

No. 293491

**COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON**

FILED

JUL 20 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STEPHEN SIPES and BRENDA KELLER,

Plaintiffs, Appellants

v.

JOHN BANGERT, CONNIE LAMBERTSON-BANGERT,

JERRARD ALCOCK and PATRICIA EVANS

Defendants, Respondents.

APPELLANTS' REPLY BRIEF

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I. PURCHASER'S ASSIGNMENT OF CONTRACT AND DEED (PACD)

1. The PACD Conveys The Original Easement To Plaintiffs.

In contention in this lawsuit is whether, upon Plaintiff Stephen Sipes' conveying Defendants Bangerts' property to Defendants' predecessors Robert and Myra Sipes, his parents, he retained easement for himself along the original easement road. Within this issue is the question whether the "existing road" Plaintiff retained in that conveyance refers to the original road or the alternate built in 1979.

Defendants state in their Brief at Page 15 and 18 that

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).

This contention and the court's conclusion is incorrect. Two roads existed in 1982. Two roads exist to this day. It is necessary to read and interpret the entire PACD to extract its meaning. The PACD clearly describes the road as follows:

. . . 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.

In 1982 when the PACD was executed, and he deeded some of his land to his parents, Stephen Sipes continued to own adjacent Government Lot 2. The easement road described in the PACD clearly traverses in a northeast direction through the E ½ of Government Lot 3 (Parcel No. 1600710) to the W ½ of Government Lot 2 (Parcel No. 1599685). The property line between Lots 2 and 3 is approximately 150 feet past Defendants Bangerts' house. (See **Ex 3**).

Trial **Exhibit 3** shows clearly that the alternate road runs due east from the County Road. The alternate is not the road described in the PACD. That description is all

important in a determination of which road was referenced in the PACD.

Defendants' Brief Page 18:

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 "new access road" was not the only "existing road". The "driveway" runs from the County road to the northeast corner of Government Lot 3 and the home the elder Sipes were constructing. Only three years prior to 1982, the "driveway" was the only road across the Clark Lake property. It didn't just disappear. In fact, John Bangert's testimony confirmed that the road bed existed (RP 58 – 59). The property line is only 150 feet from the house. The original easement existed and was "in use" as a "driveway" in 1982. By Defendants' own admission the road existed.

There is no ambiguity about the road in the language of the PACD as the Defendants suggest. "East" is not "northeast". The drafter of the deed was particular about the description of the road in that regard. The description is clear and what's more, it describes the original road.

The record therefore does not support the Court's Conclusion that the "existing road" referred to the alternate. All indications point to a contrary conclusion that it was the original easement road retained by Stephen Sipes in the 1982 PACD.

2. The Language, "Subject To", Creates An Easement.

Defendants in their Brief at Page 16 posit that there is little authority about whether the words "subject to" can create an express easement. The point arises in the context of Defendants' argument that the PACD under discussion may not have retained

an easement for the Plaintiffs, as the granting language contains the words “subject to”. However, in its citation of authority, Defendants agree that in *Beebe v. Swerda*, 58 Wn.App. 375, 793 P.2d 442 (Wash.App. Div. 1 1990) the Appellate court in construing the “subject to” language found in that case that it demonstrated an intent to create an easement. *Swerda* at 382.

In the instant case, the facts are that the granting language in the PACD provides for an easement with a specific purpose of a specific width across a specifically described parcel and in a specific direction. In subjecting the granted property to an easement, Seller reserved that same easement unto himself.

Defendants’ argument in this regard is particularly confusing in that immediately preceding it they set forth their argument that the PACD created an easement in the alternate road. Presumed in that argument would be Defendants’ belief that the “subject to” language was sufficient for the purposes of creating an easement, contrary to the logic used in the latter argument.

In *Zunino v. Rajewski*, 140 Wn.App. 215, 165 P.3d 57 (Wash.App. Div. 3 2007), citing *Beebe v. Swerda*, 58 Wn.App. 375, 793 P.2d 442 (Wash.App. Div. 1 1990) at 382, the appellate court spoke to this point. The court stated that:

No particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement are sufficient. *Id.* at 379, 793 P.2d 442. In general, deeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document. *Carr v. Burlington N. Inc.*, 23 Wash.App 386, 390-91, 597 P.2d 409 (1979). *Zunino* at 222.

