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Caldwell v. Cometto Augmentation Record Dckt. 37157

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In the Supreme Court of the State of Idaho

LAW CLERK

DAVID L. CALDWELL and KATHY C.)
CALDWELL, husband and wife;)
LAWRENCE L. SEILER and THERESA L.)
SEILER, husband and wife; and PATRICIA)
ST. ANGELO,)

Plaintiffs-Appellants-Cross Respondents,)

v.)

THOMAS W. COMETTO and LORI M.)
COMETTO, husband and wife; and DOES 1-)
5,)

Defendants-Respondents-Cross)
Appellants.)

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket No. 37157-2009
Bonner County Docket No. 2007-1744

LAW CLERK

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Appellants on April 26, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellants' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Trial Brief on Servient Re-location of the Easement Without Injury and Dominant Tenement Maintenance Using Secondary Easement, file-stamped September 2, 2008.

DATED this 3rd day of May 2010.

AUGMENTATION RECORD For the Supreme Court

Stephen W. Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record

ORDER GRANTING MOTION TO AUGMENT THE RECORD – Docket No. 37157-2009

In the Supreme Court of the State of Idaho

DAVID L. CALDWELL and KATHY C.)	
CALDWELL, husband and wife;)	
LAWRENCE L. SEILER and THERESA L.)	ORDER GRANTING MOTION TO
SEILER, husband and wife; and PATRICIA)	AUGMENT THE RECORD
ST. ANGELO,)	
)	Supreme Court Docket No. 37157-2009
Plaintiffs-Appellants-Cross Respondents,)	Bonner County Docket No. 2007-1744
)	
v.)	
)	
THOMAS W. COMETTO and LORI M.)	
COMETTO, husband and wife; and DOES 1-)	
5,)	
)	
Defendants-Respondents-Cross)	
Appellants.)	

A MOTION TO AUGMENT THE RECORD AND STATEMENT OF GROUNDS was filed by counsel for Respondents on June 14, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Defendants' Post Trial Brief, file-stamped September 19, 2008;
2. Defendants' Post Trial Reply Brief, file-stamped September 26, 2008;
3. Defendants' Response to Plaintiffs' Motion to Alter or Amend the Memorandum Decision, file-stamped April 28, 2009;
4. Defendants' Objection to Plaintiffs' Supplemental Brief Re Motion to Alter or Amend Memorandum Decision, file-stamped June 2, 2009; and
5. Defendants' Memorandum of Fees and Costs, file-stamped July 10, 2009.

DATED this 17th day of June 2010.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

COPY

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CLEAR

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**DEFENDANTS' POST
TRIAL BRIEF**

COMES NOW the undersigned counsel for and on behalf of the Defendants, Thomas
Cometto and Lori Cometto, and submits the following Post Trial Brief.

I. STATEMENT OF FACTS

This action was commenced by the Plaintiffs' filing of a pleading entitled Request for
Declaratory Judgment, Quiet Title and Injunction. The pleading filed by the Plaintiffs clearly
states in the opening paragraph that they are seeking interpretation and declaratory judgment
regarding the Easement Agreement, which was recorded as Instrument No. 570303 in the
records of Bonner County, Idaho on September 21, 2000.

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DEFENDANTS' POST TRIAL BRIEF - 1

EXHIBIT

11
A

Although the Plaintiffs' Complaint seeks a litany of specific claims for relief, this Court dismissed most of those claims pursuant to the Defendants' Rule 41(b), I.R.C.P., Motion at the close of the Plaintiffs' case.

The Court effectively dismissed item numbers 3 and 4 of the prayer for relief, page 10, of the Plaintiffs' Complaint by ruling at the onset that res Judicata bars re-litigation of the I.C. § 55-313 relocation determined upon in CV-97-01057 and CV-98-00867.

The Court dismissed any claim to relocate the east entrance on the Cometto property to the north as unsupported by fact or law, thereby disposing of the Plaintiffs' prayer for relief, item number 6, page 11, of the Request for Declaratory Judgment and Injunction.

Additionally, the Court dismissed the Plaintiffs' claim for relief that the subject roadway must be constructed to Bonner County Private Road Standards as applied to subdivisions and as adopted June 28, 2006, BCRC 12-2301. This dispatches the claims set forth in Plaintiffs' prayer for relief, item numbers 4, 7 and 8, contained on pages 10, 11 and 12 of the Plaintiffs' Request for Declaratory Judgment and Injunction.

Item numbers 10 and 11 of the Plaintiffs' prayer for relief found on page 12 of the Request for Declaratory Judgment and Injunction are moot issues, as they request this Court to temporarily reopen the "abandoned access road until May 15, 2008, for winter travel". These issues have been waived or were not pursued by motion or hearing and rendered moot since the period of temporary relief has long since lapsed prior to trial. Furthermore, there are no facts, evidence or law to support the claims.

The remaining issues are two-fold:

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1. The width of the easement as granted in the Easement Agreement, Instrument No. 570303. The Plaintiffs contend it is 30 feet in width. The Defendants maintain that the easement is the width of the actual travel surface, which was 14 feet in 1999, and by all testimony has not changed since then. The corollary issue raised by the Plaintiffs in trial concerned the location of the easement road. All parties concede that the location of the road is the same today as it was in 2000 and its location is not in dispute.

2. The secondary issue concerns the Plaintiffs' request that the Court issue declaratory judgment as to the legal effect and/or enforceable of paragraph 13 of the Easement Agreement, a hold harmless provision, which applies mutually to all parties. There is no dispute or justiciable controversy regarding that matter presented before the Court at trial. No facts exist as a context within which the Court can determine that issue. Nonetheless, the Plaintiffs' seek the Court's ruling thereon.

II. ARGUMENT

A. General Rules of Interpretation

When construing an easement, the Court is bound to interpret the instrument granting the easement according to the intent of the parties and the circumstances at the time the easement was granted and utilized. Nelson v. Johnson, 106 Idaho 385, 387, 679 P.2d 662, 664 (1984).

"Where a deed is unambiguous, however, the parties' intent must be ascertained from the language of the deed as a matter of law without resort to extrinsic evidence." C&G, Inc. v. Rule, 135 Idaho 763, 766, 25 P.3d 76, 79 (2001).

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Further, where the document to be interpreted is "clear on its face and is not ambiguous", there is no need to resort to extrinsic evidence to "interpret or modify the terms of what appears to be a clearly written document." Heinz v. Heinz, 129 Idaho 847, 854, 934 P.2d 2027 (1997).

A deed, easement or other instrument is ambiguous:

....when it is capable of more than one reasonable interpretation on a given issue. It is only if an ambiguity is found that any "construction" is necessary. Where there is no ambiguity, there is no room for construction; the plain meaning of the language governs.

Nordstrom v. Guindon, 135 Idaho 343, 346
17 P.3d 287, 290 (2000); quoting
Post v. Murphy, 125 Idaho 473, 475,
873 P.2d 118, 120 (1994)

In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.

Capstar Radio Operating Company v. Lawrence,
143 Idaho 704, 708, 152 P.3d 575, 579 (2007);
quoting C&G, Inc. v. Rule, *supra*

The first line of analysis is an examination of the easement language.

B. The Easement Agreement is Plain and Unambiguous Regarding the Width of the Easement Across Comettos' Property.

All parties testified at trial that the easement road is the same today in terms of its location and width as it was ten (10) years ago when the easement was relocated and committed to a written Easement Agreement, Instrument No. 570303.¹

¹ While there is some disagreement regarding the current condition of the road, the issue of maintenance is to be dealt with later in this pleading.

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The Easement Agreement clearly sets forth five (5) parties to the Agreement including the Plaintiff, Kathleen Caldwell, in this action. It also sets forth legal descriptions of the properties subject to or benefited by the easements created therein. The operative language is contained in Paragraph 6 of the Easement Agreement, which states as follows:

6. The Cometos hereby make, convey and grant to Campbell, Crum, Lemen and Caldwell an easement over and across the Cometto property for the benefit of their respective properties. The Cometto easement is located on the existing roadway which traverses the Cometto property to the north of the "abandoned access road" as depicted in Exhibit "A" attached hereto,.....²

The plain language of the Easement Agreement has Cometos granting to Campbell, Crum, Lemen and Caldwell an easement across the Cometto property on the existing roadway, as that is depicted in Exhibit "A".

Exhibit "A" is a sketch drawn by Richard Tucker, professional engineer, and depicts the existing roadway as it lies north of the abandoned access road as being 14 feet in width. That width measurement is contained in the sketch on the west leg and twice on the north leg, of the easement road.

Mr. Tucker also depicts the width of the roadway west of the Cometto property as 16 feet in width and east of the Cometto property as 18 feet in width.

Consequently, there is no ambiguity as to the width of the easement. The easement width is constrained to that existing roadway, which is as depicted by Richard Tucker as 14 feet in width across the Cometto property. All of the parties testified that the easement width has not changed, i.e., that it has not gotten wider or narrower other than Mr. Caldwell's

² The remainder of that paragraph pertains to location of the easement and grantees' right to

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attempts to widen the road as certain points by removing trees or other items against the Comettos' objections.

Furthermore, when looking at the easement as a whole, it is even clearer that the intended width is only that width expressly set forth on Exhibit "A", the Tucker Sketch.

Paragraph 7 of the Easement Agreement has Mr. and Mrs. Campbell granting an easement to the other four (4) parties of the Agreement and expressly states that the easement is "30 feet in width". Thus, the intent of the parties regarding the easement across the Cometto property can be inferred by their specific use of a 30 foot width elsewhere, which is notably absent in Paragraph 6 where the Comettos grant easement.

Likewise, Crum and Lemen, Paragraphs 8 and 9, simply grant easement on "the existing roadway". Neither the Crum nor Lemen easement conveyances in Paragraphs 8 and 9, respectively, define the width or reference an attachment which defines the width.

"To give effect to the intent of the parties, the contract or other writing must be viewed as a whole and in its entirety." Sells v. Robinson, 141 Idaho 767, 773, 118 P.3d 99, 105 (2005).

