

No. 293491

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

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STEPHEN SIPES and BRENDA KELLER,

Plaintiffs, Appellants

v.

JOHN BANGERT, CONNIE LAMBERTSON-BANGERT,

JERRARD ALCOCK and PATRICIA EVANS

Defendants, Respondents.

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APPELLANTS' BRIEF

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ROBERT A. SIMEONE,  
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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in not finding that the 1982 Purchaser's Assignment and Contract Deed (PACD) re-created the (Plaintiffs') original easement road. (Finding of Fact 'C', CP 230; Conclusion of Law 'B', CP 239.)

2. The trial court erred in not finding that placement of utilities along with pedestrian ingress and egress constituted use of the re-created original easement road so as to refute abandonment. (Finding of Fact 'G' & 'H', CP 233-234; Conclusion of Law 'D', CP 240.)

3. The trial court erred when it found that pedestrian, motorcycle and 4-wheeler traffic was intermittent. (Finding of Fact 'G', CP 233.)

4. The trial court erred when it concluded that Clark Lake Development (CLD) had the ability to affect the easement location after it had no ownership interest in properties it previously owned. (Finding of Fact 'D' 'E' & 'I', CP 231-232, 234-235; Conclusion of Law 'C', CP 239-240.)

5. The trial court erred when it found that Stephen Sipes took steps to discourage use of the original easement road and agreed to establish the easement elsewhere. (Finding of Fact 'H', CP 233-234; Conclusion of Law 'C', CP 239.)

6. The trial court erred in concluding that Plaintiffs/Appellants are adversely possessed of this easement. (Finding of Fact 'F', CP 232-233; Conclusion of Law 'D', CP 240.)

7. The trial court erred in concluding that Plaintiffs/Appellants have abandoned their deeded easement. (Finding of Fact 'F', CP 232-233; Conclusion of Law 'C', CP 240.)

8. The trial court erred in concluding that Plaintiffs/Appellants are equitably estopped from using their deeded easement. (Finding of Fact 'F', CP 232-233; Conclusion of Law 'E', CP 240-241.)

9. The trial court erred in concluding that the original easement shifted to the alternate access road 14 years before Plaintiffs took ownership of the dominant estate. (Conclusion of Law 'C', CP 239.)

10. The trial court erred in granting declaratory relief that reformed the Plaintiffs' easement and reformed deeds to reflect extinguishment of the original easement. (CP 249-255)

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the 1982 PACD between Stephen Sipes and Robert & Myra Sipes re-create Plaintiffs' original access and utility easement that had merged by unity in 1976? (Assignment of Error 1.)

2. Does the easement re-created in the 1982 PACD after the creation of the alternate road, coupled with the subsequent non-vehicular use of that original road, make it a created, yet unopened, easement? (Assignment of Error 1.)

3. Do utility and pedestrian ingress and egress of the re-created easement road constitute use? (Assignment of Error 2 & 3.)

4. Do pedestrian and utility use of the re-created easement negate adverse possession? (Assignment of Error 3 & 6.)

5. Do pedestrian and utility use of the re-created easement negate abandonment? (Assignment of Error 3 & 7.)

6. Do acts and conduct by Defendants/Respondents' predecessors estop Plaintiffs/Appellants of their right to use the re-created easement? (Assignment of Error 8.)

7. Does non-use of an easement without more constitute abandonment? (Assignment of Error 7.)

8. What level of interference with an access easement can occur without there being abandonment? (Assignment of Error 7.)

9. After developer CLD had divested itself of its ownership interest in its properties, was it thereafter incapable of changing the location of the original easement? (Assignment of Error 4.)

10. Did Stephen Sipes take any steps to discourage use of the original easement amounting to abandonment? (Assignment of Error 5.)

11. Plaintiffs allowed Defendants Bangert, their relatives, to pasture cattle upon the original easement road. When Bangerts' cattle operation was over and Defendants stopped using the land underlying the easement road, plaintiffs notified defendants of their intention to once again use their deeded access road. Is the period of time when permissive use of the easement road for the cattle operation excluded from any potential adverse period? (Assignment of Error 6 & 7.)

12. Do The Actions Of Defendants Or Their Predecessors Estop Plaintiffs From Asserting Their Claim To The Original Deeded Easement? (Assignment of Error 8.)

13. Can the location of an access easement shift without mutual consent of all dominant and servient estate owners? (Assignment of Error 9.)

### **C. STATEMENT OF THE CASE**

#### **1. Property Conveyances:**

In 1976 Clark Lake Development (CLD) marketed real property for sale in Stevens County. All property was subject to an express easement for ingress, egress and utilities across a long-existing road referred to in this lawsuit as the "original easement". That marketed

property consisted of the following tracts of land in Township 31 North, Range 37 EWM: Section 2: One 40 Acre Parcel; Section 3: All Parcels; and Section 10: Two 40 Acre Parcels. (Ex 6.)

Between October 1976 and May 1978 CLD sold all of this property to purchasers Beebee/Chambers, Melton, Their, White, Miller, Sipes and Eardley, and was divested at that time of all of its ownership interest in this development property. (Ex 4A-J.)

In October 1976 Stephen Sipes purchased 240 acres and an additional 24 acres in 1977. (Ex 4C-F.) As to Stephen Sipes' 264 acres the original easement merged because both dominant and servient estates subject to the original easement came into common ownership.

Robert & Myra Sipes, Stephen's father and mother, made purchase contract payments on a portion of the property that Plaintiff Stephen Sipes purchased in 1976 which included Government Lot 3. (RP 193.)

In 1982 Plaintiff Stephen Sipes conveyed by way of Purchaser's Assignment of Contract and Deed (PACD) that portion of the property, 160 acres, to his mother and father reserving unto himself the original easement expressly spelled out in that PACD. This 160 acres was contiguous to county road, and was the next parcel in line to Stephen Sipes' retained land. That property was subject to the easement that serviced the other former CLD properties above. The reservation

language in the PACD re-created the original, appurtenant easement for ingress, egress and utilities to Stephen Sipes' remaining property that included Government Lot 2, the servient estate being Government Lot 3, which contains that land now owned by Defendants. (Ex 7.)

In 1986 Stephen Sipes lost his remaining property to foreclosure. (Ex 110 & 111.) His property reverted to CLD and was subsequently sold to Meyers (Alcock-Evans predecessors) in 1992, Parcel Nos. 1629325, 1599685, 1599675; Hogan in 1992, Parcel No. 1599650; Bangert in 1992, Parcel No. 1629350; and finally to Keller in 1993, Parcel Nos. 1599600 and 1629300. (Ex 3, 6) In 1996 Keller Quit Claimed her land to herself and her husband Stephen Sipes, Appellants herein. They have title to that piece to this very day. (Ex 121, 189, 116, 118, 119, RP 355.) The Keller Deed is silent as to access/utility easement. (Ex 118.)

In 1987 Defendant John Bangert purchased the E ½ of Government Lot 3, a portion of the property Stephen Sipes had conveyed to his parents, Robert and Myra Sipes. (Ex 115.) Alcock/Evans purchased the W ½ of Government Lot 2 in 1995 (Ex 120.)