The PACD clearly shows that it reserved the original easement, stated the purpose and scope of the easement, and gave a legal description of the servient estate. As such,

Plaintiff Stephen Sipes retained an easement for himself in the PACD, and in particular retained the original easement road. *Radovich v. Nuzhat*, 104 Wn.App. 800, 806, 16 P.3d 687 (Wash.App. Div. 1 2001).

3. Reformation Of The Deeds Was Not Proper.

Defendants state in their Brief at Page 20 that

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. (Emphasis Added)

In support of their contention that reformation of the deeds by the trial court was necessary, Defendants cite Wilhelm v. Beyersdorf, 100 Wn.App. 836, 999 P.2d 54 (Wash.App. Div. 3 2000).

In *Wilhelm*, Plaintiff had the easement surveyed. A portion of the easement did not reflect the road actually on the ground. It was only that portion of the easement that was reformed. *Wilhelm* at 843.

In the instant case, the PACD clearly re-created the original easement, and reflects the easement road on the ground from the County Road running to the northeast corner of Government Lot 3 (See Argument 1, *infra*). The PACD was for ingress, egress and utilities. Both Stephen Sipes' power line and Robert & Myra Sipes' domestic water line ran under the original easement road from Government Lot 3 to Government Lot 2 at the time the 1982 PACD was executed (RP 207-08, 593-94, 596-97). Robert Sipes, the person who built the alternate road, said in his testimony that it was his intent that the original road would serve the other Clark Lake Development parcels (RP 174-76, 183).

In the instant case, the parties' intent is clear and unambiguous. Reformation of the deed by the trial court was not proper where the instrument as written set forth the parties' explicit intentions. No ambiguity exists that justifies reformation. In this way, *Wilhelm* is distinguishable from the facts of the case at hand.

II. ABANDONMENT/ADVERSE POSSESSION

To make a *prima facie* showing of abandonment the Defendants must establish (1) non-use (by the dominant estate) coupled with an act or omission with a clear intent to abandon; or (2) adverse possession by the servient estate. *Rutland v. Mullen*, 2002 ME 98, 798 A.2d 1104 (Me. 2002) at 1109 citing *Phillips v. Gregg*, 628 A.2d 151, 152 (Me. 1993).

4. Robert Sipes Never Blocked The Original Easement Road.

Defendants state in their Brief at Page 4 that

Robert 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).

None of these references to the Verbatim Report support Defendants' contention that Robert Sipes blocked the original road. All above cited references show that the fences had gates.

In their Brief, Page 5, Defendants claim that

They (Robert & Myra Sipes) also installed fencing across the easement road to keep cows away from the house (RP 63, 94-95, 154, 156, 218-20, 253 & 1334).

None of these references stand for Defendants' position on these points.

Defendants use unsupported assertions in furtherance of their position that the original easement was abandoned. To the contrary, Robert Sipes' testimony at trial was clear that

he never intended to abandon the original easement. (RP 174) He and his wife Myra continued to use the original easement road (RP 183-84, 189, 246). He never put a fence across the original road to keep cows away from the house or to block passage (RP185-86, 189, Ex. 17). Robert Sipes never intended to swap the one road for the other (RP 173-74). He always intended the new road to be in addition and not in replacement of the old road (RP 174, 239-40). It was Robert Sipes' understanding that all CLD land owners above him accessed their property by the original easement road (RP 175-76). There was no agreement to exchange the old road for the new (RP 176).

Defendants' contention that Robert Sipes blocked the original easement road is not supported by the record, and is wholly contrary to all the rest of Robert Sipes' actions and testimony to the contrary that show he intended to preserve the original easement road for access to the dominant parcels.

5. Defendants Bangerts' Home Was Rebuilt On The Site Of The Original Home In Place When The Original Road Was The Only Access Road.

The facts in the instant case are that in 1976 Clark Lake Development began to sell their property in Section 3, Township 31 N, Range 37 EWM. The easement granted to all property owners at that time, the original easement as acknowledged by both sides to this suit, ran beside a house that was built in the 1940's and burned down in 1974. Defendant Bangerts' house is built on the very same foundation of that house. (RP 53-54, 90, 142-144, 178-80, 558).

The foundation was not adverse to the original easement granted to all CLD property owners in 1976. It did not then and does not now encroach into the easement.

In furtherance of their claim that Plaintiffs have abandoned the original road, Defendants state in their Brief at Page 5 that

the back porch (of Defendant Bangerts' house) is within the easement, RP 144 & 773.

Elsewhere Defendants repeat their contentions. At Page 28-29 it is stated that the *exclusive use, coupled with the encroachment of the Bangerts' improvements and the obstruction of the original road for a period of nearly 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.*

At Page 34, the Brief goes on to say

. . . parts of the house encroached in the roadway.