There is no ambiguity in the Instrument No. 570303. The Court can find further plain, ordinary and proper use of the language of the Agreement can derive the intent of the parties that that intent being that Comettos granted a 14-foot-wide easement across their property as indicated on Exhibit "A" and, specifically, that that easement is constrained to the "existing roadway". That existing roadway, by all accounts in the trial testimony, has not changed in its width or location since its creation.

modifications of the easement, which will be addressed subsequently.

DEFENDANTS' POST TRIAL BRIEF - 6

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There simply is no language or evidence to suggest that the intent of the Easement Agreement was to create a 30-foot-wide easement. Even Mrs. Caldwell's testimony at trial dispels that notion. Mrs. Caldwell testified that she did not read the Easement Agreement when she signed and does not remember if Exhibit "A", the Tucker Sketch, was attached, but that it was her intent in signing the document that when things had "settled down", she could "renegotiate" the easement with the Cometos.

Unfortunately, Mr. Caldwell chose to attempt a forcible relocation of the east entrance to the Cometto property by tearing down fences, towing away vehicles, and, ultimately, causing Mrs. Cometto to call law enforcement to stop the intrusion. The Court will recall from the testimony that at the time Mr. Caldwell attempted to relocate the east entrance of the Cometto property, he did not own the adjoining property to the east and the Campbells still owned that property. While Mr. Caldwell represented that he had permission to relocate the east entrance on and through the Campbell property, Mrs. Cometto testified at trial that it was precisely those circumstances previous to the 1997 litigation that resulted in Jerry Campbell filing suit against the Cometos for trespass. The result of that litigation was to locate the east leg of the road through the Cometto property as it currently exists and required Mr. and Mrs. Cometto to remove road rock from the Campbell property and she thereafter erected the fence to prohibit any off road travel.

It is not difficult to understand why Mr. and Mrs. Cometto refused the Caldwells' suggestion to "relocate the east entrance" at a time when Mr. Caldwell did not own the property across which the road would be built as he proposed.

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It is also not difficult to image why the Comettos were unwilling to "renegotiate" the easement width or its location, as Mr. and Mrs. Caldwell sought to do following Mr. Caldwell's attempt to forcibly trespass across the Comettos' property in 2004, tearing down fences, pulling away vehicles and causing law enforcement's intervention.

Nonetheless, and despite the ill will between these parties, there is no ambiguity regarding the width of the easement. It is "the existing roadway" which has not changed in ten (10) years.

This Court should find for the Defendants that the width of the existing road is as it is depicted in the Tucker Sketch and as it has been since execution of the Easement Agreement in question.

While the Plaintiffs seek to broaden the width of the easement by claiming a need or necessity, the facts dispute that claim (see video of Mr. Caldwell negotiating the subject easement with a 47-foot truck and trailer).

Furthermore, Idaho law does not permit an expansion of the easement width or physical dimensions of the easement.

An increase in width does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land.

Argosy Trust v. Wininger, 141 Idaho 570, 573,
114 P.3d 128, 131 (2005)

This Court should find for the Defendants as to the width of the easement based upon the plain and unambiguous language of the Easement Agreement with attached Tucker drawing.

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C. The Defendants Cometto Have Done Nothing to Interfere With the Plaintiffs' Easement Rights.

This Court should find from the undisputed testimony that there has been no interference with the Plaintiffs' access or use of the easement.

Plaintiffs Caldwell assert a number of items have interfered with their reasonable use and enjoyment of the easement. It is a question of fact whether items interfere with easement rights of the dominant estate holder. However, the servient estate owner "has the right to use his entire land for any purposes not inconsistent with the rights of the holder of the dominant easement, the use by the servient estate must be truly inconsistent" to constitute an interference with the dominant estate's easement rights. Kolouch v. Kramer, 120 Idaho 65, 68-9, 813 P.2d 876, 879 (1991).

In this case, the undisputed trial testimony from both Plaintiffs and Defendants established that the old yellow truck, roofing tin, snow plow, wood blocks, boulder and wooden panel fence are all outside of the existing roadway and therefore outside of the easement area granted by the Easement Agreement, Instrument No. 570303. In fact, the testimony established that the old yellow truck is exactly in the location it was when that roadway was constructed in 1997. (See Plaintiffs' Exhibit F.) As such, all of the personal property items of the Comettos' are outside the easement area and, therefore, are not interfering with Plaintiffs' easement rights.

With regard to the gate, it is undisputed that the gate has always been unlocked and that it existed prior to the Caldwells' purchase of the property.

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Idaho law supports the servient estate holders' (Comettos') right and entitlement to impose reasonable regulations concerning use of the easement. Those reasonable regulations concerning use of the easement have and do include the construction and maintenance of the gate across the easement so long as that gate does not threaten or in any way infringe upon the dominant estate's use of the easement. See Drew v. Sorenson, 989 P.2d 276, 282 (1999).

So long as the dominant estate holder can continue to use the easement for the specific purpose of gaining access to the lands, as he is legally entitled to do, there is no interference and regulatory measures taken by the servient estate are not interference with the easement rights. See also Carson v. Elliott, 111 Idaho 889, 728 P.2d 778 (1986).

In this case, the Plaintiffs have alleged that the gate and certain cross ditching have interfered with their use. However, the Plaintiffs have pointed to no occasion in which either item has interfered with or prohibited their access to the Caldwell property. Nonetheless, Mrs. Cometto stated in her testimony that she had no objection to the Plaintiffs filling in the drainage, cross ditches, if that was their desire. She only asked that the work be completed in a manner that does not interfere with or trespass upon the Cometto property.³

This Court should find for the Comettos regarding the issue and/or allegation by the Plaintiffs that the servient estate has interfered with or encroached upon the easement by placement of cross ditching, a gate (which predated Caldwells' ownership), parking of a vehicle, placement of tin, snowplow and other personal property items, all outside of the

³ Interestingly, Caldwells testified that they have never asked Comettos if they could fill in the cross ditching. The only testimony from Caldwells regarding the cross ditching and interactions with the Comettos was from Mr. Caldwell who stated that when he asked Comettos the reasons for the cross ditching, they stated it was to slow down another neighbor.

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easement area. The Comettos have not interfered with and, in fact, have not even encroached upon the easement as defined by the existing roadway.

D. There is No Justiciable Controversy Before the Court Permitting an Interpretation of Paragraph 13 of the Easement Agreement Referred to as the Hold Harmless Provision, and I.C. § 29-114 is Inapplicable.

First, the Court should note there is no justiciable controversy between the Plaintiffs and Defendants regarding Paragraph 13 of the Easement Agreement. The Plaintiffs have presented no evidence of a claim for damages or that any party has invoked this hold harmless language set forth in Paragraph 13. Indeed, a legal issue is moot if it does not present “a real and substantial controversy that is capable of being concluded through the judicial decree of specific relief.” Koch v. Canyon County, 145 Idaho 158, 177 P.3d 372, 377 (2008).

Since there is no justiciable controversy, there is no real or substantial conflict. No facts have been presented by the Plaintiffs to bring this issue before the Court in such a manner. The issue is moot and the Court should decline to declare any relief on these claims.

Should the Court determine there is a justiciable controversy regarding Paragraph 13 of the Easement Agreement, then Idaho law upholds the hold harmless provision as appropriately enforceable.

We have previously held that parties to a transaction may agree by contract to limit liability for negligence or contractually waive rights and remedies, subject to certain exceptions.

Lee v. Sun Valley Company, 107 Idaho 976, 978,
695 P.2d 361, 363 (1984)

In an earlier case, the Idaho Supreme Court noted as follows:

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We went on to hold that "express agreements exempting one of the parties for negligence are to be sustained except where:

(1) one party is at an obvious disadvantage in bargaining power;

(2) a public duty is involved (public utility companies, common carriers)."

Steiner Corp. v. American Dist. Telegraph,
106 Idaho 787, 791, 683 P.2d 435, 439 (1984)

In Steiner the Supreme Court noted by footnote in the opinion as follows:

Steiner argued at oral argument on appeal (although it was not argued below) that I.C. § 29-114 should apply to invalidate the clause D part of this contract. That code section was intended to apply *only* to agreements by third parties, strangers to the negligent occurrence, to indemnify the tortfeasor for liability for the occurrence. As such, it is ***not applicable in this case where no third party is involved***, no indemnification situation is presented.

Steiner Corp. v. supra, at 792 (footnote 1)
[emphasis added]

In this case, the Plaintiffs argue the very same statutory provision, that is Idaho Code § 29-114, as invalidating Paragraph 13 of the Easement Agreement. The Idaho Supreme Court has previously ruled, some 24 years ago, that that statutory provision may not be invoked by a party to the contract to invalidate the contractual hold harmless provision.

In this case, the Plaintiffs are parties to the Easement Agreement and are not strangers or third parties claiming damage. As such, they have no standing to invoke I.C. § 29-114.

The Defendants are entitled to judgment as a matter of law denying the Plaintiffs' claims.

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DEFENDANTS' POST TRIAL BRIEF - 12

Unless in circumstances affronting public policy, it is no part of the business of the Court's to decline to give effect to contracts which the parties have freely and deliberately made.

Rawlings v. Layne & Bowler Pump Company,
93 Idaho 496, 500, 465 P.2d 107, 111 (1970)
[citation omitted]

The Court should find for Defendants Cometto on this claim.

E. There is No Dispute Regarding the Plaintiffs' Right to Maintain the Roadway.

The Plaintiffs, as a matter of law, have the right and obligation to maintain the easement.

The Court may note that testimony presented at trial by Plaintiffs provided no real justiciable controversy on this issue, either. Mr. Caldwell stated that he had never discussed with the Comettos grading over or filling in the cross ditching. Mrs. Cometto testified that she and her husband had no objection to the Caldwells or other dominant estate holders maintaining the easement road so long as they did not exceed the scope of the easement or trespass upon the rest of the Cometto property.⁴ As a matter of law, the Plaintiffs have the obligation and/or right to maintain the easement across the Cometto property. See Gibbons v. Weisshaupt, 98 Idaho 633, 640, 570 P.2d 870 (1977).

