finding of Fact 24 and 28).

These findings of fact, to which Appellant failed to assign error, establish that Hintz's use of the gravel was open and notorious; they establish that route was uniform; and, they establish that the Hintz made commercial

use of the gravel road for more than ten years. Hintz's use was adverse to the true owner (Knopp and Walters), and at any time Knopp or Walters could have demanded that Hintz limit his use to the confines of his express easement.

The Court should affirm the trial court's conclusion that Hintz acquired a prescriptive easement that authorizes him to use that portion of the gravel road outside of his express easement.

C. The Trial Court Properly Concluded that Appellant Failed to Prove that Hintz Is Overburdening the Easement.

When a servient owner alleges that an easement on his property is being misused, it is the servient owner who has the burden of proving misuse. *Logan v. Brodrick*, 29 Wash.App. 796, 799-800, 631 P.2d 429 (1981). Thus, Appellant had the burden of proving at trial that Hintz was misusing the easement.

At trial Appellant failed to present any testimony or evidence of overburdening. There was no evidence, for example, of an increase in the amount of trespassers on Appellant's property; an increase in the amount of litter on Appellant's property; or, an increase in the amount of vandalism of Appellant's property. Instead of presenting any such evidence, Appellant focused all of its attention at trial on establishing that

Hintz's use fell outside of the scope of the easement. In other words, Appellant focused exclusively on the original grantor's (Jones) intent.

The trial court properly concluded that Appellant failed to meet its burden of showing that Hintz was misusing the easement.

D. The Trial Court Properly Concluded that Hintz's Current Use is Within the Scope of the Easement.

The scope of an easement is determined by looking at the intention of the parties to the original grant, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied. *Logan, supra at 799*. Here, the trial court properly considered all three factors.

1. The Trial Court Properly Considered the Intention of the Parties to the Original Grant.

Appellant's fundamental contention, from day one, has been that Hintz could not use the easement for ingress/egress to the temporary outdoor events he was hosting on his property because Herman Jones, when he created the easement, did not intend to allow for commercial use of the easement. Appellant's position was that Mr. Jones only intended the easement to be used for ingress/egress for hunting on the dominant parcel.

With respect to the issue of Jones' intent, Appellant first argues

that Finding of Fact number 11 is not supported by the evidence. Finding of Fact 11 reads as follows: “At the time Jones reserved the access easement for the benefit of the parcel he retained, Jones did not impose any limitations or restrictions on his use of the easement . . .” (Emphasis added.)

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational trier of fact that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). There is substantial evidence in the record to support this finding.

What the trial court was addressing in Finding of Fact 11 was the lack of restrictive language in the easement with regard to use of the easement. It is undisputed the easement in question contains no current or future restrictions on the amount of vehicles that can use the easement, the types of vehicles that can use the easement, the times at which vehicles may use the easement, etc. The easement is devoid of use restrictions. CP 72 (lines 7-8); Exhibit 2.

Mr. Herman Jones testified at trial. Based on his testimony, as well as the plain language in the easement, the trial court made certain findings about his intent. The trial court found that Jones believed the easement he had reserved was sufficiently broad in scope to allow

commercial uses. CP 73 (Finding of Fact 15). Notably, Appellant did not assign error to Finding of Fact 15. Findings to which error has not been assigned are verities on appeal. *Robel supra*, at 42.

On appeal, Appellant has refined its argument. Rather than argue that Jones only intended to allow the easement to be used for hunting purposes, Appellant concedes that Jones intended to allow commercial use of the easement. However, according to Appellant, Jones only intended to allow commercial uses that are “agricultural” in character. Appellant’s punch-line is that the temporary outdoor events Hintz is hosting on the dominant estate, although commercial in nature, are not “agricultural” in character, and therefore are not within the scope of the easement.

There is no evidence in the record to support Appellant’s contention that Jones intended to restrict the use of the easement to commercial uses that are “agricultural” in character.

Appellant’s argument also overlooks the fact that the law assumes “the parties had in mind the natural development of the dominant estate.” *Logan, supra*, at 800. Thus, the fact that Jones did not contemplate in 1978 the particular use Hintz is now making in 2010 is not germane. Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement. *Logan, supra*, at 800. Temporary outdoor events,

as expressly allowed under the Grant County Code, are “normal development.”