Page 40 states

He (Stephen) observed and acquiesced in the construction of the house in the old easement.

Page 6 states

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).

Page 18 states

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).

Those passages in the Report of Proceedings are devoid of evidence that the home is built into the original easement road. The house is now where it once was, coinciding and harmonious with the original easement.

6. Stephen Sipes Did Not Discourage Use Of The Original Easement.

To further their argument that the easement road was abandoned, Defendants

state in their Brief at Page 6 that

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). . . 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).

To the contrary, Stephen Sipes did not create the berm to prevent use by vehicular traffic. Rather, the berm was created as a result of his smoothing the alternate road to prepare for the delivery of the Plaintiffs' manufactured home (RP 105). This berm was easily removed by Jerry Alcock, a seventy-year-old man, in 2006 with manual tools.

As to this berm, at Page 6 of their Brief, Defendants first contend that

In 1996, Stephen B. Sipes created a three-foot dirt and rock berm on the original access road. . .

Next at Page 7 of their Brief Defendants change their facts:

It was in 1996 that he (Stephen) also created a larger berm. . .

At Page 10, Defendants change the facts again:

(when the new road was built Harrison) remembers the old access road was blocked off by rocks, dirt & logs.

Finally at Page 19, they say

In 1982 . . . The fences and berm blocked further access. . .

None of these accounts is correct. The fact is that the berm was a minor impediment to travel across the road by vehicles, and no impediment at all to pedestrian traffic or utilities. The obstacle presented, pales in comparison to those found to be no obstacle at all in *Shields v. Villareal*, 177 Or.App. 687, 33 P.3d 1032 (Or.App. 2001). None of Defendants' efforts to increase the significance of the berm increases the importance of the non-obstacle it represents.

7. Use Of An Alternate Easement Does Not Demonstrate Abandonment.

Along the same lines as the part of their Brief dedicated to the berm, Defendants state in their Brief at Page 7 that

He (Stephen Sipes) testified he chose this route (the alternate road) 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).

Defendants aggrandize the extent of the minor impediments to travel. Any minor obstacles on the original road could have been removed to allow for the passage of the manufactured home. Not knowing when the home would be delivered, Plaintiffs allowed the fences over the original easement to be left in place. Otherwise, the fences would have been down indefinitely and Defendants would not have been able to run their cattle (RP 598-603, 1044-1045).

These few minor impediments to travel across the road are far less significant than those obstacles that other courts found were not sufficient to constitute abandonment. *Rutland v. Mullen*, 2002 ME 98, 798 A.2d 1104 (Me. 2002); *Johnston v. Cornelius*, 230 Or.App. 733, 218 P.3d 129 (Or.App. 2009); *1st National Bank v. Mountain Agency LLC*, 2009-Igui-2202, CA 2008-05-056 (OHCA12); *Lone Star Steakhouse & Saloon Of Ohio, Inc. v. Ryshka*, 2005-Ohio-3398, 2003L192, 05-LW-2931 (11th) (OHCA11); *Strahin v. Lantz*, 193 W.Va., 285, 456 S.E. 2d 12 (W.Va. 1995); *Downing House Realty v. Hampe*, 127 N.H. 92, 497 A.2d 862 (1985); *Boyer v. Dennis*, 2007 S.D. 121, 742 N.W.2d 518 (S.D. 2007).

8. The “Shifting Easement” Theory Does Not Apply.

Prior to the conveyance of property to his parents by way of the 1982 PACD,

Stephen Sipes owned all of the property. Until that time, the original easement had been extinguished by merger. A shift in the easement could not occur because the alternate road was constructed in 1979 before the easement was re-created by the PACD in 1982.

Based on the Defendants' assertions in the instant case, namely that the alternate road and all obstructions predated the re-creation of the easement conveyed in the PACD, and that there has been no use of the newly created easement, the easement is a "created yet unopened easement". *Heg v. Alldredge*, 157 Wn.2d 154, 137 P.3d 9 (Wash. 2006); *Cole v. Laverty*, 112 Wn.App. 180, 49 P.3d 924 (Wash.App. Div. 3 2002); *Burkhard v. Bowen*, 32 Wn.2d 613, 203 P.2d 361 (Wash. 1949); *Van Buren v. Trumbull*, 92 Wash. 691 159 P. 891 (Wash. 1916). No shifting of the easement has occurred.