Plaintiffs and Defendants all own additional property, but for clarity, Bangerts own the E ½ of Government Lot 3, (Parcel No. 1600710); Alcock/Evans own the W ½ of Government Lot 2, (Parcel No. 1599685); and Keller/Sipes own the E ½ of Government Lot 2, (Parcel

No. 1599600), all of which are subject to the easement created by the PACD. (Ex 3, 7.)

Upon the sale of its last parcel to Eardley in 1978, and until Sipes' foreclosure in 1986, CLD didn't own any property subject to the easement under discussion. Between 1986 and 1993 all of Plaintiff Stephen Sipes' property that was foreclosed was resold by Clark Lake Development and all CLD contracts were satisfied. By 1993 CLD once again had no interest in any property subject to the easement under discussion. (RP 1236, 1220-1231.)

**2. History of Easement Road:**

In 1976 there was an existing foundation of a house that burned down and a barn with an attached loafing shed on Government Lot 3. The only road accessing the Clark Lake Development property above Government Lot 3 went past that barn and foundation. (RP 510, 1222-1226.)

Robert and Myra Sipes, who are the parents of Stephen Sipes and his sister Connie Bangert, lived on the Government Lot 3 property off and on beginning in 1977. (RP 528.) They pastured cows and horses for a year or two and kept them contained by an additional little barn on the property, and along the lake in front of the house. Robert, Myra, Vicki and Stephen Sipes all testified that there were no fences without gates

across the easement. (RP 184, 189. 247, 252-253, 838 – 839.) The pictures provided by Defendants show that there were no fences along the original easement road as it traversed the property in 1987 when Bangert's purchased. (RP 78, Ex 17.)

Beginning in 1977 Robert and Myra Sipes began to improve the barn. Eventually they built a small apartment in the barn. (RP 530-531.) Connie Bangert, John Bangert and Stephen Sipes helped in certain phases of the construction. (RP 531, 180.) During the same period of time Robert Sipes began construction of a house on the original concrete foundation and wall of the old burned down house. At that time, the original easement went past the foundation of the burned down house. (RP 180, 241-242, 532.)

Between 1977 and 1978 Stephen Sipes improved his property in Government Lot 2. He hired Aqua Drill of Couer d'Alene, Idaho to drill a well. Robert Sipes and John Bangert assisted Stephen Sipes in installing the pump in said drilled well. Stephen Sipes contracted with Washington Water Power to install underground power from the power pole at the barn in Government Lot 3 to his home site in Government Lot 2, quite a distance away. Stephen Sipes also hired one Mel Dashiell to excavate a septic system and Colville Valley Concrete to deliver a 1200 gallon septic tank. Aqua Drill, Washington Water Power, Mel Dashiell and Colville

Valley Concrete all used the original easement for access to Government Lot 2. (RP 548 – 550.)

In 1979 Robert Sipes created a firebreak that eventually was used as an alternate road to Government Lot 2. When that firebreak/alternate road was created, two roads existed across the property. (RP 243.)

Although the firebreak could be used as a road, it is steep, upwards of 16.6 percent grade. (RP 281.) It is treacherous in winter. At times it is impassible even by four wheel drive vehicles. Robert & Myra Sipes continued to use the original easement after the firebreak/alternate access was created. (RP 183-184, 246.) As stated above, in 1982 Plaintiff Stephen Sipes conveyed the E ½ of Government Lot 3, in which lies the origin of the easement road, to his parents. Stephen Sipes testified that he used the original easement exclusively until he lost his property to foreclosure in 1986. (RP 576 – 577.)

Neither Robert and Myra nor Stephen Sipes consented to the relocation of the original easement. Rather, they regarded the firebreak road as a second road. (RP 248, 243-244, 185, 539.) No writing evidences consent by any of the property owners, either dominant or servient, to the relocation of the original easement. (RP 71-75, 176, 183, 240, 245, 248, 262, 535–536, 539, 554, 556, 1215, 1229-1230.)

In 1987 John Bangert purchased the East ½ of Government Lot 3 from Robert and Myra Sipes. (Ex 115.) The two roads discussed above existed at that time. At no time did Robert & Myra Sipes ever represent to the Bangerts that the alternate access would be the future access road to property above. (RP 183, 245, 248.) At no time did Stephen Sipes ever represent to the Bangerts that the alternate access would be the future access road to the property above as Stephen Sipes had no interest in any property subject to the easement after foreclosure in 1986. (Ex 111.) He only reacquired that land through his wife Brenda Keller's purchase in 1993. (Ex 9, RP 570, 575.)

In 1987 the Bangerts replaced their water line putting it on top of the underground power which ran along the original easement road. They had Mel Dashiell bring in an excavator and dig the water line up the original easement road. (RP 123 – 131.)

When Keller purchased in 1993, Defendants Bangert were pasturing cattle, which activity began in approximately 1990 - 1991. (RP 1061.) Defendant John Bangert and his son Joshua erected and maintained fences to contain the cows. They installed a gate in the fence along the original easement road to allow for escaped cows to be returned to the pasture. (RP 156, 416.)

Upon Keller's purchase in 1993 she and her family began pedestrian use of the original easement and vehicular use of the alternate access to permit the Bangerts to continue to pasture cows. (RP 1040.) Alcock/Evans purchased in 1995 and allowed Bangerts to pasture cattle across their property and upon the original easement road. (RP 472-474, 139.)

From 1993 to 1996 Plaintiffs lived at 4033 Bissell Rd., a short distance away from their ownership herein, which land was owned by Robert and Myra Sipes. They frequently used both the original and alternate accesses during this time. (RP 1040, 1093.)

In 1996 CLD recorded what it called a "Clarification of Easement". As mentioned earlier, all CLD contracts were satisfied by 1993. CLD no longer had any interest in any property subject to the easement when the document was recorded in 1996. (RP 1236.)

Beginning in 1995 Keller-Sipes improved their real property in the East ½ of Government Lot 2 by connecting to the existing well and underground power at the pump house. They installed a septic system and footing/foundation for a manufactured home. Stephen Sipes smoothed the alternate access road to allow for the passage of a manufactured home to the homesite. The home was delivered in 1997. Plaintiffs moved into their home in 1998 and have resided there since. (RP 1043-1045.)

From 1998 through 2008, pedestrian use of the original easement was continuous. Plaintiffs' daughter, Kaytlyn Sipes, testified that she used the original easement at least once a month. (RP 692–695.) Plaintiffs both testified that they frequently walked the original easement to get their mail at the County road and to visit Defendants Bangert. (RP 1046–1047, 606.) This walk along the easement road crosses property owned by Defendants Alcock/Evans. (RP 1034.)

The underground power that Stephen Sipes installed in 1977 along the original easement was in the same location when Keller-Sipes purchased their property in 1993. (RP 135, 549, 593-596, 135-136, 1043.) The underground power remained in its original location until 2001 – 2002 when Avista replaced it because it was faulty. (RP 593–596.)

John Bangert asked Avista to relocate the underground power through his field to the alternate access. Bangert did not give Avista an easement to run the power through his field. The power now runs underground from the power pole outside Bangerts' barn (located at the site of the original barn discussed herein) through their field south to the alternate access and then along the alternate access for approximately 300 feet, there blending into the original easement road. Avista changed the routing because Bangerts' water line ran up the original easement road and Bangert was afraid Avista would damage his water line. (RP 135.)