However, should the dominant estate's maintenance of the easement create an additional burden or interference with the servient estate (Cometto), the servient estate is entitled to then dictate the standards by which the easement should be maintained, expend

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⁴ Mr. Caldwell certainly set the stage for Comettos to be vigilant on this point by his attempts to forcibly relocate the east entrance into the Cometto property.

funds to maintain it to that level, and seek reimbursement for those expenditures and future expenditures from the dominant estate. See Beckstead v. Price, 190 P.3d 876, 885-6 (2008).

In this case the Cometos assert that maintenance of the easement is the responsibility of Caldwells. However, Mrs. Cometto testified that Mr. Caldwell's prior attempts to grade the road pushed rocks and gravel off of the easement area and into the ditching and adjoining Cometto property. Furthermore, the un rebutted testimony established that Mr. Caldwell has removed trees and attempted to broaden the width of the easement against the objections of Cometos. To that extent, the Defendants Cometto maintain the right to review or scrutinize any maintenance attempted by the Plaintiffs to ensure that it does not encroach upon their property or create additional burden or interference with the Cometos' rights. This is well established and supported by Idaho case law.

The Court should find in favor of the Defendants Cometto on this issue.

III. CONCLUSION

Based upon the testimony presented at trial, there is no support for any of the Plaintiffs' claims and the Court should award and enter Judgment in favor of the Defendants on all counts.

DATED this 19th day of September, 2008.

FEATHERSTON LAW FIRM, CHTD

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2008, I caused a true and correct copy of the foregoing document to be served upon the following persons in the following manner:

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Hon. Charles Hosack
District Court Judge
P.O. Box 9000
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By 

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2009 SEP 26 P 3:43

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**DEFENDANTS' POST
TRIAL REPLY BRIEF**

COMES NOW the undersigned counsel for and on behalf of the Defendants, Thomas Cometto and Lori Cometto, and submits the following Post Trial Reply Brief.

The Plaintiffs filed an opening "Post Trial Brief" entitled Plaintiffs' Proposed Memorandum Opinion, Findings of Fact and Conclusions of Law on September 19th. The Defendants Cometto will respond to the arguments contained therein.

The Plaintiffs also filed a pleading entitled Plaintiffs' Trial Brief on "Hold Harmless" Provision of Easement Agreement on September 19th. The Defendants will not further rebut that pleading since the case law cited in Defendants' initial Post Trial Brief is dispositive of that issue and the Plaintiffs' claims.

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DEFENDANTS' POST TRIAL REPLY BRIEF - 1

EXHIBIT

"B"

I. MANY OF THE PLAINTIFFS' "PROPOSED FINDINGS OF FACT" ARE UNSUPPORTED BY ANY EVIDENCE.

Beginning on page 2 of the Plaintiffs' Proposed Memorandum Opinion, there are several numbered proposed findings of fact, many of which are not supported by any evidence in the record. Those unsupported proposed findings are as follows:

1. Finding No. 3 asserting that the Tucker sketch attached to the Easement Agreement was created at the request of the Crum family is not supported by any evidence.

2. Paragraph 4 asserts that Kathy Caldwell signed the Easement Agreement at the request of her brother. The testimony from Ms. Caldwell was that she found the Easement Agreement amongst her brother's items and took it to attorney, Terry Jensen's, office and signed the agreement there.

3. The Plaintiffs argue, and this is an important one, that when Ms. Caldwell signed the Easement Agreement, the Exhibit "A" Tucker sketch was not attached. Ms. Caldwell's actual testimony that she did not "recall" whether it was attached.

4. Finding No. 6 asserts that Ms. Caldwell signed the agreement with a good faith belief that it provided for a 30-foot-wide easement for travel is not supported by the testimony.

5. The prior Easement Agreement was admitted over the objection of the Defendants as an inadmissible attempt to collaterally attack the contents of the document Ms. Caldwell signed and as irrelevant.

6. Finding of Facts Nos. 7, 8, 9, 10 and 11 are not supported by any testimony at trial. Furthermore, Findings Nos. 7, 8, 9, 10 and 11 are irrelevant to any findings and issues before the Court.

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7. Further, the Plaintiffs' counsel argues ambiguities beginning at Finding of Fact No. 12. However, many of the ambiguities argued were not presented as ambiguities at trial and there is no testimony before the Court regarding those "ambiguities". Beginning with Findings Nos. 13, 14, 15, 17, 18, and 19, the Plaintiffs argue ambiguities that bear no relevance nor relationship to any facts or circumstances before the Court as actual, justiciable controversies between the Plaintiffs and Defendants requiring the Court's determinations.

8. Proposed Finding of Fact No. 20, the Plaintiffs' counsel blatantly disregards the Court's pretrial ruling on Defendants' Motion in Limine that the Black Diamond Report was not be admitted or considered as representing a land survey of the boundary lines of the Cometto property because Black Diamond Engineering was not a licensed public land surveyor under the rules, regulations and laws of the State of Idaho.

9. Proposed Findings No. 40 in the Plaintiffs' Post Trial Memorandum is unsupported by the record and the physical evidence. Both Mrs. Cometto's testimony and the photograph taken in 1997 during the construction of the easement road in question reveal that the yellow pick up truck is exactly in the same location as it has been for more than 10 years.

10. Proposed Findings Nos. 45, 46, 47, 48, 49, 50 and 51 appear to assert facts which are not supported by the evidence as well as a legal theory of relocating the east entrance into the Cometto property. That theory was dismissed by the Court at the end of the Plaintiffs' case on Defendants' Rule 41 Motion.

11. Plaintiffs' Proposed Findings Nos. 34, 35, 36, 37, 38, 39, 42, 52, 53, 54 and 55 are all directed at Plaintiffs' assertion that they are entitled to a snow storage easement off of

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the designated easement width. That is not supported by Idaho case law nor any reading of the plain language of the Easement Agreement at issue in this litigation.

12. Findings of Fact Nos. 57, 58, 59 and 60 are all findings of fact which are not supported by the evidence but further appear to be Plaintiffs' assertion that they may collaterally attack the District Judge's ruling in CV-97-01057 and CV-98-867 in which the Court ruled upon and determined that the Defendants Cometto had complied with Idaho Code § 55-313 in construction of and completion of a relocated easement across the Comettos' property. Despite Plaintiffs' desire to argue otherwise, that determination is a matter of law and contains a finding that the roadway was "finished" and any argument in Plaintiffs' Findings Nos. 57, 58, and 59 to the contrary is a violation of the res Judicata principles which bar a re-litigation of those findings.

II. ARGUMENT

The Plaintiffs and Plaintiffs' counsel misconstrue Idaho case law throughout their proposed memorandum. However, prior to engaging in that rebuttal, the Defendants proffer the following fundamental legal principles well established by the Idaho Supreme Court.

A. The Plaintiffs' Subjective Assertion Ambiguity in the Easement Agreement is not Sufficient Cause for this Court to Re-Interpret the Agreement's Intent

"A party's subjective undisclosed interpretation of a word or phrase cannot make the contract ambiguous. If it could, then all contracts would be rendered ambiguous merely by a party asserting a misunderstanding of the meaning of one or more of the words used."

Swanson v. Beco Construction Company, 145 Idaho 59, ____ 175 P.3d 748, 752 (2007)

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The Idaho Supreme Court went on to state as follows:

The intent of the parties is determined from the plain meaning of the words. A contract is not rendered ambiguous on its face because one of the parties thought that the words used had some meaning that differed from the ordinary meaning of those words.

Id.

In this case, Mrs. Caldwell asks the Court to reinterpret the Easement Agreement because she had read a previous draft of the Easement Agreement and it provided for a 30-foot-wide easement. She argues to the Court today, almost nine (9) years later, that the term “roadway” is ambiguous, the location of the “existing roadway” is ambiguous and its width is ambiguous even though it clearly states that the easement is restricted to the existing roadway as depicted on the Tucker sketch and the Tucker sketch defines that roadway width at 14 feet.

Here the plain language of the Easement Agreement is the issue, not the Caldwell’s subjective and undisclosed interpretation of that language, almost nine (9) years ago when Mrs. Caldwell signed the Agreement.

The Supreme Court in Beco also noted that a party’s failure to determine the ordinary meaning of the words used in the Agreement does not make that language ambiguous. Id.

Mrs. Caldwell testified that she believed that she should sign the Agreement as written and that when things “settled down” later, they could renegotiate or change the terms.

However, this Court is required to interpret the intention of the parties from the plain, complete and unambiguous language contained in the Easement Agreement. According to the Idaho Supreme Court, the “actual or secret intentions of the parties” when signing the Agreement is irrelevant. Beco, supra, quoting 17A Am. Jur. 2nd Contracts § 348 (2004).

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This Court must interpret the plain language of the Easement Agreement without regard to Mrs. Caldwell's "interpretation" or secret understandings or intentions of the word at the time she signed in early 2000. That plain and unambiguous language calls for the Court to constrain the easement to a 14-foot width as it currently exists on the ground across the Cometto property.

B. This Court May Not Consider Whether or Not Mrs. Caldwell Read the Agreement or Observed the Tucker Sketch Attached to the Agreement at the Time of Her Signature.

"The voluntary failure to read a contract does not excuse a party's performance." Swanson v. Beco Construction Company, 145 Idaho 59, ___, 175 P.3d 748, 752 (2007); citing Belk v. Martin, 136 Idaho 652, 39 P.3d 592 (2001). As such, it is irrelevant whether or not Mrs. Caldwell read the Easement Agreement in 2000; whether she understood the words contained in the Agreement at the time she signed it, and, whether or not the Tucker sketch was attached at the time of her signature.

"Similarly, a party's failure to determine the ordinary meaning of the words used in a contract does not make it ambiguous." Id.