9. The *Burkhard/Van Buren* Rule Applies To This Case.

In their Brief at Page 32, Defendants state

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.

In *Burkhard*, a subdivision platted in 1889 was not opened within 5 years, and the public easements over alleys and streets were vacated by statute. *Burkhard*, at 615, 620. Defendant Bowen acquired two lots near the end of a vacated alley in 1922, and Burkhard acquired nine lots which were adjacent to Bowen's and which straddled the alley closer to its opening. At the time Burkhard acquired his property, eight of the lots were fenced as one unit, completely obstructing Bowen's access to the alley. *Burkhard* 614-15.

Although Burkhard filed suit to extinguish Bowen's private easement over the alley as platted, asserting adverse possession, the trial court found and the appeals court affirmed the continuing validity of Bowen's private easement. *Burkhard*, at 616-17, 623-24.

In *Van Buren* a subdivision was platted in 1888, showing "a street through the center of the tract, known as Clark Street. *Van Buren*, at 691. However, the street was not opened by the public within a 5 year period, and the public right of way was eliminated. *Van Buren*, at 693-95. Van Buren purchased land on one side of Clark Street, and Trumbull purchased land on the other side of Clark Street. *Van Buren*, at 691. At the time of Trumbull's purchase, Van Buren "or their predecessors had fenced off all of Clark Street abutting Trumbull's property", *Van Buren*, at 692. For a while Trumbull egressed over Van Buren's property through a gate to established streets. However, when differences arose, Van Buren closed and locked the gate, barring access to Trumbull's former route of egress, and sued to quiet title to the land lying within vacated Clark Street, asserting adverse possession. *Van Buren*, at 692. In 1916, the trial court's decision affirming the validity of Trumbull's private easement over vacated Clark Street was upheld on appeal. *Van Buren*, at 694-95, 698.

In both *Barnhart v. Goldrun, Inc.*, 68 Wn.App. 417, 843 P.2d 545 (Wash.App. Div. 3 1993) and *Curtis v. Zuck*, 65 Wn.App. 377, 829 P.2d 187 (Wash.App. Div. 1 1992), there was one established road that all parties used. It did not follow the platted roadway. Permanent obstructions, houses, were built on the land where the easement belonged by description. In *Burkhard* and *Van Buren* the appellants attempted to extinguish by affirmative exclusion the private easement of an adjoining landowner. In

Curtis and Barnhart there was no such attempt. The Plaintiffs there tried to enforce a private easement as platted after the easement had been constructed in the wrong location. The court held that the easement simply shifted due to a period of long use which predated both parties' ownership and the rule of *Burkhard* and *Van Buren* did not control. The court reformed the easement to reflect the actual location on the ground. In the instant case, the *Burkhard/Van Buren* rule does apply because the original road remains in existence.

Shifting is what happens when an easement is constructed other than in its described location. This was the case in *Curtis and Barnhart*. The easement created by the PACD is unlike the easement in those cases because it was not created as a result of confusion over the precise location of the easement. Rather, it is a separate use right which was created by the PACD after the alternate road was built.

In the instant case, the only attempt to block Plaintiffs' vehicular access was by way of construction of fences specifically found in *Burkhard* and *Van Buren* not to be sufficiently hostile to give rise to adverse possession. There are no permanent obstructions on the original easement. The roadway here did not simply "shift"; the original roadway, where it has always been, still exists.

It is clear that the *Burkhard/Van Buren* rule would apply in this case, prohibiting the Defendants from denying the full effect of the deed and the right of ingress and egress granted therein.

10. Pasture Fences Do Not Give Rise To Adverse Possession.

Defendants' Brief at Page 28 states

Like the situation in 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.

Defendants' fabricated encroachments are not substantiated by the record. There are no permanent obstructions along the original easement (RP 105, 429, 589, 746, 1039).

In answer to the question as to what kind of obstructions were enough to give rise to adverse possession, the court in *Beebe v. Swerda*, 58 Wn.App. 375, 793 P.2d 442

(Wash.App. Div. 1 1990), said

The owner of a servient estate has the right to use his land for purposes not inconsistent with its ultimate use for reserved easement purposes during a period of nonuse [by the dominant estate holder]. The property remains in the ownership of the servient estate, and the owner is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement. *Thompson v. Smith*, 59 Wn.2d 397, 407-08, 367 P.2d 798 (1962). This right of the servient estate owner to the use of the property covered by the easement during periods when the easement is not being used means that the use of the area covered by the easement is not adverse to the owner of the dominant estate. The use of the property by Swerda during periods of nonuse by Beebe and his predecessors in interest is not inconsistent with the future use of the easement. *Edmonds v. Williams*, 54 Wn App. 632, 636, 774 P.2d 1241 (1989). Swerda's use of the property during the period of nonuse by Beebe is more accurately characterized as privileged rather than adverse. Accordingly, we find that Swerda did not extinguish the easement by adverse possession.