Appellant claims that the fact the Grant County Board of Commissioners’ issuance of a Conditional Use Permit (CUP) to Hintz is evidence of “abnormal development.” What Appellant fails to grasp is that in Grant County, temporary outdoor events are expressly allowed in Agricultural zones, without permit. CP 75 (9-26). A CUP is necessary only when the property owner seeks to have more than four temporary outdoor events in a year. CP 75(23-26). The fact that a CUP is issued does not change the underlying use from “normal development” to “abnormal development.”

2. The Trial Court Properly Considered the Nature and Situation of the Properties.

The second consideration when determining the scope of an easement is the nature and situation of the properties subject to the easement. *Logan, supra* at 799.

Here, the trial court considered the nature and situation of the properties. For example, the trial court considered numerous photographs depicting the nature of the dominant estate and servient estate. The trial court saw photographic evidence of an oasis-like setting on the dominant estate. The trial court subsequently found that the dominant estate

contains “numerous natural springs and various fauna.” CP 70-71 (Finding of Fact 4).

Natural springs are rare in the arid expanse of central Washington. It is reasonable to assume a property owner having a rare, natural feature on his property may attempt to use that feature for commercial purposes. That both Skane and Hintz attempted to operate a commercial fish hatchery on the dominant estate is not surprising. Nor is it surprising or unexpected that Hintz would attempt to use the desert-oasis for other uses, such as temporary outdoor events.

3. The Trial Court Properly Considered the Manner in Which the Easement Had Been Used.

The final factor the trial court must consider when determining the scope of an easement is the manner in which the easement has been used and occupied. *Logan, supra*, at 799.

In the instant case it is undisputed that Skane, after acquiring the dominant estate from Jones, operated a commercial venture from 1978 until 1990. It is undisputed that from 1990 to 2001 Hintz continued to operate that commercial venture. It is undisputed that Hintz continued to make commercial use of the easement after he ceased operating the fish hatchery 2001. Thus, it is undisputed that for over 30 years the dominant estate owners have made commercial use of the easement in question.

The trial court considered these facts when it analyzed this case, as evidenced in Conclusion of Law 11, which is unchallenged. Conclusion of Law 11 reads as follows:

11. Skane and Hintz collectively used a portion of the express easement for commercial purposes (commercial fish hatchery) from 1985 until 2001. From 2001 to current, Hintz has made use of a portion of the express easement for a different commercial purpose (venue for temporary outdoor events.) Although the nature of Hintz's commercial activity changed from a commercial fish hatchery to temporary outdoor events, the type of vehicles and the number of vehicles using the express easement did not substantially change. What changed is when the vehicles use the express easement in that the commercial fish hatchery was in operation every day year round while the temporary outdoor event venue operates for a limited amount of time (approximately 6 months of the year and usually only on weekends). The amount of use of the easement on an annual basis has not substantially changed.

The key part of the trial court's analysis is the following: "The amount of use of the easement on an annual basis has not substantially changed." Although labeled a conclusion of law, this statement is better characterized as a finding of fact. When a finding of fact is erroneously described as a conclusion of law it is reviewed as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Appellant

did not assign error to this finding, and therefore it is a verity for purposes of appeal. Robel supra, at 42.

To the extent the Court concludes the finding is not a verity because it was mislabeled as a conclusion of law, there is substantial evidence in the record supporting this finding. The trial court heard evidence regarding the amount of use Hintz made of the easement when he was operating the fish hatchery on the dominant estate. Based on this evidence, the Court made unchallenged findings regarding the type and volume of use. CP 73 (lines 15-23). The trial court also heard evidence regarding the amount of use Hintz is making of the easement while hosting temporary outdoor events on the dominant estate. CP 75 (lines 16-21). From these unchallenged findings, the Court properly found the amount of use of the easement on an annual basis did not substantially change when Hintz transitioned from operating a commercial fish hatchery to hosting temporary outdoor events.

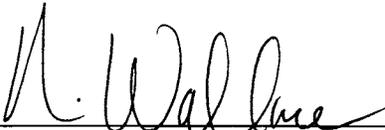
CONCLUSION

The trial court properly concluded that Hintz acquired a prescriptive easement. The trial court also properly concluded that Hintz's current use of the easement is within the scope of the easement and that Appellant had failed to meet its burden of proving Hintz's use of the easement for ingress/egress to temporary outdoor events is overburdening the easement.

The Court should affirm the trial court's decision in its entirety.

Respectfully submitted this 14th day of October, 2010.

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