Thus, all of the testimony from Mrs. Caldwell: that she did not understand the Agreement when she signed it, did not read the Agreement when she signed it, or that the Tucker sketch may not have been attached to the Agreement when she signed it does not render the Agreement void, unenforceable or ambiguous. The Agreement called for and provided an easement across the Comettos' property, across the "existing roadway". The existing roadway by Mrs. Caldwell's testimony was in place, on the ground, exactly as it is today. Its width, location and parameters did not change from January 31, 2000, when Mrs.

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Caldwell signed the Agreement until September, 2008, when the trial was conducted. Therefore, there was no ambiguity then or now as to the issues of locations, width, parameters of the easement. This Court should find for the Defendants on all such claims.

C. Idaho Case Law Expressly and Clearly Constrain the Width of the Easement to that as Defined in the Easement Agreement.

Plaintiffs' counsel badly misconstrues Idaho law when he asserts on page 10 of the Proposed Memorandum Opinion that because this is an express easement, the case law restricting the scope of use to historical use is "inapplicable". Plaintiffs' counsel cites Argosy Trust v. Wining, 141 Idaho 570 (2005).

Defendants' counsel represented Argosy at the District Court and argued the appeal to the Idaho Supreme Court. In Argosy the Court was asked to interpret an express easement executed in 1965 to determine whether the Plaintiff, Argosy Trust, still had easement rights across the Wining property. The Court, in so ruling, determined it must interpret the easement agreement to determine the width thereof. Despite arguments to the contrary (which were almost factually identical to the arguments proffered by Plaintiffs' counsel in this case) the Court found that regardless of the need for larger vehicles, trucks, safety vehicles or other equipment which required a broader easement width for functional use, an express easement is constrained to the historical use at the time the easement agreement was granted or created. The Court made a very clear distinction in Argosy that while the scope of use may change, i.e., timber land to residential, the width of the easement does not expand proportionately unless the historical use or the specific terms of the easement agreement provide such additional width. Indeed, an expansion of the width of the easement would have the effect of encompassing or

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impacting additional land of the servient estate an outcome the Idaho Supreme Court rejected.

Argosy Trust v. Winninger, 141 Idaho 570 (2005).

The Plaintiffs' argument in this case is unavailing and one which was specifically and unequivocally rejected by the Idaho Supreme Court some three (3) years ago.

This Court should find for the Defendants Cometto and reject the Plaintiffs' attempt to expand the width of the easement to suit their current desires.

D. There is No Case Law to Permit this Court to Read Into the Easement Agreement Other Collateral Easement Rights Including Snow Storage or the Right to Remove Timber or Other Items Outside the Existing Roadway Through the Cometto Property.

The Plaintiffs argue that the Court should find that they are entitled to "snow storage easement" because there was no contemplation of the "average snowfall" in the area at the time the Easement Agreement was entered. To the contrary, the testimony establishes that the Defendants Cometto were snowmobiling in and out in the years preceding and following the execution of the Easement Agreement. Likewise, the testimony established that both the Caldwells and their predecessors Campbells entered and exited during the winter months by snowmobile and, thus, it would appear that snow plowing and/or winter travel were clearly contemplated at the time.

Regardless, there is no case law or statute which would permit the Court to reform this easement and thereby impose additional easement encumbrances upon the Cometto property for the purposes of snow storage, as is argued by the Plaintiffs.

It is undisputed that the Easement Agreement, Instrument No. 570303, contains no such provision for snow storage, collateral or secondary easement.

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It is a well accepted general principle that the dominant estate may not enlarge the easement or encompass more of the servient estate's property than is provided under the Easement Agreement. Abbott v. Nampa School District No. 131, 119 Idaho 544, 808 P.2d 1289 (1991).

Even when secondary easements are provided for in an easement agreement or by law, the law constrains those secondary easements to a degree that it not expand the burden upon the servient estate.

In this case, the Plaintiffs argue that the Court require the Defendants Cometto to remove the yellow pick up, which has been in its current location for 12 years, the panel fencing, the earth berm, all other materials along the east boundary of the Cometto property and trees so that Mr. Caldwell can store snow off the easement roadway.

Likewise, the Plaintiffs assert to the Court that the Defendants should be required to remove the dirt and rock berm and partially constructed pole barn at the west entrance to the Cometto property so that the Plaintiffs Caldwell can store snow in that location as well.

It is difficult to imagine requests that could be more burdensome upon the servient estate than to require the servient estate to cease and desist its rightful and legal activities on their property outside of the easement roadway, some of which have been ongoing for several years even preexisting the existence of the roadway.

On this point, the Court should find for the Defendants Cometto and against the Plaintiffs. There is no right of snow storage off of the easement roadway.¹

¹ The Defendants Cometto have consistently maintained and did so testify at trial, they do not object to the fact that snow, when plowed, rolls off the end of the plow into the ditch adjoining the roadway or even slightly beyond. Their objection has consistently been that

E. There is No "Nuisance" or "Spite" Wall, Fence or Barrier.

The undisputed testimony before the Court is that Mr. and Mrs. Cometto relocated the roadway through their property in 1997. It was followed by the filing of litigation by two neighbors, who were predecessor in interest to the Plaintiffs Caldwell and the Plaintiff St. Angelo in this case. The third Plaintiff in this case's predecessor, Arthur Lemen, was represented in the negotiation of the negotiation of the Easement Agreement. See Exhibits 24 and 25.

At the time the roadway was relocated, Mr. and Mrs. Cometto built a berm to stop attempted travel through their property along the old roadway in large part because a portion of the old roadway had been physically removed behind the Comettos' residence and drivers entering from the east side would possibly drive off an embankment if they attempted to traverse the old roadway. The berm on the east entrance to the Cometto property has been in place since 1997. The berm at the west entrance to the Cometto residence is likewise been in place since 1997 though there has been some slight modification since 2000, which allow the Comettos to utilize the old roadway as a driveway approach to their residence. As such, there is absolutely no evidence to support a finding that either berms were put up in spite, since they predate the ownership of all of the Plaintiffs in this litigation. Furthermore, their existence is fully supported by the purposes related to the original relocation of the easement in 1997. This Court should find for the Defendants Cometto on this matter.

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Plaintiffs' attempt to expand or broaden the roadway completely disregard the existing roadway as constraining their easement rights with the hope that they may use any and all of the Cometto property as the Plaintiffs desire.

III. CONCLUSION

It would be well for the Plaintiffs and Plaintiffs' counsel to recall the words of the Supreme Court some years ago that read as follows:

Words do not become ambiguous simply because lawyers and laymen contend for different meanings.

Blackburn v. State Farm, 108 Idaho 85, 87,
697 P.2d 425, 428 (1985).

In this case that is exactly what the Plaintiffs assert. They argue that this Court should renegotiate and reform the Easement Agreement because words they either did not read or did not understand at the time they signed the agreement are "ambiguous" to them.

Such a contention is not supported by the law and this Court should find for the Defendants and should award attorneys' fees to the Defendants Cometto as the prevailing party.

DATED this 26th day of September, 2008.

FEATHERSTON LAW FIRM, CHTD.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2008, I caused a true and correct copy of the foregoing document to be served upon the following persons in the following manner:

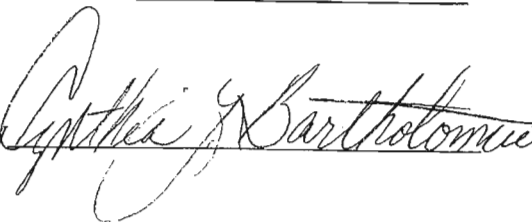
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
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DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**DEFENDANTS' RESPONSE
TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE
MEMORANDUM DECISION**

COMES NOW the undersigned counsel for and on behalf of the Defendants, Thomas W. Cometto and Lori M. Cometto, and in response to the Plaintiffs' Motion to Alter or Amend the Court's Memorandum Decision provides Points and Authorities and argument as follows:

I. STANDARD OF LAW

The Trial Court should not consider or admit new evidence on a Motion to Amend or a Motion to Reconsider Findings of Fact and Conclusions of Law after the trial has concluded and the evidence is closed. First Security Bank v. Webster, 119 Idaho 262, 267, 805 P.2d 468, 472 (1991).

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE MEMORANDUM DECISION - 1

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EXHIBIT C

In this matter the Caldwells, through their counsel, have asked the Court to consider a number of photos and they further make various representations of fact within their Memorandum and Motion to Alter which are not facts in the record or exhibits introduced at trial. This Court should disregard such evidence in ruling upon and denying Plaintiffs' Motion.

The Plaintiffs' Motion can be summed up as one more attempt to acquire easement rights upon the Cometto property not granted nor contemplated in the original Easement Agreement signed by the Plaintiff, Kathleen Caldwell. In short, the Plaintiffs request that the Court widen the easement and alter its findings to allow a widening of the easement roadway so as to allow them to conduct the following:

1. Remove all trees adjacent to the roadway or within three (3) feet of the edge of the roadway;
2. Permit Caldwells to excavate, alter and otherwise substantially modify the road base itself so as to change grade, elevation and widen such roadway to accommodate side ditching on either shoulder of the roadway.
3. The Plaintiffs again ask the Court to award them "snow storage" areas at the four (4) corners of the roadway despite the Court's finding that such was not granted in the original Easement Agreement and the Court's finding that adequate snow storage is provided on Plaintiffs' own property or within the three (3) foot adjacent areas to the roadway through the Cometto property.

Defendants request that this Court deny each of the requested amendments or alterations to the Court's Memorandum Decision and each will be addressed in turn as follows:

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE MEMORANDUM DECISION - 2

1. Creation of Snow Storage Areas

The Plaintiffs argue that there is no adequate snow storage area provided for in the Court's Memorandum Decision. The Court made a ruling that the Easement Agreement originally executed in 1999 contemplated the creation of an easement as wide as the road then and now exists. That width is defined by the Provolt survey. The Court went on to find that the issue of secondary easements for snow storage and/or for repair and maintenance of the easement cannot enlarge the burden upon the Cometto estate and the agreement contemplated ditches at different locations adjacent to the travel way. The Court then found that a 3-foot-wide strip adjacent to each side of the travel way to the 14-foot-wide travel way is sufficient for routine maintenance such as drainage or snow storage. The Court noted that the Cometto property is relatively flat topography and that the alignment of the travel way of the road allows for adequate maintenance and snow removal within the 3-foot-wide adjacent strip on each side of the roadway.