Beebe at 383-84. (Emphasis Added.)

Such is the case here. The construction of pasture fences to control livestock by Defendants or their predecessors on the servient estate property is not inconsistent with the future use of the easement. Therefore, Defendants' use of their property during periods of non-use by Plaintiffs herein is privileged rather than adverse. The "hostile" element of adverse possession has not been established. Therefore, the easement has not been

extinguished by adverse possession.

In furtherance of their position on adverse possession, Defendants state in their brief at Page 33 that

In Smith v. Breen, 26 Wn App 802, 805, 614 P.2d 671 (1980) "an 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 through out the statutory period. Chaplin v. Sanders, supra; Roy v. Cunningham, 46 Wn App 409, 731 P2d 526 (1986). That is precisely what the Bangerts have done here.

Defendants' Brief at Page 34 states that

A mere protest, or unsolicited consent, will not interrupt possession that is hostile at its inception. Huff v. Northern Pacific Ry. Co., 38 Wn2d 103, 113, 228 P2d 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. Bartness, 97 Wn App 245, 982 P2d 690 (1999)(same).

The Defendants confuse hostility with a corresponding principal that gives them the right to use their land for any purpose that does not permanently interfere with the use of the easement. *Beebe* at 384. There were no hostile acts by Defendants for Plaintiffs to protest or interrupt. The only obstacles along the original easement were pasture fences. Taking from *Beebe*, *infra*, pasture fences are not sufficient to support a hostile claim of right to Plaintiffs.

Without the hostility necessary for adverse possession, whether the Defendants usage of the easement road is permissive or not is unimportant. The cite from *Huff* wherein it is held that unsought consent does not interrupt hostile entry, does not apply.

III. USE OF ORIGINAL EASEMENT/RE-CREATED EASEMENT

11. Power Lines And Water Lines Run Up The Original Easement To This Day.

Defendants state in their Brief at Page 10-11 in furtherance of their abandonment argument that

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. . . The original access road was described as not usable, with a fence across it, filled with brush and overgrowth and had trees planted in it near the Bangert parking area. . .

That Defendants' select witnesses made these comments is not dispositive of the existence or usability of the easement road. Defendant Bangert (RP 112-13), defense witnesses Robert Walker (RP 1275) and Arnold Johnson (RP 1339) all testified that the road may have been used when they were not there to see. Also, numerous witnesses testified that they in fact used the original easement road after the alternate was created (RP 130, 180-81, 183-84, 245-46, 407, 421, 607, 692-94, 739, 802, 836-37, 979-80, 1027-28, 1046-48, 1093).

Contrary to the position taken by Defendants on this point, Plaintiffs' underground power ran up the original easement from 1977 to 2001 or 2002. It was partially rerouted by Avista at the request of John Bangert at that time because the Bangerts' water line runs underground along the original easement. The power today begins and ends in the same location as in 1977. The ongoing, uninterrupted and continuous use of the original easement for utility purposes alone confirms its viability.

12. Pedestrian Use Qualifies As Ongoing Usage.

Defendants state in their Brief at Page 9 and 25 that

*Thomas T. Eardley owned Parcel No. 1599300 (Ex. 6) for over 10 years starting in 1979 (RP 394-95). . . He used the new access road **unless he was on foot** (RP 396, 399 & 400-02). (Emphasis Added).*

Defendants' Brief Page 36:

Some intermittent pedestrian use was shown. . .

In *Johnston v. Cornelius*, 230 Or.App. 733, 218 P.3d 129 (Or.App. 2009) and *Boyer v. Dennis*, 2007 S.D. 121, 742 N.W.2d 518 (S.D. 2007), the courts recognized and respected that pedestrian usage was ingress and egress so as to defeat a challenge to a dominant estate holder's claim to a use right. The same rule should apply here. Travel by foot from the county road or Defendant Bangerts' home to that of Plaintiffs required passing across the property of Defendants Alcock/Evans. Such use was consistent with the dominant estate holder's use right and defeats both claims of abandonment and adverse possession.

There has been continuous pedestrian ingress and egress along the original easement by Plaintiffs (RP 607, 692-94, 802, 1046-48, 1093).