In 2005 the Bangerts stopped pasturing cows. Thereafter, in 2006 both pasture fences that crossed the original easement were removed. (RP 120, 1061.) Alcock/Evans removed the pasture fence on their property, smoothed the berm and opened up the original access easement across their property. (CP 271.) John Bangert removed the pasture fence on his property near the garden. (RP 120, 1061-1062.) Vehicular traffic began to flow along the original easement. (RP 112-113, 979-980, 1065–1067.)

Vehicular use of the Plaintiffs' deeded easement is crucial to the enjoyment of their property. The alternate road is unacceptably unsafe and dangerous, and in winter often prevents access to Plaintiffs' property. It is steep and drops off precipitously on the downhill side. Plaintiffs cannot get up the road in 4-wheel drive vehicles. They have sustained extensive damage to their vehicles when they have slid backwards in attempting to navigate the slope, as steep as 16.6 percent in places. (RP 1048–1053, 536-537, 281, 272, Ex 16A-B.)

On November 6, 2008, Plaintiffs wrote to Defendants to inform them of their intention to begin using the original easement again, as the cattle operation had ended. In response to Plaintiffs' November 6, 2008 letter, Bangerts and Alcock/Evans replied that they would consider use of the easement as criminal trespass. (Ex 34 & 37, RP 1067, 1375–1376.)

Bangert erected a fence across the easement road near his garden

on November 18, 2008. Alcock erected a fence across the easement road on his property where the alternate road and original easement meet on November 30, 2008. The instant law suit followed. (RP 1067–1068.)

#### **D. ARGUMENT**

1. **Substantial Evidence Does Not Support The Challenged Findings Of Fact and Conclusions Of Law**

Plaintiffs have challenged all Findings of Fact and Conclusions of Law adverse to them. (CP 194-215.) “Substantial evidence” is evidence in sufficient quantities to persuade a fair-minded person of the truth of the declared premise. *Edmonson v. Popchoi*, 155 Wn App 376, 383, 228 P3d 780 (Div. 1 2010). Plaintiffs endeavor to have the court review the sufficiency of all adverse findings and conclusions due to their evidentiary insufficiency.

2. **An Express Conveyance Revives An Easement Previously Extinguished By Merger**

*a. The Description Of The Road By Direction Confirms That The Original Easement Road Was Reserved And Revived In The 1982 Purchaser’s Assignment Of Contract Deed.*

Plaintiffs agree that in 1976, Plaintiff Sipes bought parcels that were both dominant and servient. As to those parcels, the easement was

extinguished by merger. *Radovich v. Nuzhat*, 104 Wn.App. 800, 16 P.3d 687 (Wash.App.Div. 1 2001).

However, in 1982, Plaintiff Sipes conveyed land to his parents by Purchaser's Assignment and Contract Deed. A portion of that property, now owned by Defendants Bangert, lies between the property Plaintiff Sipes kept and the County Road. Sipes reserved the original easement road to himself in the PACD.

These facts raise the issue of whether or not the previously extinguished easement was revived by this new reservation.

In *Radovich*, the court spoke to this point. The court stated that  
When 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 the 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* at 805-806. (Emphasis Added.)

In the instant case, the plain language in the Purchaser's Assignment of Contract and Deed dated March 22, 1982 from Stephen B. Sipes and Priscilla Michelle Sipes to Robert B. Sipes and Myra E. Sipes expressly reserves the original easement road to Plaintiff Sipes. That

easement, by way of the PACD, revives the original easement road regardless of whether the easement was previously extinguished by merger. (Ex 7.) In pertinent part the PACD reads as follows:

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. (Emphasis Added)

The description “running to the northeast corner” is of particular importance in identifying the original easement road as the one being granted in this conveyance. It is also the same language used in the 1976 Deed from CLD to Stephen Sipes, when only one road existed. (Ex 4D).

The PACD recites that the easement runs from the county road near the north line of Section 3, running to the northeast corner of Government Lot 3. The alternate road runs in an easterly direction from the county road starting well south of the north line, and does not run to the northeast corner of Government Lot 3. The PACD clearly describes the original easement. Therefore the PACD as fashioned in the conveyance re-created the original easement road to Stephen Sipes’ remaining property.

If there is any doubt as to what easement was reserved to Stephen Sipes, the express language spells out that it was the original easement due to the “northeast” directional language it contains.

***b. Nothing More Than The Granting Language In The Reconveyancing Is Required To Re-Establish The Original Easement***

The *Radovich* court contemplated whether something more is required in the granting language to re-create a previously extinguished easement than is required to create the easement in the first instance. In its decision, the Court noted there is no authority for a heightened standard of clarity to accomplish the re-creation of an extinguished easement.

*Radovich* at 806.

As such, the original easement here was re-created by express reference. This is very much like the facts in Radovich where the court said

We find that the recent conveyances to respondents in this case were not “mere references” to the earlier easement because the language in those conveyances was sufficient to create the easement anew.

*Radovich* at 808.

As was the case in *Radovich*, the 1982 PACD did not just reference the original easement. 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.

**3. Plaintiffs’ Title Includes A Perpetual, Non-exclusive, Appurtenant Easement**

An easement appurtenant is an irrevocable interest in land which has been obtained for duly given consideration. *Bakke v. Columbia Vly. Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956). There is a strong presumption in Washington that easements are appurtenant. *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, 102 Wash. 608, 618, 173 P. 508 (1918). An easement appurtenant passes to successors in interest by the conveyance of the property to which it is appurtenant regardless of whether it is specifically mentioned in the instrument of transfer. *Loose v. Locke*, 25 Wn.2d 599, 603, 171 P.2d 849 (1946); *Cowan v. Gladder*, 120 Wash. 144, 145, 206 P. 923 (1922); *Kirk v. Tomulty*, 66 Wn App 231, 831 P 2d 792 (1992).

Here, the issue that arises is what access right came with Plaintiffs' purchase of their presently owned land in 1993? Although the deed is silent as to that point, there is no dispute that Plaintiffs gave consideration for access easement to their property when they purchased. As to this very property (Government Lot 2), the previously merged access easement was expressly revised by way of the 1982 PACD. The conclusion to be reached is that it was the re-created, original easement road Plaintiff took in 1993 when she bought in Government Lot 2.

The presumption that easements are indefeasible, appurtenant and irrevocable, supports the conclusion that the easement was included in

Plaintiffs' 1993 purchase. It was indeed part of the title to Plaintiffs' land. It was not necessary that the easement be specifically mentioned in the deed from Clark Lake Development to Plaintiff Keller. The easement created by the 1982 PACD ran with the land Plaintiff Keller purchased in 1993 and inhered in her title. This easement never fell out of the inclusions that went with this property. *Kirk v. Tomulty, supra*. It is therefore the re-created original easement that is presently appurtenant to Plaintiffs' property.

4. **The Original Easement Road Remained In Regular Use**

*a. Underground Utility Placement*

Defendants contend that no one used the original easement after the creation of the firebreak/alternate road in 1979. The uncontested testimony is that the original underground power was installed by Stephen Sipes in 1977, going from Government Lot 3 to Government Lot 2 along the original easement road, and remained in that location until 2001 or 2002. (RP 549, 593-596, 135-136.) Bangerts' domestic waterline also traverses the original easement road. (RP 131.)