In extraordinary circumstances of heavy snow, the Court found that the Plaintiffs have a right to snow storage in specified areas of the northwest corner between the outside of the curve of the travel way and the Cometto's west boundary line, at the west end of the Cometto easement between the west boundary of the Cometto property and the west edge of the travel way and within the 3-foot adjacent strip on either side of the travel way. The Court noted that Comettos have raised five (5) children in a more than ten (10) year timeframe while living under the same conditions the Plaintiffs now complain of.

The Court also required the Comettos to remove the gate at the west end of the subject easement to accommodate snow storage and snow removal as provided in the Court's findings.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE MEMORANDUM DECISION - 3**

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The Court further noted that should there be a need for snow storage, the Plaintiffs Caldwell own a 10-acre parcel immediately to the east of the Cometto property and could reasonably store snow on their own property.

Plaintiffs argue in their motion that this is not adequate because it does not establish a right in perpetuity and ownership of the 10-acre piece may change in the future with the new owner disallowing snow storage on that eastern 10-acre parcel.

This argument is without logic. Plaintiffs do not argue that they cannot physically or logistically store snow on the adjacent 10-acre piece owned by Caldwells, simply that future ownership may prohibit it.

The simple solution to this supposed "problem" is to establish and record a snow storage easement on the Caldwell parcel. Plaintiffs Caldwell, Seiler and St. Angelo may simply establish this easement to benefit their dominant estates in the adjacent section to the east.

Incidentally, the Plaintiffs raise the issue of Defendant Comettos' pole barn at the west boundary of their property and immediately south of the easement area. This issue is unrelated to any of the issues raised in this litigation. The Court will recall that at the time of the viewing during trial, the pole barn was partially constructed in that location. In fact, the Court and counsel parked at that location and walked the roadway.

Furthermore, there was no delay in paying the surveyor while the building was constructed. The surveyor, Mr. Provolt, was paid as quickly as possible given the holiday season when funds became due.

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE MEMORANDUM DECISION - 4

The pole building was necessarily completed in December due to Plaintiff Caldwell's apparent report to Planning and Building authorities that the building (which had been under construction for approximately two years prior to the commencement of this litigation) was commenced without a proper building permit. In short, the Plaintiffs' decision to report this matter to the Planning and Building authorities resulted in a requirement that a building permit be acquired and that construction be completed. However, the matter is unrelated to any snow storage issue or any pending issues before the Court during the trial last September.

Regardless, this Court should deny the Plaintiffs' Motion to Amend or Alter.

2. Maintenance Requirement

On this issue, the Plaintiffs raise a number of issues itemized as (a) through (d). Those subheadings can be summarized, however, by saying that the Plaintiffs desire the Court to widen the easement roadway, permit them to remove trees and personal property outside the easement area and allow ditching and reconstruction of the roadway according to the Plaintiffs' desires.

It is worth noting at this juncture that this easement was originally an unrecorded access easement and the Plaintiffs and/or their predecessors had no recorded easement to their properties to the east in the adjacent section. When the Easement Agreement was executed in 1999, it created a recorded right of access for the first time to Plaintiffs' dominant estates in the adjacent section to the east. Furthermore, the roadway itself is nothing more than a forest service access traversing some 25 plus miles from the City of Sandpoint until it arrives at the west edge of the Cometto property.

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To review the Plaintiffs' argument in their Motion to Amend and in their prior briefing, it would appear they desire to create a super highway through the Cometto property. Indeed, that may be their desire, but it defies logic to think that a small section of a few hundred yards through the Cometto property could be improved to any significant degree that would alleviate the many miles of substandard road one must traverse to arrive at the west boundary of the Cometto property.

Furthermore, the Plaintiffs argue that they "need" to remove trees and other material in order to ditch and grade and properly drain the roadway itself. This argument overlooks the condition of the road leading up to the Cometto property. Plaintiffs' obvious ability to import rock, rip rap and fill material to raise the road level and create drainage in low spots as needed. There is no necessity for the removal of trees and ditching.

Furthermore, and most importantly there is no evidence in the record that the sections of the roadway in question were flooded or lacked adequate drainage. The Plaintiffs did argue that the corner on the Cometto property at the east end of the subject roadway and as it entered the Caldwell property had a low spot which collected water. Again, the solution would be the importation of material to raise that site and adequately drain it.

Once again, the Plaintiffs argue a number of photographs and facts which were not presented at trial and are not part of the record. To the extent that it is contained in Plaintiffs' Motion, the Defendants object and request the Court to disregard the same.

For the reasons set forth above, the Defendants request that the Court deny the Plaintiffs' Motion to Amend or Alter the Memorandum Decision.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE MEMORANDUM DECISION - 6**

Featherston Law Firm, Ltd.

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law*

*113 S. Second Ave.
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Fax (208) 263-0400*

** Licensed in
Idaho & Washington*

II. CONCLUSION

Based upon the foregoing, this Court should deny the Plaintiffs' Motion to Amend or Alter and should enter Judgment according to the form to be submitted by the undersigned Defendants' counsel.

DATED this 28th day of April, 2009.

FEATHERSTON LAW FIRM, CHTD.



By: BRENT C. FEATHERSTON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2009, I caused a true and correct copy of the foregoing document to be served upon the following persons in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

☒ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand delivered
☒ Facsimile No. (208) 664-9933
☐ Other: _____

Hon. Charles Hosack
District Court Judge
P.O. Box 9000
Coeur d'Alene, Idaho 83816

☐ U.S. Mail, Postage Prepaid
☐ Overnight Mail
☐ Hand delivered
☒ Facsimile No. (208) 446-1138
☐ Other: _____

Featherston Law Firm cka

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
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Idaho & Washington*

By: 

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
TO ALTER OR AMEND THE MEMORANDUM DECISION - 7

COPY

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

2009 JUN -2 P 3:46

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**DEFENDANTS' OBJECTION TO
PLAINTIFFS' SUPPLEMENTAL
BRIEF RE MOTION TO ALTER
OR AMEND MEMORANDUM
DECISION**

COMES NOW the undersigned counsel, BRENT C. FEATHERSTON of
FEATHERSTON LAW FIRM, CHTD., and hereby objects to the Plaintiffs' Supplemental
Brief Re Motion to Alter or Amend Memorandum Decision.

This Court heard argument on May 5, 2009, and at the close of hearing indicated that it
would consider tree removal only in those snow storage areas identified in the Court's
Memorandum Decision as necessary during extraordinary snowfall years and identified on
Page 11 of the Court's Memorandum Decision as being located at the inside corner of the

Featherston Law Firm ctd

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**DEFENDANTS' OBJECTION PLAINTIFFS' SUPPLEMENTAL
BRIEF RE MOTION TO ALTER OR AMEND MEMORANDUM
DECISION - 1**

EXHIBIT u D 11

southwest turn or curve of the subject roadway and the outside corner of the northwest corner of the subject roadway and between the curve of the roadway and the west boundary of the Cometto property.

As the Court will recall, Defendants' counsel explicitly stated on the record that if trees needed to be removed in those specific areas, Defendants would try to cooperate in identifying the necessary trees to be removed.

Plaintiffs made no attempts to collaborate with the Defendants and instead filed their Supplemental Brief seeking removal of trees all along the subject roadway and within both the snow storage area as well as the three foot wide adjacent secondary easement for maintenance and drainage. This issue had previously been ruled upon by the Court in its decision rendered in open court on May 5th and in the written Order denying Plaintiffs' Motion to Alter or Amend executed May 18th.

Since that date on May 18th Defendants counsel corresponded with Plaintiffs' counsel suggesting again that rather than pursuing a subsequent hearing on their Supplemental Memorandum the parties should collaborate in determining what trees needed to be removed between the west boundary of the Cometto property and the west edge of the curve of the southwest corner and the northwest corner of the subject roadway to accommodate snow storage.

To my knowledge, neither the Plaintiffs nor their counsel have identified what trees in these snow storage areas they deem it necessary to remove. (It was suggested that the trees be flagged or otherwise marked in a non-permanent manner.)

Featherston Law Firm clal

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**DEFENDANTS' OBJECTION PLAINTIFFS' SUPPLEMENTAL
BRIEF RE MOTION TO ALTER OR AMEND MEMORANDUM
DECISION - 2**

Again the Plaintiffs assert a right to remove all the trees along and within the three foot wide adjacent secondary easement as well as the snow storage easement. It is also suggested that it may be helpful for the surveyor to identify on the ground or with reference to the photographs the points within the curvature of the two turns in the roadway so as to more specifically identify the snow storage area.

Defendants are still awaiting a response from the Plaintiffs regarding contribution for the additional costs of the surveyor's preparation of a legal description of the road perimeter. (Requested last week.)

This Court issued an Order of Submittal of Pending Motion for Decision citing that no response from the Defendants had been received in regard to the Supplemental Memorandum filed by the Plaintiffs. The Defendants were unaware of any Order required supplemental briefing be submitted on a specified timeline. Further, the Plaintiffs' Supplemental Memorandum was not noted for hearing. Pursuant to I.R.C.P. 7(b)(3), Defendants are allowed to submit briefing and affidavits in response to Plaintiffs' Supplemental Brief no later than seven (7) days prior to a hearing. There is no hearing noted by Plaintiffs on the Supplemental Brief.