13. The Road's Condition Does Not Render It Unusable Or Abandoned.

Numerous cases from other jurisdictions have addressed the abandonment issue in the face of arguments such as these (See Appellants' Brief Page 35-46). All have reached conclusions that roads with more serious obstacles than those alluded to here were not abandoned or unusable. *Shields v. Villareal*, 177 Or App 687, 691, 694, 33 P3d 1032 (2001); *1st National Bank v. Mountain Agency LLC*, 2009-Ohio-2202, CA 2008-05-056 (OHCA12); *Johnston v. Cornelius*, 230 Or.App. 733, 218 P.3d 129 (Or.App. 2009); *Heg v. Alldredge*, 157 Wn.2d 154, 137 P.3d 9 (Wash. 2006).

14. Use Of The Easement Negates Abandonment And Adverse Possession.

Plaintiffs concurrently used the original easement for utilities and pedestrian ingress and egress as well as the alternate road. Neither Defendant told Plaintiffs they could not use the original easement road until their exchange of correspondence in 2008.

The “exclusive and adverse” prongs of adverse possession have not been met. *Sabino Town and Country Estates Ass’n v. Carr*, 186 Ariz. 146, 150, 920 P.2d 26 (Ariz.App. Div 2 1996); *Mueller v. Hoblyn*, 887 P.2d 500, 509 (Wyo. 1994).

IV. EQUITABLE ESTOPPEL

15. Plaintiffs Are Not Accountable For The Actions Of Robert Sipes.

Defendants, in their Brief at Page 38, state the following supports the conclusion that Keller/Sipes are estopped from asserting a right in the original easement road:

. . . Robert B. Sipes’ actions in building the alternate access road and in telling the Bangerts future access would be by the new access road. . . 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 the Bangerts’ home only a few feet off the old access road.

For one to be equitably estopped in the assertion of a position, our jurisprudence requires: “(1) an admission, statement or act (by the party to be estopped) inconsistent with the claim asserted afterward; (2) action by the other party in reasonable reliance on that admission, statement or act; and (3) injury to that party when the first party is allowed to contradict or repudiate its admission, statement or act. *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 849, 999 P.2d 54 (Wash.App. Div. 3 2000); *Heg v. Alldredge*, 157 Wn.2d 154, 165, 137 P.3d 9 (Wash. 2006). Each element must be proven by clear, cogent, and convincing evidence. *Wilhelm* at 849. Equitable estoppel is not favored in the law. *Robinson v. City of Seattle*, 119 Wash.2d 34, 82, 830 P.2d 318 (1992).

The actions of Robert Sipes are not the actions of these Plaintiffs. Other than the fact that Robert Sipes is Stephen Sipes’ father, there is no legally applicable connection between the two that makes Stephen Sipes accountable for Robert Sipes’ conduct. If

there were any representation by Robert Sipes in action or word that could be a basis for an estoppel argument, which Plaintiffs dispute *ab initio*, such conduct is not visited upon Plaintiffs. Robert Sipes is not Plaintiffs' predecessor in interest or in any other way responsibly upstream from Plaintiffs.

Plaintiffs cannot be estopped from enforcing their easement rights based on the alleged conduct of Robert and Myra Sipes, Bangerts' predecessors. Such a result would be in contradiction to the language requiring "the party to be estopped" to have acted or made statements inconsistent with his or her later claim. *Heg* at 166-67.

16. Defendants By Their Conduct Acknowledged The Existence Of The Easement.

The Bangerts knew the original easement existed when they purchased in 1987. They built their house in its current location with that knowledge. They built a pump house at the site of their well in Government Lot 2 and connected the well to the underground power that runs along the original easement in 1988. Defendants Bangert continue to use the original easement for power and domestic water to this day. That same power services Plaintiffs' home.

Plaintiffs did not own any CLD property from the time of Stephen Sipes' foreclosure in 1986 until Brenda Keller's purchase in 1993. Defendants Bangerts' purchased in 1987 and the exterior of their house was completely finished prior to Plaintiff Keller's purchase in 1993 (Ex. 17). Defendants did not build their home relying on any of Plaintiffs' acts.

The Defendants have not established all elements of equitable estoppel. The Plaintiffs made no statements, and took no action inconsistent with their current position

about their use rights on the original easement.

17. Defendants Are Charged With Knowledge Of All That Their Inquiry Would

Reveal.

In furtherance of their estoppel argument, Defendants' Brief Page 40 – 41 states:

Had they (Bangerts) 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.