*b. Plaintiffs' Use Of The Re-created, Original Easement  
Was Continuous And Uninterrupted*

The testimony developed at trial showed that pedestrian use, while not frequent, was regular considering the fact that the Plaintiffs are the only

landowners who reside on their property year round. (RP 668-669, 1053-1054.) The usage of the roads whether the original easement or the alternate road, is naturally light. Defense witness Hogan testified that he visited his property only seven to eight times per year. (RP 358.) Those using the easement other than Keller-Sipes are the odd trespasser, hunter, or perhaps a realtor showing real property. (RP 256, 552.)

Continuous and uninterrupted use does not mean necessarily constant use of a roadway. *810 Properties v. Jump*, 141 Wn App 688, 170 P 3d 1209 (WA 2007) Citing *Lee v. Lozier*, 88 Wash App 176, 184, 945 P 2d 214 (1997) (finding seasonal occupancy of a summer house did not destroy the continuity of Claimant's use where the use was consistent with that of a true owner.)

When Plaintiffs' purchased in 1993, pasture fences were already erected across the re-created easement. (RP 1034–1035, Ex 13.) Plaintiffs walked the re-created easement when they lived adjacent to Defendants Bangert at 4033 Bissell Road from 1993 – 1996. (RP 1036.) Plaintiffs moved to Vancouver, B.C. from 1996 until 1998. (RP 1085.) After Plaintiffs' manufactured home was delivered to 4019 Bissell Road in the E ½ of Government Lot 2, Plaintiffs moved in and have occupied the home since 1998. (RP 1046.)

From that time, Plaintiffs continued to walk the re-created original easement to get their mail at their mail box on the County road and to visit Bangerts. They also walked the re-created easement when the alternate road was impassible by vehicle due to adverse weather conditions. (RP 605-607, 1053.)

Plaintiffs' children walked the re-created, original easement to and from the school bus which picked the children up on the County road. They also walked the re-created, original easement to Defendant Bangerts' home to borrow video games and movies. (RP 692-693.) Kaytlyn Sipes testified that she alone used the easement an average of once a month if not once a week. (RP 695.) Kaytlyn Sipes and Brenda Keller both testified that they witnessed Connie and John Bangert frequently walking the original easement to access their pump house on Plaintiffs' property. (RP 693, 1048.)

John and Josh Bangert testified that they put a gate in the fence that crossed the original easement on the Alcock-Evans' property to allow escaped cows to return to their pasture. This point indicates Bangerts themselves used the original easement road to get back and forth to the neighboring Alcock property where they kept their cows in their day-to-day activities of pasturing cattle. (RP 156, 427.)

After the pasture fences were removed in 2006, the original

easement road was used by four-wheelers and a cat. (RP 956, 979–980, 753, 111–113, 1065–1066.) Stephen Sipes also mowed the original easement with his riding lawn mower and drove his tractor to retrieve rocks off Alcock/Evans property. (RP 912–913, 1067.)

Use of the re-created, original easement by Plaintiffs has been continuous. The trial court erred when it found use of the easement was intermittent. (Finding of Fact ‘G’, CP 233.)

**5. Defendants’ Use Of The Land Containing The Re-created, Original Easement Was Permissive**

At trial, it was learned that Plaintiffs and Defendants Bangert were close as family members. Connie Bangert, Stephen Sipes’ sister, told Plaintiffs that the property they eventually bought at 4019 Bissell Road next door to Defendants Bangert was for sale. (RP 801.)

After Plaintiffs purchased their property, Plaintiffs and Defendants Bangert enjoyed many activities such as skiing, white water river rafting and family reunions together. (RP 62, 605, 1046.) Connie and John Bangert babysat Plaintiffs’ children after school. (RP 114, 159, 422, 707–708.) They often visited each other’s homes. (RP 605, 1046.)

When Plaintiffs’ purchased in 1993, Defendants Bangert were pasturing cattle. As Bangerts were close relatives and living on a meager budget, Plaintiffs allowed them to continue to pasture cows with

permission upon the fenced in area of the original easement road as it crossed the Defendants' property. (RP 1040–1041, 590.)

Defendants Alcock/Evans also allowed Defendants Bangert to pasture cattle with permission on their property. (RP 472-473.) Alcock/Evans purchased their property subject to the easement under discussion in 1995. (Ex 11.) Alcock/Evans removed the pasture fence on their property in 2006. (RP 731.) More than ten years of use occurred. John Bangert testified he had Alcock/Evans' permission to pasture cattle on their property underlying the easement. (RP 139.)

Defendants' witness Arnie Johnson owns an irrigation easement across Bangerts' property. (RP 1306–1308, 1327.) Pasture fences were erected across Johnson's water easement. (RP 1333.) Bangerts pastured cows with permission on Johnson's easement for more than ten years. Bangerts did not adversely possess Johnson of his irrigation easement due to their admitted occupancy by permission. (RP 1329, 1334–1037.)

Defendant Connie Bangert's parents, Robert and Myra Sipes, as well as her uncle Lawrence Sipes, permitted Bangerts to pasture cattle on their property to the south west and north of Bangerts' property. (RP 1038-1039, Ex 3.)

These facts raise the issue of whether the Defendants' use of the land underlying the easement was permissive, rather than hostile.

“Permission” is defined in Black’s Law Dictionary 1298 (4<sup>th</sup> ed. 1968) as:

“A license to do a thing; an authority to do an act which, without such authority, would have been unlawful.

Permission can be express or implied, and a use which is initially permissive cannot ripen into a prescriptive right unless the claimant makes a distinct and positive assertion of a right hostile to the owner. *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946); *Crites v. Koch*, 49 Wn. App. 171, 177, 741 P.2d 1005 (1987).

The inference of permissive use is applicable to any situation in which it is reasonable to infer that the use was permitted by sufferance and acquiescence. It is not necessary that permission be requested. *Cuillier v. Coffin*, 57 Wn.2d 624, 626, 358 P.2d 958 (1961); *Roediger v. Cullen*, *Supra* at 707; *Crites v. Koch*, *Supra* at 177. A finding of permissive use is supported by evidence of a close, friendly relationship or a family relationship between the claimant and the property owner. Stoebuck, *The Law of Adverse Possession in Washington*, 35 Wash. L. Rev. 53, 75 (1960). Defendants availed themselves of a family closeness in acquiring Plaintiffs’ agreement to allow Defendants to pasture cattle. They cannot exploit that closeness to their advantage under the pretense that this was not permissive use.

6. **The “Clarification Of Easement” Filed By Clark Lake Development Confirms The Original Easement Road Is The Contemplated Access To The Landowners’ Property**

The court should note two things with regards to the “Clarification”: First, as it pertains to Government Lot 2 and the property to the south and east of Government Lot 2, the description of the easement in the clarification is identical to the description in the deeds from Clark Lake Development to land owners who originally purchased property from CLD in 1976 – 1978 when only one road existed across the property. . . .from the county road in government Lot 3, running easterly to the northeast corner of Government Lot 2.

(Ex 4A-E, 4G-I, 12.). As such, Clark Lake’s effort to clarify the easement road has no effect but to clarify that the original easement road was the one to which all landowners it sold to were entitled.