In conclusion, the Defendants are perfectly willing to accommodate a reasonable request for tree removal within the two snow storage area between the west boundary of the Cometto property and the southwest curve and northwest curve of the subject roadway. However, the Defendants strenuously object to the Plaintiffs seeking the removal of all trees adjacent to the subject roadway within the secondary easement. This matter has been ruled upon. Furthermore, it is incredible to suggest that the Plaintiffs cannot functionally use the

**DEFENDANTS' OBJECTION PLAINTIFFS' SUPPLEMENTAL
BRIEF RE MOTION TO ALTER OR AMEND MEMORANDUM
DECISION - 3**

Featherston Law Firm and

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law*

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subject travelway without removal of those trees when they and their predecessors have done so for more than ten (10) years to date.

It is requested that the Court deny Plaintiffs' Motion and/or set the matter for further hearing.

DATED this 2nd day of June, 2008.

FEATHERSTON LAW FIRM, CHTD.

By 

BRENT C. FEATHERSTON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

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District Court Judge
P.O. Box 9000
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[] Other: _____

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By 

DEFENDANTS' OBJECTION PLAINTIFFS' SUPPLEMENTAL
BRIEF RE MOTION TO ALTER OR AMEND MEMORANDUM
DECISION - 4

COPY

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
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JUL 10 P 3:55

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID L. CALDWELL, KATHLEEN C.)	Case No. CV 2007-01744
CALDWELL, LAWRENCE L. SEILER,)	
THERESA L. SEILER, and PATRICIA)	
ST. ANGELO,)	
)	DEFENDANTS'
)	MEMORANDUM OF
Plaintiffs,)	FEES AND COSTS
)	
vs.)	
)	
THOMAS W. COMETTO and LORI M.)	
COMETTO,)	
)	
Defendants.)	

Pursuant to Rule 54 and 11 of the Idaho Rules of Civil Procedure and Idaho Code §12-120, §12-121 and §12-123, the Defendants Cometto, as prevailing party, submit and file the following Memorandum of Fees and Costs in the above-captioned matter:

COSTS AS A MATTER OF RIGHT PURSUANT TO RULE 54(d)(1)(C):

Appearance Fee.....	\$ 58.00
M&M Court Reporting – depositions of Kathleen Caldwell....	354.51
M&M Court Reporting – depositions of David Caldwell.....	798.97
M&M Court Reporting – depositions of Thomas Cometto.....	141.28
M&M Court Reporting – depositions of Lori Cometto.....	129.59
M&M Court Reporting – Appearance Fee – Depo of Mr. Seiler	85.00
Bonner County Recorder – Certified Copy of Easement Agrmt.	8.00
Bonner County Recorder – Certified Copies.....	16.00
Bonner County Recorder - Certified Copies.....	13.00
GI2 – enlarged copies.....	4.82
Court Ordered Survey Cost (paid directly by clients).....	1,725.00

**TOTAL COSTS AS A MATTER OF RIGHT
PURSUANT TO IRCP 54(d)(1)(C).....**

\$ 3,334.17

DEFENDANTS' MEMORANDUM OF FEES AND COSTS – I

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Brent C. Featherston*
Jeremy P. Featherston
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EXHIBIT

DISCRETIONARY COSTS PURSUANT TO RULE 54(d)(1)(D):

Copies.....	3.90
Copies.....	3.90
Postage.....	.82
Copies.....	9.45
Postage.....	2.33
Postage.....	1.16
Postage.....	5.74
Copies.....	43.65
Postage.....	1.68
Copies.....	4.50
DHL Express Mailing	44.88
Mileage to & from Cd'A for hearing.....	50.50
Mileage to Cd'A for hearing.....	22.73
Mileage to and from Cd'A for hearing.....	50.50
Federal Express Mailing.....	24.74

TOTAL DISCRETIONARY COSTS

PURSUANT TO IRCP 54(d)(1)(C)..... **\$ 270.48**

TOTAL ALL COSTS..... **\$ 3,604.65**

ATTORNEY FEES:

Brent C. Featherston 125.00 hours at \$200.00 per hour \$25,000.00

TOTAL ATTORNEY FEES **\$25,000.00**

RECAPITULATION:

TOTAL COSTS \$ 3,604.65

TOTAL FEES: \$ 25,000.00

AMOUNT OWING: **\$28,604.65**

The foregoing statement of costs and attorney fees actually incurred by Defendants Cometto in this action is correct and in compliance with Rule 54(d) of the Idaho Rules of Civil Procedure. The foregoing statement of attorney fees is supported by the Affidavit of Brent C. Featherston, filed herewith, pursuant to Rule 54(e) of the Idaho Rules of Civil Procedure.

DEFENDANTS' MEMORANDUM OF FEES AND COSTS -2

Featherston Law Firm Chad

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This Memorandum of Fees and Costs is filed pursuant to Civil Rule as Defendants are the prevailing party under the Court's Judgment. The Defendants are entitled to award of attorneys' fees and costs.

DATED this 10th day of July, 2009.

FEATHERSTON LAW FIRM, CHTD.

By 

BRENT C. FEATHERSTON
Attorney for Defendants Cometto

STATE OF IDAHO)
) ss:
County of Bonner)

BRENT C. FEATHERSTON, being first duly sworn, upon oath deposes and says:

That I am the attorney for the above-named Defendants Cometto, that I have read the contents of the foregoing Memorandum of Costs and Attorney Fees; that to the best of my knowledge and belief, the items therein are true and correct, and that the costs claimed are in compliance with Rule 54(d)(5), Idaho Rules of Civil Procedure, and that the items in the above bill have been reasonably and necessarily incurred in this action related in defense of the Plaintiffs' Complaint. The attorney fees and costs represented herein are dated from November 26, 2007, to June 23, 2009, for a total award herein of \$28,604.65.

DATED this 10th day of July, 2009.


BRENT C. FEATHERSTON

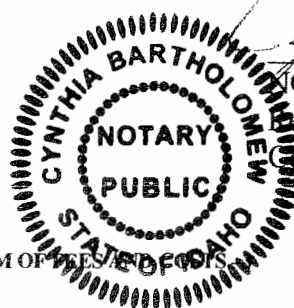
SUBSCRIBED AND SWORN TO before me this 10th day of July, 2009, by Brent C. Featherston.

Featherston Law Firm chd

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
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NOTARY PUBLIC - State of Idaho

Residing at Coosville, ID
Commission expires 8-15-2014

DEFENDANTS' MEMORANDUM OF FEES AND COSTS

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of July, 2009, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
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By 

Featherston Law Firm ckd

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DEFENDANTS' MEMORANDUM OF FEES AND COSTS -4

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Page 1

Selection Criteria

Slip.Date 5/1/1900 - Latest
Slip.Classification Open
Client (hand select) Include: ComettoTom.BCF.Caldwell et al

Rate Info - identifies rate source and level

Slip ID	Dates and Time	User	Units	Rate	Slip Value
	Posting Status	Activity	DNB Time	Rate Info	
	Description	Client	Est. Time	Bill Status	
		Reference	Variance		
22933	EXP	B. Featherston	1	58.00	58.00
	11/26/2007	\$Expenses			
	Billed G:19438 12/5/2007	ComettoTom.BCF.Caldwell et			
	Clerk of Court - Answer Appearance Fee				
23024	TIME	B. Featherston	1.00	200.00	200.00
	11/26/2007	Review	0.00	T@10	
	Billed G:19438 12/5/2007	ComettoTom.BCF.Caldwell et	0.00		
	Review Complaint; telephone conference with attorney Art Macomber; draft Notice of Appearance		0.00		
23160	TIME	B. Featherston	0.75	200.00	150.00
	12/6/2007	Office Confer	0.00	T@10	
	Billed G:19560 1/6/2008	ComettoTom.BCF.Caldwell et	0.00		
	Office Conference with Lori; review correspondence; draft correspondence in response		0.00		
23163	TIME	B. Featherston	1.00	200.00	200.00
	12/7/2007	Revise	0.00	T@10	
	Billed G:19560 1/6/2008	ComettoTom.BCF.Caldwell et	0.00		
	Revise/edit correspondence; review file; retrieve closed files from storage; title research		0.00		
23199	TIME	B. Featherston	1.50	200.00	300.00
	12/19/2007	Draft	0.00	T@10	
	Billed G:19560 1/6/2008	ComettoTom.BCF.Caldwell et	0.00		
	Draft Answer; review pleadings		0.00		
23279	EXP	B. Featherston	26	0.15	3.90
	1/7/2008	\$Expenses			
	Billed G:19918 4/3/2008	ComettoTom.BCF.Caldwell et			
	Copies				
23375	TIME	B. Featherston	0.50	200.00	100.00
	1/8/2008	Tele. Conf. w/	0.00	T@10	
	Billed G:19918 4/3/2008	ComettoTom.BCF.Caldwell et	0.00		
	Telephone conference with Tom; review		0.00		

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Page 2

Slip ID	Dates and Time	Posting Status	Description	User	Activity	Client	Reference	Units	DNB Time	Est. Time	Variance	Rate	Info	Bill Status	Slip Value
			pleadings; draft Objection												
23280	EXP			B. Featherston				26				0.15			3.90
	1/10/2008			\$Expenses											
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et											
			Duplicate copies												
23382	TIME			B. Featherston				1.00				200.00			200.00
	1/10/2008			Conference w/				0.00				T@10			
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et				0.00							
			Conference with Lori					0.00							
23389	TIME			B. Featherston				1.00				200.00			200.00
	1/11/2008			Attend				0.00				T@10			
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et				0.00							
			Attend hearing re TRO; review proposed					0.00							
			Stipulation; telephone conference with												
			attorney Macomber												
23397	TIME			B. Featherston				6.50				200.00			1300.00
	1/14/2008			Draft				0.00				T@10			
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et				0.00							
			Draft Stipulation; review file; conference with					0.00							
			Lori; telephone conference with attorney												
			Macomber; travel to Cd'A; attend TRO												
			hearing												
23781	TIME			B. Featherston				0.50				200.00			100.00
	2/12/2008			Dictate				0.00				T@10			
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et				0.00							
			Dictate correspondence; conference with					0.00							
			Logire blocked roadway												
23845	EXP			B. Featherston				2				0.41			0.82
	2/13/2008			\$Expenses											
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et											
			Postage												
24142	TIME			B. Featherston				0.75				200.00			150.00
	3/7/2008			Draft				0.00				T@10			
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et				0.00							
			Draft, revise and edit Answers to Discovery					0.00							
24178	TIME			B. Featherston				1.20				200.00			240.00
	3/13/2008			Dictate				0.00				T@10			
	Billed	G:19918	4/3/2008	ComettoTom.BCF.Caldwell et				0.00							
			Dictate discovery					0.00							