In *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 999 P.2d 54 (Wash.App. Div. 3 2000), the Beyersdorfs, servient estate holders, were assured by their real estate agent that there were no easements encumbering their property. When they visited the site, they saw what they described as an old logging road winding through dense woods, unimproved and apparently unused. The Beyersdorfs drilled a domestic well on the road surface. *Wilhelm* at 840. Wilhelm filed suit seeking declaratory judgment regarding the right to use the easement. The court ruled that

If the purchaser had knowledge of facts sufficient to excite inquiry, however, we presume the purchaser had constructive knowledge of all that the inquiry would have discovered. *Miebach*, 102 Wash.2d at 175-176, 685 P.2d 1074. "Inquiry is not limited to searching record title." *Kirk*, 66 Wash.App. at 240, 831 P.2d 792.

. . .The fact that the easement was properly recorded gave constructive notice in itself. *Ellingsen*, 117 Wash.2d at 30, 810 P.2d 910. Additionally, the Beyersdorfs' personal investigation of the property revealed at least one established road that should have excited inquiry. All the above sufficiently establish actual or constructive notice of the Featherman easement. Accordingly the Beyersdorfs were not bona fide purchasers entitled to take title free of the easement.

Wilhelm at 846.

Defendants Bangert knew the road existed with both actual and constructive notice. The PACD is a recorded document and the re-created easement road exists on the ground. Defendants Bangert are not entitled to take title free of the easement created by

the PACD.

18. Balancing Of The Equities.

Defendants are not entitled to a balancing of the equities in reforming the original easement because of a potential hardship that may be imposed upon them due to building their house in its current location.

In *Wilhelm*, the court opined

Generally, however, the benefit of the doctrine of balancing the equities, or relative hardships, is reserved for the innocent defendant who proceeds without knowledge that he or she is encroaching on another's property rights. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 699-700, 974 P.2d 836 (1999); *Bach v. Sarich*, 74 Wash.2d 575, 582, 445 P.2d 648 (1968). Due to their actual and/or constructive knowledge that their property was encumbered by an easement on an existing road, the Beyersdorfs were not innocent defendants when they built a well on the established road's surface. The filed easement gave notice that it was 40 feet in width. Under these circumstances, the Beyersdorfs were not innocent defendants and consequently were not entitled to a balancing of the equities before the court granted the reformation. *Hollis*, 137 Wash.2d at 700, 974 P.2d 836.

In the instant case, the easement does not interfere with the Defendants' house.

Defendants built their house in its current location knowing that a road ran behind it.

They use the very same road as their driveway and for their utilities to this day.

Defendants Bangert are not innocent defendants and cannot fall back upon a balancing of the equities or relative hardship to gain a benefit that the law does not confer upon them.

19. Clean Hands Doctrine Militates Against An Equitable Estoppel Theory.

Defendants Bangert do not come to court with clean hands. They knew the original easement existed. This fact is not in dispute. They built their house with this knowledge and understanding prior to Plaintiff Keller's purchase in 1993. They knew that Plaintiffs used the original easement road for utilities and pedestrian ingress and egress from the time Plaintiffs purchased in 1993. They cannot rely upon an estoppel

argument to deny Plaintiffs' assertion of a right to this easement, and the court's finding to this effect is in error.

20. Plaintiffs' Silence Has Not Estopped Them From Using The Original Easement.

Defendants assert that because Plaintiffs were silent, they are estopped from using the easement road. Defendants' Brief Page 37 states

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

This argument begs the question: What is it that Plaintiffs were to speak out against? Is it that Defendants Bangert had constructed their house on the very same foundation of a home destroyed by fire, a structure that co-existed with the usage of the original easement road for ingress, egress and utilities since the 1940's (Ex 5)? Or is it that minor obstructions, i.e., trees were already planted within the easement road and three pasture fences, two that had gates, and one that could be unwired from a post in a couple minutes (RP 157), crossed the road when Keller purchased in 1993? Neither construction of the house nor the placement of minor obstructions was Plaintiffs' doing. More importantly, neither building of the home nor the minor impediments interfered with the permanent use of the easement road or Plaintiffs' continuous use of the original easement for utilities and pedestrian ingress and egress. There simply wasn't anything for Plaintiffs to bring to Defendants' attention that would suggest that Plaintiffs' silence estops them from asserting their interest in the easement.