The easement clarification is not usable at all as a new conveyance. It does nothing except to show that the easement runs along the original easement road. The trial court agreed:

<sup>1</sup> The clarification did not extinguish or create an easement, since it was not consented to by all parcel owners with an interest in such an easement. (CP 231, Finding of Fact ‘D’.)

Secondly, Clark Lake was impotent to clarify the easement in 1996 as it had no ownership interest in property so as to be able to accomplish

anything. (RP 1236.) The same conclusion was reached in *Coast Storage Company v. Schwartz*, 55 Wn 2d 848 (1960) in regard to a similar contention by a party without any ownership interest. *Coast Storage* at 854.

This court should conclude that the “Clarification”, whatever its purport, did not affect the original easement.

7. **No Mutual Consent Was Given For Relocation Of Easement Road**

The Doctrine of Mutual Consent runs through Washington jurisprudence as a method by which access easements can be relocated. Washington has adhered to a traditional rule, that easements can only be relocated by mutual consent. Our courts have expressly chosen not to adopt the approach of the Restatement (Third) of Property Servitudes (2000) which relaxes the level of action necessary for a relocation by consent to obtain. *Crisp v. Van Laecken*, 130 Wn App 320 (2005).

*Crisp* is directly applicable to the facts here. Plaintiffs Crisp tried to relocate an easement that crossed their servient estate without the dominant estate owner’s consent. They wanted to move the easement road crossing their property to accommodate the construction of a home, in the only appropriate location available to construct that home. They sought declaratory relief from the court to allow them to relocate the road.

The Court of Appeals, Division II, affirmed the trial court's denial of the change. In rejecting the Restatement's view on a servient estate's unilateral power to relocate an easement, the court in *Crisp* said

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, regardless of how the easement was acquired, so long as the relocation will not significantly lessen the utility of the easement, increase the burdens on the owner of the easement in its use and enjoyment, or frustrate the purpose for which the easement was created. We decline to adopt the *Restatement (Third)* approach, and adhere to the traditional rule that easements may not be relocated absent mutual consent of the owners of the dominant and servient estates, regardless of how the easement was created.

*Crisp* at 324. Accord, *MacMeekin v. Low Housing Institute*, 111 Wn. App. 188 (2002). (Emphasis Added)

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. The rule adopted by our court and announced in *Crisp* prevents softness and uncertainty in the foundation of landowners' titles and easement rights.

***a. No Writing Evidencing Consent Exists***

The nature of the consent needed to be given effect has been

defined by our courts as well. In *Kessinger 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. The requirements for consent are strict for relocation by consent to be given effect.

The facts applicable to this case are that at no time did Plaintiffs ever reach an accord with the Defendants to where the necessary consent as described by the courts in Washington has ever been reached. There is no deed or other writing or memorandum 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 *Crisp*, 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. 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.

***b. No Consent Given By Stephen Sipes***

At the time Robert Sipes, Defendant Bangert's predecessor, blazed the alternate access road, Plaintiff Stephen Sipes owned the property where the alternate access road is located. As such, Stephen Sipes

would have had to consent to a change of location as well as all other dominant estate owners. No such consent occurred. Rather, Plaintiff Stephen Sipes allowed his father to create a firebreak which was eventually used as an alternate access. (RP 535, 539–540, 548, 554, 556, 575, 1215.)

Even though Stephen Sipes acquiesced in his father's building a firebreak/alternate access in 1979, he specifically re-created and reserved to himself the original easement when he conveyed the property to his mother and father, Myra and Robert Sipes, by way of the above-mentioned PACD in 1982. These actions are not inconsistent with his present claim to use the legally deeded easement road.

At best what occurred upon the alternate road being constructed was that another access was created across Defendants' land. But to say, as Defendants do, that the construction of the alternate access extinguished Plaintiffs' deeded easement, which was re-created by way of the PACD in 1982, after the creation of the alternate access, is contrary to existing law.

There being no showing by Defendants of consent for relocation much less a writing complying with the requisites of a deed per RCW 64.04.010, it must be concluded that this easement was not relocated by consent.

## 8. Defendants Cannot Establish Adverse Possession

Recent case authority confirms that the party claiming adverse possession must establish all elements in support of its position. The court in *Teel v. Stading*, 155 Wn.App. 390, 228 P.3d 1293 (Wash.App. Div. 2 2010) said that permission by the true owner negates hostility. The party claiming adverse possession, the court said, is required to prove that they possessed the disputed area in a manner that was

(1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted for the statutory period of 10 years. RCW 4.16.020(1); *Chaplin v. Sanders*, 100 Wash.2d 853, 857-62, 676 P.2d 431 (1984). The party claiming adverse possession must establish each element by preponderance of the evidence. *Varrelman v. Blount*, 56 Wash.2d 211, 211-12, 351 P.2d 1039 (1960). **Permission, express or implied, from the true owner negates the hostility element because permissive use is inconsistent with making use of property as would a true owner.** *Chaplin*, 100 Wash.2d at 861-62, 676 P.2d 431.

*Teel* at 393 – 394. (Emphasis Added)

*Mueller v. Hoblyn*, 887 P.2d 500 (Wyo. 1994) is a Wyoming Supreme Court case where a servient estate owner in a position of the Defendants here asserted that an access easement had been extinguished by one of several alternative theories. *Mueller* at 504. The report studiously reviews principals of law pertaining to adverse possession, extinguishment by abandonment and termination by estoppel. *Mueller* cites with approval *Beebe v. Swerda*, 58 Wn.App. 375 (1990). *Swerda* sets forth much of the accepted Washington law regarding usage by a

servient estate owner of property covered by easement. *Mueller* at 508.

As such it is an aid to the consideration of all issues raised in the instant case.

Addressing the adverse possession theory, the Wyoming court in *Mueller* said that the servient owner's actions there in maintaining boundary fences or making agricultural use of the land by growing crops on ground burdened by the easement were "not sufficient" to terminate the dominant estate owner's easement by adverse possession. *Mueller* at 507. The facts of Mueller are sufficiently similar to those of the instant case to make it an aid to this court in resolving issues pertaining not only to adverse possession but also abandonment, *infra*.

In the Arizona case of Sabino Town and Country Estates Ass'n v. Carr, 186 Ariz. 146 (App. 1996), 920 P.2d 26, cited in *Mueller*, the court said:

"The evidence also was undisputed that, despite Sabino's fencing the east and west sides of its common area, Packard's family and others continued to use the area, with Sabino's knowledge and consent, for hiking, jogging horseback riding and some moped riding. Packard's mere non-use of the easement for motor vehicle ingress or egress does not establish Sabino's adverse possession. . . ("The law is well-settled that the owner of an easement created by express grant is under no duty to make use of the easement in order to retain his entitlement."). . . We adopt and apply that principle here but limit its application to cases like this involving claims of partial extinguishment of an easement's scope of use by adverse possession. In such cases, when an unrestricted, perpetual, recorded easement of ingress and egress has not been needed or used for that purpose, and when the owner of the dominant estate has had uncontested

access to the easement and has continuously used it for other purposes, “the maintenance of a fence which obstructs (the) unused easement does not terminate the easement by adverse possession.” (Emphasis added). *Mueller*, 887 P.2d at 509 (servient estate owner’s actions in maintaining boundary fencing, growing crops and drilling water well did not terminate easement by adverse possession). Under such circumstances, there must be a clear, unequivocal message from the servient estate’s owner, beyond mere fencing, prohibiting any future use of the easement for ingress/egress. The easement holder should not be left to speculate as to whether an easement may be partially extinguished or its scope of future use limited.”