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Page 3

Slip ID	Dates and Time	User	Activity	Units	Rate	Slip Value
Posting Status		Client		DNB Time	Rate Info	
Description		Reference		Est. Time	Bill Status	
				Variance		
24185	TIME	B. Featherston		3.00	200.00	600.00
3/14/2008		Review		0.00	T@10	
Billed	G:19918 4/3/2008	ComettoTom.BCF.Caldwell et		0.00		
Review file; draft discovery; research				0.00		
easement/form of judgment						
24211	TIME	B. Featherston		0.50	200.00	100.00
3/19/2008		Revise		0.00	T@10	
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Revise discovery				0.00		
24252	EXP	B. Featherston		63	0.15	9.45
3/31/2008		\$Expenses				
Billed	G:19918 4/3/2008	ComettoTom.BCF.Caldwell et				
Copies						
24253	EXP	B. Featherston		1	2.33	2.33
3/31/2008		\$Expenses				
Billed	G:19918 4/3/2008	ComettoTom.BCF.Caldwell et				
Postage						
24330	TIME	B. Featherston		1.00	200.00	200.00
4/2/2008		Draft		0.00	T@10	
Billed	G:20080 5/1/2008	ComettoTom.BCF.Caldwell et		0.00		
Draft Motion for Restraining Order; research				0.00		
and review file						
24331	TIME	B. Featherston		0.35	200.00	70.00
4/3/2008		Revise		0.00	T@10	
Billed	G:20080 5/1/2008	ComettoTom.BCF.Caldwell et		0.00		
Revise/edit Affidavits and Motion				0.00		
24383	TIME	B. Featherston		4.00	200.00	800.00
4/10/2008		Review		0.00	T@10	
Billed	G:20080 5/1/2008	ComettoTom.BCF.Caldwell et		0.00		
Review file; prepare for and attend hearing				0.00		
on TRO						
24612	TIME	B. Featherston		0.25	200.00	50.00
4/21/2008		Review		0.00	T@10	
Billed	G:20080 5/1/2008	ComettoTom.BCF.Caldwell et		0.00		
Review correspondence				0.00		
25084	TIME	B. Featherston		2.00	200.00	400.00
5/7/2008		Review		0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et		0.00		
Review answers to Discovery; Dictate				0.00		
Compliance Letter; Draft responsive						
correspondence						

7/2/2009
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Page 4

Slip ID	Dates and Time	User	Units	Rate	Slip Value
	Posting Status	Activity	DNB Time	Rate Info	
	Description	Client Reference	Est. Time	Bill Status	
			Variance		
25137	TIME	B. Featherston	0.45	200.00	90.00
5/9/2008		Revise	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
	Revise/edit correspondence		0.00		
25139	TIME	B. Featherston	0.50	200.00	100.00
5/9/2008		Revise	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
	Revise/edit correspondence		0.00		
25355	EXP	B. Featherston	2	0.58	1.16
5/9/2008		\$Expenses			
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et			
	Postage				
25157	TIME	B. Featherston	2.50	200.00	500.00
5/19/2008		Review	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
	Review Plaintiffs' Motion to Compel; draft		0.00		
	Answers to Admissions; conference with Lori				
	Cometto; revise/edit our Motion to Compel;				
	draft Supplemental Answers to Plaintiffs First				
	Set of Interrogatories				
25362	EXP	B. Featherston	2	2.87	5.74
5/19/2008		\$Expenses			
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et			
	Postage				
25363	EXP	B. Featherston	291	0.15	43.65
5/19/2008		\$Expenses			
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et			
	Copies				
25107	TIME	B. Featherston	0.30	200.00	60.00
5/20/2008		Conference w/	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
	Conference with Lori; Review Answers		0.00		
25365	EXP	B. Featherston	1	1.68	1.68
5/21/2008		\$Expenses			
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et			
	Postage				
25364	EXP	B. Featherston	30	0.15	4.50
5/21/2008		\$Expenses			
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et			
	Copies				

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Slip ID	Dates and Time	User	Units	Rate	Slip Value
Posting Status		Activity	DNB Time	Rate Info	
Description		Client	Est. Time	Bill Status	
		Reference	Variance		
25271	TIME	B. Featherston	3.50	200.00	700.00
6/3/2008		Review	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
Review pleadings from attorney Art Macomber; review file; participate in telephonic hearing			0.00		
25300	TIME	B. Featherston	0.25	200.00	50.00
6/16/2008		Correspondence	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
Correspondence email; telephone conference with counsel and client re vacating depositions			0.00		
25605	TIME	B. Featherston	0.50	200.00	100.00
7/17/2008		Review	0.00	T@10	
Billed	G:20595 7/28/2008	ComettoTom.BCF.Caldwell et	0.00		
Review correspondenc re discovery; telephone conference with Art Macomber re extension of time; telephone conference with Lori Cometto			0.00		
25867	TIME	B. Featherston	0.50	200.00	100.00
7/28/2008		Review	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Review 2nd request for Admissions and draft responses			0.00		
25870	TIME	B. Featherston	1.25	200.00	250.00
7/28/2008		Review	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Review correspondence and conference with Lori; review answers to discovery			0.00		
25886	TIME	B. Featherston	0.30	200.00	60.00
8/7/2008		Draft	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Draft correspondence			0.00		
26043	TIME	B. Featherston	3.50	200.00	700.00
8/12/2008		Review	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Review file; draft Motion to Compel Deposition, Motion for Sanction, Motion to Shorten Time, Notice of hearing; office conference with Lori; review deed listing			0.00		
26128	TIME	B. Featherston	3.50	200.00	700.00
8/15/2008		Review	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		

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Slip ID			User	Units	Rate	Slip Value
Dates and Time			Activity	DNB Time	Rate Info	
Posting Status			Client	Est. Time	Bill Status	
Description			Reference	Variance		
Review file; prepare for and attend hearing; draft Order; review discovery				0.00		
26056	EXP		D. Featherston	1	354.51	354.51
8/19/2008			\$Expenses			
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et			
M & M Court Reporting- Witness Kathleen Caldwell						
26057	EXP		D. Featherston	1	798.97	798.97
8/19/2008			\$Expenses			
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et			
M & M Court Reporting- Witness David Caldwell						
26137	TIME		B. Featherston	8.00	200.00	1600.00
8/19/2008			Prepare	0.00	T@10	
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Prepare for and conduct Deposition of David Caldwell and Deposition of Kathleen Caldwell				0.00		
26140	TIME		B. Featherston	1.00	200.00	200.00
8/20/2008			Draft	0.00	T@10	
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Draft correspondence to counsel and dictate Notice of Deposition for Seiler and correspondence				0.00		
26058	EXP		Stephen Snedden	1	129.59	129.59
8/22/2008			\$Expenses			
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et			
M & M Court Reporting- Witness Lori Cometto						
26055	EXP		D. Featherston	1	141.28	141.28
8/22/2008			\$Expenses			
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et			
M & M Court Reporting- Witness Thomas W. Cometto						
26156	TIME		B. Featherston	4.00	200.00	800.00
8/22/2008			Attend	0.00	T@10	
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Attend Deposition of Tom Cometto; attend Deposition of Lori Cometto				0.00		
26160	TIME		B. Featherston	1.00	200.00	200.00
8/22/2008			Draft	0.00	T@10	
Billed	G:20975	9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Draft Witness List; research surveyor's				0.00		

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Slip ID		User	Units	Rate	Slip Value
Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client	Est. Time	Bill Status	
Description		Reference	Variance		
licensing statute					
26059	EXP	Stephen Snedden	1	85.00	85.00
8/25/2008		\$Expenses			
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et			
M & M Court Reporting- Witness Lawrence Seiler					
26070	EXP	J. Featherston	1	8.00	8.00
8/25/2008		\$Expenses			
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et			
Bonner County Recorder- Certified Copy of Easement Agreement					
26161	TIME	B. Featherston	0.50	200.00	100.00
8/25/2008		Prepare	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Prepare for and attend Deposition of Dr. Seiler; review of file			0.00		
26165	TIME	B. Featherston	3.50	200.00	700.00
8/26/2008		Review	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Review pleadings; research and draft trial memorandum; prepare trial exhibits			0.00		
26071	EXP	Stephen Snedden	1	16.00	16.00
8/27/2008		\$Expenses			
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et			
Clerk of the Court- Certified Copies					
26169	TIME	B. Featherston	5.50	200.00	1100.00
8/27/2008		Research	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Research and draft pretrial motions and trial brief; research and prepare for trial			0.00		
26171	TIME	B. Featherston	1.25	200.00	250.00
8/28/2008		Prepare	0.00	T@10	
Billed	G:20975 9/16/2008	ComettoTom.BCF.Caldwell et	0.00		
Prepare for trial; conference with Lori; telephone conference with Judge's Clerk; draft correspondence to FATCO re claim			0.00		
26355	EXP	B. Featherston	1	44.88	44.88
8/29/2008		\$Expenses			
Billed	G:20991 10/2/2008	ComettoTom.BCF.Caldwell et			
DHL Express- Mailing Costs					