If Defendants did not want anyone to use the road they could have said so. The record shows no such objection by the Defendants to Plaintiffs' continual use of the

original road. Plaintiffs used the original easement road from the time of their purchase in 1993 for utilities and pedestrian ingress and egress without any question of right. It was only after the Plaintiffs' letter to Defendants announcing resumption of full use of the road that Defendants denied Plaintiffs use of the road (Ex. 37). At that point, the Plaintiffs started this suit and were not silent on the issue.

V. MUTUAL CONSENT

21. Use Of The Alternate Road Does Not Constitute Consent To Relocation.

Defendants state in their Brief at Page 19 that

. . . They (Plaintiffs) did not argue an easement by necessity, and thus such a theory has been waived. RAP 2.5.

Plaintiffs did not have to plead easement by necessity because the original easement was never relocated. Plaintiffs' position follows that expressed by the Washington courts in adopting the view of Restatement Third regarding relocation. The reason for the demonstration that the alternate road is dangerous is to point up the fact that Plaintiffs would never have agreed to a relocation of the easement road.

Washington appellate courts have not adopted the approach of *Restatement (Third) of Property Servitudes* (2000) under which an easement generally may be relocated by the owner of the servient estate, so long as the relocation will not significantly lessen the utility of the easement, not increase the burdens on the owner of the easement in its use and enjoyment, or frustrate the purpose for which the easement was created.

In *Crisp v. Van Laecken*, 130 Wn.App. 320, 122 P.3d 926 (Wash.App. Div 2 2005), the Washington appellate court specifically denied the Restatement's approach to this issue:

Judicial relocation of established easements, such as the one at issue here, would introduce uncertainty in real estate transactions. The Restatement's version of the relevant rule could invite endless litigation between property owners as to whether a servient estate owner may relocate an existing easement without a dominant estate owner's consent.

Crisp at 325-26.

Plaintiffs neither assert nor waive the rights of non-parties to this suit whether aligned with their position or not.

23. Clark Lake Development's Understanding Of The Location Of The Easement.

Defendants state in their Brief at Page 10 and 26 that

As a partner, he (Darrell Harrison of CLD) understood that once built, the new road provided exclusive access to the CLD properties (RP 1196 & 1198).

Review of Darrell Harrison's testimony at RP 1196 and 1198 confirms that Darrell Harrison did not state this. There is no testimonial or documentary evidence that Clark Lake Development agreed to relocate or abandon the original easement.

24. Plaintiffs Have Not Agreed To Relocate The Easement.

Defendants state in their Brief at Page 23 that

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.

No relocation of the easement has occurred. Relocation requires mutual consent by both servient and dominant estate holders. See *MacMeekin v. Low Housing Income Institute Inc.*, 111 Wn.App. 188, 45 P.3d 570 (Wash.App. Div. 1 2002).

In *Kesinger v. Logan*, 113 Wn.2d 320 (1989), our State Supreme Court ruled that even a deed that would have relocated access was insufficient to change an easement

where that attempt to relocate was not recorded. In the instant case, there is no deed or other writing that would militate in favor of a finding of mutual consent for relocation posited by the Defendants. (RP 71-75, 176, 183, 240, 245, 248, 262, 535, 539, 554, 556, 1215, 1229-1230, 1236.) Indeed, as set forth in *Kesinger*, a document signed by all landowners, servient and dominant with full requisites of a deed have to be in place for such a relocation by consent to have been achieved. *Kesinger* at 325-26

The facts of this case being to the contrary of what the Doctrine of Mutual Consent requires, this court should conclude that there has been no mutual consent that affects the location of Plaintiffs' easement road.

VI. ATTORNEY'S FEES

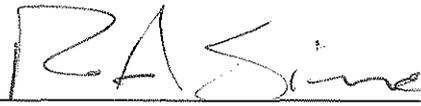
25. Reply to Defendants' Request For Attorney's Fees And Costs.

Attorney's fees are not awardable in the courts of review any more so than they are in the trial court, which they are not. The Defendants are not entitled to attorney's fees on appeal as they request at Page 41. *Lamar Outdoor Advertising v. Harwood*, 29024-7-III (WACA).

VII. CONCLUSION

For the reasons set forth above, the Judgment of August 18, 2010, granting Declaratory Relief, Reforming Easement and Reforming Deeds must be reversed, and Plaintiffs' right to use of their original, deeded easement restored.

Respectfully submitted this 18 day of July, 2011.


ROBERT A. SIMEONE, WSBA #12125
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of July, 2011, I caused to be served a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF by the method indicated below, and addressed to the following:

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BONNIE INMAN