**a. Exclusivity Element: No Prohibition Of Use**

The exclusivity requirement of adverse possession dovetails with the permissive use argument and with the logic and reasoning set out in the *Sabino*, supra, case. The Defendants cannot establish the exclusivity element of adverse possession, since Plaintiffs have continuously used the physically described easement for underground electricity lines that run down the original easement, and pedestrian ingress and egress. In order to have adverse possession, Defendants would have needed to prohibit the Plaintiffs from the use and occupancy of the easement, which they have not done. *Sabino* at 150.

The facts of this case are that Stephen Sipes purchased his original property holdings in 1976. He owned property and used the original easement road exclusively through 1986. Brenda Keller, Stephen Sipes’ wife, repurchased their current property and resumed using the original easement in 1993. They have used the original access road unabated for

their utility lines. Thus only seven years elapsed where the original easement was not used by Plaintiffs. No adverse possession can have occurred. RCW 7.28.010.

***b. Hostility Element: Periods Of Use By Defendants During Plaintiffs' Non-Use Are Not Adverse***

Use of the land underlying the easement by servient owners during periods of non-use by dominant estate owners. The decision in *Beebe v. Swerda*, 58 Wn.App. 375 (1990) states

*"Burkhard v. Bowen*, supra, held that, among themselves, common grantees from the dedicator may not question the right of ingress and egress over a platted street, and that such a private easement cannot be destroyed even by adverse possession. Swerda cites no case holding that a landowner extinguished an easement across his own property by adverse possession. 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. 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."

*Swerda* at 383-384.

The court in *Cole v. Laverty*, 112 Wn. App. 180 (2002) found that

During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement's future use.

*Cole* at 185; *Edmonds*, 54 Wn. App. at 636. (Emphasis Added)

The *Cole* court went on to say that

. . .if an easement has been created and no occasion has arisen for its use, the owner of the servient estate may fence the land and that use will not be considered adverse until (1) the need for the right of way arises, (2) the owner of the dominant estate demands that the easement be opened, and (3) the owner of the servient estate refuses to do so.

*Id.* at 185 citing *Edmonds* at 636-37.

After John Bangert purchased his property from Robert and Myra Sipes he pastured cows within the area previously fenced. The undisputed testimony was that John Bangert stopped running cattle in 2005. (RP 473-474, 731, 760, 1061.) Plaintiffs demanded by way of letter to the Defendants dated November 6, 2008, that they be restored to their easement access. (Ex 28.). Thereafter Defendants put up fence. (RP 1067-1068.) Then and only then did the adversity begin. The period of non-use by Plaintiffs, dominant estate holders, wherein Defendants

occupied the land did not add to the adverse period claimed by Defendants. At best, the adverse period would be from 1986 – 1993.

*c. Adverse Use Must Be Clearly Hostile By Servient Estate Owners*

Nothing Defendants did put Plaintiffs on notice of hostility until the exchange of correspondence in November, 2008 referred to above. According to the Defendants, the fences, rocks and berm already existed prior to the severance of unity and re-creation of the easement in 1982, which therefore had no adverse effect.

The conclusion the court should reach is that no adverse possession occurred due to there being 1) no exclusivity, 2) no hostility, and 3) no requisite 10-year period, that was adverse.

**9. Abandonment**

*a. Non-use Does Not Constitute Abandonment*

The only remaining theory that can terminate Plaintiffs of their original easement is the abandonment theory based upon non-use of the newly created easement at the time of severance in 1982. Defendants and their witnesses have testified that after the creation of the alternate road by Robert Sipes in 1979, no one ever used the original easement. The court in *Heg v. Alldredge*, 157 Wn.2d 154 (2006) established that

Extinguishing an easement through abandonment requires more than mere nonuse – the nonuse “must be accompanied with the express or implied intention of abandonment.”

*Heg* at 161 citing *Winsten v. Prichard*, 23 Wn.App. 428, 431, 597 P.2d 415 (1979)(quoting 2 GEORGE W. THOMPSON, *Commentaries on Modern Law of Real Property* § 322, at 69 (John S. Grimes repl. 1961)).

In *Heg* the trial court disposed of the question of abandonment by simply concluding

[m]ere nonuse of an easement for no matter how long a period will not extinguish it. . .

*Heg* at 162.

***b. An Element Of Adversity By Clear And Convincing Proof Should Be Required Before Abandonment Can Be Found.***

The facts alleging non-use, however, still raise the issue of whether or not this easement was terminated by abandonment. Washington law does not favor termination of easements. *Edmonds*, 54 Wn. App. at 636. By including the requirement of use contrary to the purpose of the easement, that is, an adverse use, the courts have incorporated notions of adverse possession into abandonment concepts.

The fences and gates, ultimately removed by Defendants in approximately 2006, did not constitute permanent obstructions that would otherwise put Plaintiffs or Plaintiffs’ predecessors on notice that the

Bangert's or Alcock's were asserting hostile, exclusive interest over the easement. See *Edmonds*, 54 Wn. App. at 636, 637 (construction of a fence is not a sufficiently inconsistent use to constitute adverse possession).

Jurisdictions from around the United States have addressed the issue of abandonment. The rule to be extracted from the wide sampling that follows is that non-use, unless accompanied by actions of the dominant estate owner itself evidencing abandonment, will not terminate an easement. In several, the fact patterns are very similar to and on point with that of the instant case and have resulted in decisions and outcomes favorable to parties in the position of the Plaintiffs here.

Reference is once again made to *Mueller v. Hoblyn*, 887 P.2d 500 (Wyo. 1994) cited in Section 8 of this Memorandum Re: Adverse Possession. In *Mueller*, the servient estate owner attempted to terminate dominant estate owner's access easement by, *inter alia*, a theory of abandonment. Interestingly, the servient estate owner's advancement of the abandonment theory was based upon the use of an alternate access by the dominant estate owners. This usage, the servient owner's argument went, evidenced the intent to abandon the road. The use of the alternative road was for some twenty-seven years, from 1963 to 1990. *Mueller* at 505 - 506. The holding in *Mueller* was that use of the alternative route did not establish an intent to abandon an easement. On the issue of use of an

alternate route of access, the court was clear that such conduct did not constitute abandonment:

While (dominant estate holders) Coffee and Hoblyn did make use of another means of access, the failure to use the easement does not mean the purpose of the easement ceased to exist. *Crabbe v. Veve Associates*, 150 Vt. 53, 549 A.2d 1045, 1048 (1988). The easement holders retained the right to use the easement even if they used an alternative route. *Jackvony*, 584 A.2d at 1117. We hold that Coffee, Hoblyn and their predecessors-in-interest did not abandon the easement granted by the Englemans. *Carney*, 757 P.2d at 562-63.

*Mueller* at 506.

The ruling of the court in *Mueller* is particularly supportive of Plaintiffs' position here. This is because in *Mueller* the court reviewed facts where the dominant estate owner while using an alternative means of access failed to use the easement expressly granted them altogether.

*Mueller* at 506. The court, however, held that the easement holders retain the right to use the easement even if they use an alternative route and turned away servient estate owner's abandonment theory notwithstanding that fact. Citing other Wyoming precedent, the court went on to say that the owner of the dominant easement would have two available routes of access to its property. *Mueller* at 506.

Plaintiffs in the instant case present a better set of facts in arguing against abandonment in that they did continue to use the original easement, even during a period of time when the road was fenced by the

Defendants for their cattle operation purposes. (RP 605-607, 694-695, 1047-1048.)

In *Shields v. Villareal*, 177 OR APP 687, 33 P3d 1032, (Court of Appeals, Oregon 2001). Plaintiffs sought a declaratory judgment confirming their ownership of an express easement across Defendant's property and an injunction ordering Defendant to remove all impediments from it and to refrain from future interference. In Defendant's Answer, they argued Plaintiffs had abandoned the easement and that it should therefore be extinguished.

The facts in Shields were in several respects comparable to those presented here. Plaintiff dominant-estate holder owned property immediately north of property owned by Defendants. Plaintiff had an express easement by deed for access. Plaintiffs improved their property by building a shop and a parking lot. In the process they graded their parcel and put in a curb and a row of bushes along the property line between their lot and the Defendants. As a result of that improvement the elevation of the Plaintiffs' property was higher than the elevation of the easement road on Defendant's property by about as much as six feet at the one end. That action rendered the easement unusable for its stated access purpose.

Some twelve years later, the Defendants turned their undeveloped parcel into a steel yard. In the process they placed large amounts of fill dirt on the easement blocking the Plaintiffs' ability to traverse its length. Defendants contended that by virtue of the Plaintiffs having earlier planted bushes that had grown into a huge hedge that completely blocked vehicular access that the Plaintiffs did not and could not use the easement, Defendants asserting a theory of abandonment. Defendants added that they never observed the Plaintiffs vehicles jumping over the tree-lined curb or otherwise making use of the easement and that they observed no vehicle tracks on the easement. Neither was there any observation of any maintenance being performed on the easement. The trial court found that by a preponderance there that Plaintiffs had "manifested an intent to relinquish possession. . . by performing acts inconsistent with the continued use of the easement and subsequently relinquished possession of the easement by non-use. *Shields* at 690.

On *de novo* review, the Oregon Supreme Court reversed and remanded. The court first determined that the clear and convincing evidence standard was the standard of proof that was applicable for an adverse party to prevail on the claim of abandonment. Washington has applied the same standard in cases involving abandonment of a water right. *Public Utilities District No. 1 v. Department of Ecology*, 146 Wn 2d

778, 779 (2002), (non-use alone does not constitute abandonment). This court should apply that standard of clear and convincing evidence when deciding the issue of abandonment.

The court in *Shields* went on to discuss the issue of abandonment itself. Although the court addressed the issue in terms of whether or not a factual dispute existed to support a Summary Judgment Motion, the court's opinion on the issue of abandonment was clear. In its opinion, the court stated that it was possible that Plaintiff dominant-estate owner used the easement at times when the Defendant, servient estate owner was not present to observe the activity. That usage would therefore be inconsistent with abandonment of the easement by installing a curb, hedge and berm. In other words, the court concluded that even the ostensible signs of abandonment by way of obstruction of a curb, hedge and berm that would have prevented normal passage on the easement was insufficient to reach a conclusion of abandonment.

In the instant case, the indicia of abandonment are much less noteworthy than those shown in *Shields*. The only evidence that the Defendants can adduce here is slight overgrowth of brush on the easement road, and the positioning of a flimsy, easily removed fence and a berm put in place at the juncture of the alternate road and the deeded easement road when the alternate road was bulldozed. Fence removal, brush removal and

the undoing of the berm was a simple matter manually conducted by Jerrard Alcock and Pat Evans, an older couple, so that they could use the easement road themselves. (RP 157, CP 271.)

In *Rutland v. Mullen*, 798 A.2d 1104, (Maine Supreme Judicial Court 2002), the Court addressed facts very similar to those before this court. In 1997 Plaintiff dominant estate holder Rutland purchased a parcel of property adjoining Defendants Mullen who had owned since 1971. A road traveled from a public road (Route 1) through the Defendants' property, and then on to the Plaintiff Rutland's property. The lower portion of that road extended from the public road to Defendant Mullen's residence. The upper portion extends north from Mullen's residence to Rutland's property. Defendants contended that the upper road was "a narrow trail or foot path up to the woods and was completely impassible by motor vehicle and in other places the trail traversed swamp land". *Rutland* at 1108. Defendants went on to allege that since their purchase in 1971, some twenty-eight years before the Plaintiffs' purchase, that they blocked the lane by using the mouth of the upper portion of the road as a parking lot and leaving vehicles there for months on end. Furthermore, they contended that neither the Plaintiffs nor any of their predecessors had used the upper portion to gain access to the public road since 1971. Notably in *Rutland*, Plaintiffs' property was accessible by another road.

When the Defendants obstructed access to the subdivision on Plaintiffs' property a lawsuit commenced. The Defendants' counterclaimed for declaratory judgment. The Plaintiffs then moved for Summary Judgment on the issues of all counts relating to their right to the access including Declaratory Judgment, Injunctive Relief, Quiet Title, Implied Easement, Prescriptive Easement and Easement by Estoppel in Necessity.

The trial court granted Summary Judgment in favor of the Plaintiffs, subscribing to the Plaintiffs' theory of abandonment. Notably in *Rutland*, the Defendants conceded that the Plaintiffs' property was once benefited by private easement over their property, as the Defendants in this case concede as well. (RP 1280, 1282-1283.)

Defendants on appeal contended that the court's entry of Summary Judgment in favor of Plaintiff was error because a genuine issue of material fact existed in the record regarding whether or not Rutland's easement was extinguished by abandonment. *Rutland* at 1109.

The Maine Supreme Court in affirming summary judgment in favor of Plaintiff dominant estate owner said that to make a *prima facie* showing of abandonment the Mullens must establish

1. non-use coupled with an act or omission with a clear intent to abandon; or
2. adverse possession by a servient estate.

*Rutland* at 1109 citing *Phillips v. Gregg*, 628 A.2d 151, 152 (Me. 1993).

The Maine Supreme Court in *Rutland* used language almost identical to that adopted by Washington Courts in ruling that if relying upon non-use for proof of abandonment, acts adverse to the dominant estate must indicate an intention that the easement shall never be used for its intended purpose. *Rutland* at 1109. The *Rutland* court went on to cite incidents where acts adverse to the dominant estate did not constitute abandonment: the right-of-way being overgrown with trees, blocked by rocks and inaccessible by car for many years (*Phillips v. Gregg*, 628 A. 2d 151 (1993)).

Notably in *Rutland*, the Maine Court cited an old case that found that building a fence across an easement road and using it for pasturage was insufficient to constitute abandonment by the dominant estate holder. *Rutland* at 1109, citing *Bartlett v. City of Bangor*, 67 Me. 460, 466 (1878). Acts cited by the court that did show an intent to abandon were far more extreme in nature: *Bolduc v. Watson*, 639 A. 2d 629, 630 Me (1994) (Six year acquiescence to the erection of a garage blocking an easement); *Chase v. Eastman*, 563 A. 2d 1099, 1102 (Me. 1989) (construction of cottages across an easement area).

In *Rutland*, the court noted that the upper portion of the easement lane had not been used or maintained for a number of years, and that the Defendants blocked the mouth of the upper portion with parked cars.

These facts, the court concluded, made a *prima facie* showing of a history of non-use of the easement but they did not establish the requisite second element of abandonment: an act or omission on the part of the dominant estate owner or predecessors evincing a clear intent to abandon the easement. *Rutland* at 1110. The court found that the Defendants' factual allegations were insufficient to support the finding of abandonment as a matter of law. The court in affirming summary judgment for plaintiffs in the same position as Plaintiffs here, went on to say that the Superior Court did not err when it entered Summary Judgment in favor of "Plaintiffs" declaring the continuing existence of a private easement.

*Rutland* at 1110.

No facts can be adduced by the Defendants here to establish non-use plus the second crucial element of acts sufficient to support an intent to abandon. First of all, the usage of the road area all along was with the permission of these Plaintiffs to allow Defendants to pasture cattle. Secondly, and more importantly, nothing done to the road prevented usage of it. A minor amount of berm-flattening and foliage maintenance revived it for vehicular use. Here the Plaintiffs used the land for pedestrian access to their property regularly. Jerrard Alcock himself has used the road for purposes of removing a portion of the pasture fencing which was located on his property. Friends of the Defendants and others made vehicular use

of the road to access property beyond that of the Plaintiffs. No structures were established across the roadway that would have signaled Plaintiffs' acquiescence to the abandonment of the road for access purposes. As was the case in *Rutland*, none of the facts in the instant case establish the second required element of abandonment: an act or omission on the dominant estate owner's part evincing a clear intent to abandon. As such, the defense of abandonment has no merit and can't obstruct Plaintiffs' right to use their deeded easement.

Case authority from across the nation is supportive of the same conclusion that abandonment of an easement does not occur without a patent showing of an intent to abandon in addition to non-use. *1<sup>st</sup> National Bank v. Mountain Agency LLC*, 2009-Ohio-2202, CA 2008-05-056 (OHCA12), *Lone Star Steakhouse & Saloon Of Ohio, Inc. v. Ryshka*, 2005-Ohio-3398, 2003L192, 05-LW-2931 (11<sup>th</sup>) (OHCA11); *Johnston v. Cornelius*, 230 Or.App. 733, 218 P.3d 129 (Or.App. 2009); *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);

Many, if not all examples shown in those cases, show much more egregious acts in addition to non-use that still did not rise to abandonment. The conclusion to be reached here, supported by ample precedent, is that

no abandonment by Plaintiffs Keller/Sipes of the deeded easement occurred.

**10. The “Shifting Easement” Theory Does Not Apply Where The Construction Of The Alternate Road Pre-Dates The Re-creation Of The Easement By Way Of The PACD**

In 1979 the alternate road was created. At that time, the easement was extinguished due to merger. The 1982 PACD re-created the original easement. A shift in the easement could not occur because the alternate road existed before the original easement was re-created.

In Conclusion of Law ‘C’, the trial court relied on *Barnhart v. Goldrun, Inc.*, 68 Wn.App. 417, 422-23, 843 P.2d 545 (1993); and *Curtis v. Zuck*, 65 Wn.App. 377, 382, 829 P.2d 187 (1992) for the proposition that “The dominant and servient owners, by their actions or conduct, relocated the access road and abandoned the old road. The use had shifted to the new access road 14 years before Keller/Sipes took ownership of the dominant estate. This served to shift the location of the access road easement.”

This conclusion is in error. As stated in Section 9, the affirmative acts showing abandonment must be those of the dominant estate holder. *Heg*. In *Heg v. Alldredge*, 157 Wn 2d 154, 137 P 3d 9 (Wash. 2006), the

Supreme Court stated:

In *Curtis*, 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, accepting defendants' argument that "the private easement they share[d] with the [plaintiffs] ha[d] simply shifted due to a period of long use which predate[d] both parties' ownership." *Curtis*, 65 Wash.App. at 382, 829 P.2d 187.

*Barnhart* distinguished *Burkhard v. Bowen*, 32 Wash.2d 613, 203 P.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, reasoning that whereas *Burkhard* and *Van Buren* "attempted to extinguish the private easements of adjoining landowners by affirmatively excluding them from their right to use the platted alley or street," in *Curtis* "there was no such attempt." *Barnhart*, 68 Wash.App. at 422, 843 P.2d 545 (emphasis added).

*Heg* at 163.

Plaintiffs respectfully submit that the court has misapplied

*Barnhart*. The construction of the alternate access road predates the re-creation of the easement via the 1982 PACD. The alternate road is unlike the "jeep road" in *Barnhart* because it was not created as a result of confusion over the precise location of the easement, as was the case there. Rather, this alternate road was a separate accommodation which predates the creation of the easement conveyed in the PACD.

The re-creation of the original easement in 1982 undoes any

arguable effect of shifting the road that may have occurred when the alternate was built in 1979.

11. **Neither Plaintiffs Nor Their Predecessors Are Estopped From Asserting An Interest In Their Deeded Access Easement.**

Defendants raised the issue that the Plaintiffs, by their actions, were estopped from asserting a right to their deeded easement. Equitable estoppel requires a showing that the *party to be estopped*

(1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act.

*Heg v. Alldredge*, 157 Wn 2d 154, 165 (Wash. 2006)

Conclusion of Law 'E' states: "Robert Sipes built the new access road, used the new access road, and told the Bangert's future access would be by the new access road. The Bangerts relied on these actions and statements in building the home, in landscaping their yard, and in the use of their property." (CP 240-241)

There is no conduct by the Plaintiffs or Plaintiffs' predecessors that the Bangerts relied on in building their home or landscaping their yard. The Bangerts' home was already being built and the blue spruce trees that were given as a wedding gift to the Bangerts in 1991 were already planted prior to the Plaintiffs' purchase in 1993. (RP 90, 1120-1121, Ex 17.)

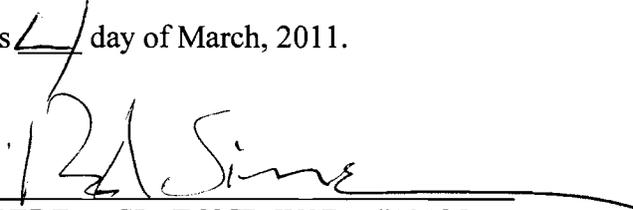
Stephen Sipes may have acquiesced in his father building an alternate road in 1979. But he specifically re-created the original easement when he conveyed the property to his father and mother, Robert and Myra Sipes, by way of the above-mentioned PACD in 1982. These actions are not inconsistent with his present claim to use the legally deeded easement road.

Plaintiffs cannot be estopped from enforcing their easement rights based on the alleged conduct of Robert and Myra Sipes, Bangert's 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.

#### **E. CONCLUSION**

None of the theories relied upon by the trial court serve to extinguish Plaintiffs' right to their original, deeded easement. The trial court's 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 4 day of March, 2011.

  
ROBERT A. SIMEONE, WSBA #12125  
Attorney for Appellants/Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of March, 2011, I  
caused to be served a true and correct copy of the foregoing  
APPELLANTS' BRIEF by the method indicated below, and addressed to  
the following:

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