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Slip ID	Dates and Time	Posting Status	Description	User Activity	Client Reference	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
26445	TIME			B. Featherston		2.50	200.00	500.00
	9/1/2008			Prepare		0.00	T@10	
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et		0.00		
	Prepare for trial					0.00		
26448	EXP			B. Featherston		100	0.505	50.50
	9/2/2008			\$Expenses				
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et				
	Mileage							
26446	TIME			B. Featherston		11.50	200.00	2300.00
	9/2/2008			Prepare		0.00	T@10	
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et		0.00		
	Prepare for trial; travel (round trip) to and from Coeur d'Alene; attend trial					0.00		
26447	TIME			B. Featherston		9.00	200.00	1800.00
	9/3/2008			Prepare		0.00	T@10	
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et		0.00		
	Prepare for trial; view property; attend trial; research					0.00		
26449	EXP			B. Featherston		45	0.505	22.73
	9/3/2008			\$Expenses				
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et				
	Mileage							
26393	EXP			J. Featherston		1	13.00	13.00
	9/3/2008			\$Expenses				
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et				
	Recorder's Office- Fees							
26451	EXP			B. Featherston		100	0.505	50.50
	9/4/2008			\$Expenses				
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et				
	Mileage							
26450	TIME			B. Featherston		6.50	200.00	1300.00
	9/4/2008			Prepare		0.00	T@10	
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et		0.00		
	Prepare for trial; travel to and from Cd'A; attend trial					0.00		
26459	TIME			B. Featherston		0.35	200.00	70.00
	9/8/2008			Correspondence		0.00	T@10	
	Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et		0.00		
	Correspondence email to Phil De Angeli re status of trial					0.00		

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Slip ID	Dates and Time	User	Activity	Units	Rate	Slip Value
	Posting Status	Client		DNB Time	Rate Info	
	Description	Reference		Est. Time	Bill Status	
				Variance		
26414	EXP	B. Featherston		1	24.74	24.74
9/18/2008		\$Expenses				
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et			
Fed Ex- Mailing Costs						
26412	EXP	B. Featherston		1	4.82	4.82
9/18/2008		\$Expenses				
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et			
GI12 Costs						
26494	TIME	B. Featherston		2.50	200.00	500.00
9/18/2008		Research		0.00	T@10	
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et	0.00		
Research and draft post trial brief				0.00		
26497	TIME	B. Featherston		3.50	200.00	700.00
9/19/2008		Research		0.00	T@10	
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et	0.00		
Research and draft post trial brief				0.00		
26502	TIME	B. Featherston		1.75	200.00	350.00
9/22/2008		Review		0.00	T@10	
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et	0.00		
Review Plaintiffs' Post Trial Brief and Proposed Findings; research legal issues re interpretation of easement				0.00		
26521	TIME	B. Featherston		2.50	200.00	500.00
9/26/2008		Research		0.00	T@10	
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et	0.00		
Research and draft Reply Brief				0.00		
26524	TIME	B. Featherston		1.00	200.00	200.00
9/26/2008		Research		0.00	T@10	
Billed	G:20991	10/2/2008	ComettoTom.BCF.Caldwell et	0.00		
Research; revise/edit Reply Brief				0.00		
26949	TIME	B. Featherston		0.50	200.00	100.00
11/3/2008		Draft		0.00	T@10	
WIP		ComettoTom.BCF.Caldwell et		0.00		
Draft pleadings; review file; draft correspondence, conference with surveyor Gilbert Bailey				0.00		
26983	TIME	B. Featherston		0.35	200.00	70.00
11/12/2008		Tele. Conf. w/		0.00	T@10	
WIP		ComettoTom.BCF.Caldwell et		0.00		
Telephone conference with Lori; telephone conference with Art Macomber; dictate corresndence and request hearing				0.00		

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Slip ID	Dates and Time	User	Units	Rate	Slip Value
	Posting Status	Activity	DNB Time	Rate Info	
	Description	Client	Est. Time	Bill Status	
		Reference	Variance		
26999	TIME	B. Featherston	0.75	200.00	150.00
	11/17/2008	Tele. Conf. w/	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Telephone conference with Judge Hosack re		0.00		
	court ordered survey				
27004	TIME	B. Featherston	0.30	200.00	60.00
	11/19/2008	Correspondence	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Correspondence (email) to Macomber;		0.00		
	telephone conference with Lori				
27638	TIME	B. Featherston	0.20	200.00	40.00
	1/16/2009	Correspondence	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Correspondence to Court		0.00		
27969	TIME	B. Featherston	1.50	200.00	300.00
	2/3/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review file and prepare for hearing; atend		0.00		
	hearing on Plaintiffs' Motion to Compel				
	Compliance				
27994	TIME	B. Featherston	0.50	200.00	100.00
	2/11/2009	Tele. Conf. w/	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Telephone conference with Dan Provolt;		0.00		
	dictate orders and correspondence				
28031	TIME	B. Featherston	0.75	200.00	150.00
	2/20/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review correspondence and Affidavit of Alan		0.00		
	Neill; draft Objection to Affidavit; research				
	Court Rules				
28380	TIME	B. Featherston	0.25	200.00	50.00
	3/10/2009	Tele. Conf. w/	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Telephone conference with Judge's office re		0.00		
	status; email client and counsel				
28359	TIME	B. Featherston	0.35	200.00	70.00
	3/13/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review Court Decision		0.00		

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Slip ID	Dates and Time	User	Units	Rate	Slip Value
	Posting Status	Activity	DNB Time	Rate Info	
	Description	Client	Est. Time	Bill Status	
		Reference	Variance		
28843	TIME	B. Featherston	1.25	200.00	250.00
	4/28/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review Macomber's Motion and Memorandum; deictate reply		0.00		
28970	TIME	B. Featherston	2.00	200.00	400.00
	5/5/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review file; attend hearing on Plaintiff's Motion to Alter/Amend		0.00		
28986	TIME	B. Featherston	0.40	200.00	80.00
	5/11/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review notes; dictate Order Denying Motion to Alter/Amend		0.00		
28996	TIME	B. Featherston	0.75	200.00	150.00
	5/14/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review fax Memorandum		0.00		
29004	TIME	B. Featherston	0.35	200.00	70.00
	5/18/2009	Dictate	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Dictate correspondence		0.00		
29045	TIME	B. Featherston	1.50	200.00	300.00
	5/28/2009	Draft	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Draft proposed Final Judgment; review Memorandum Decision and telephone conference with Dan Provolt		0.00		
29054	TIME	B. Featherston	0.30	200.00	60.00
	5/29/2009	Dictate	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Dictate Motion for Entry of Final Judgment		0.00		
29274	TIME	B. Featherston	0.75	200.00	150.00
	6/2/2009	Draft	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Draft response; review file		0.00		
29421	TIME	B. Featherston	0.35	200.00	70.00
	6/8/2009	Review	0.00	T@10	
	WIP	ComettoTom.BCF.Caldwell et	0.00		
	Review Court Order; telephone conference with Judge's office		0.00		

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Slip ID		User	Units	Rate	Slip Value
Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client	Est. Time	Bill Status	
Description		Reference	Variance		
29438	TIME	B. Featherston	1.00	200.00	200.00
6/10/2009		Review	0.00	T@10	
WIP		ComettoTom.BCF.Caldwell et	0.00		
Review Final Judgment and participate in phone conference re Final Judgment			0.00		
29492	TIME	B. Featherston	1.00	200.00	200.00
6/22/2009		Review	0.00	T@10	
WIP		ComettoTom.BCF.Caldwell et	0.00		
Review proposed Judgment; correspondence to Court re Judgment			0.00		
29500	TIME	B. Featherston	0.20	200.00	40.00
6/23/2009		Review	0.00	T@10	
WIP		ComettoTom.BCF.Caldwell et	0.00		
Review correspondence from Macomber			0.00		
Grand Total					
		Billable	125.00		26879.65
		Unbillable	0.00		0.00
		Total	125.00		26879.65

In the Supreme Court of the State of Idaho

DAVID L. CALDWELL and KATHY C.
CALDWELL, husband and wife;
LAWRENCE L. SEILER and THERESA L.
SEILER, husband and wife; and PATRICIA
ST. ANGELO,

Plaintiffs-Appellants-Cross Respondents,

v.

THOMAS W. COMETTO and LORI M.
COMETTO, husband and wife; and DOES 1-
5,

Defendants-Respondents-Cross
Appellants.

ORDER GRANTING MOTION TO
AUGMENT THE RECORD

Supreme Court Docket No. 37157-2009
Bonner County Docket No. 2007-1744

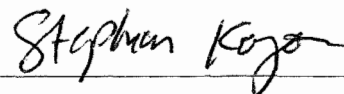
A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Appellants on April 26, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellants' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Trial Brief on Servient Re-location of the Easement Without Injury and Dominant Tenement Maintenance Using Secondary Easement, file-stamped September 2, 2008.

DATED this 3rd day of ~~April~~ May 2010.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

ORDER GRANTING MOTION TO AUGMENT THE RECORD – Docket No. 37157-2009

5-3-10

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2008 SEP -2 A 8: 16

MARIE SCOTT
CLERK DISTRICT COURT

ap
CLERK

Arthur B. Macomber, Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, ID 83814
Telephone: 208-664-4700
Facsimile: 208-664-9933
State Bar No. 7370
Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
C. CALDWELL, husband and wife;)
LAWRENCE L. SEILER AND)
THERESA L. SEILER, husband and)
wife; PATRICIA ST. ANGELO;)
Plaintiffs)

vs.)

THOMAS W. COMETTO and LORI)
M. COMETTO, husband and wife; and)
DOES 1-5,)
Defendants.)

Case No: CV-07-01744

**TRIAL BRIEF ON SERVIENT RE-
LOCATION OF THE EASEMENT
WITHOUT INJURY AND
DOMINANT TENEMENT
MAINTENANCE USING
SECONDARY EASEMENT**

COMES NOW DAVID L. CALDWELL and KATHY C. CALDWELL, et al., by
and through their attorney of record, Arthur B. Macomber, to provide this Court a Trial
Brief on law related to the Servient Re-location of the Easement.

STATEMENT OF FACTS

In 1997 or 1998, defendants Cometto moved the roadway, Strawberry Mountain
Road, which ran close to the front of their residence allegedly due to concerns about their

childrens' safety and allegedly due to water drainage into their home. (Lori Cometto Depo. Trans., Aug. 22, 2008, pending issuance.)

Due to the four nearly ninety (90) degree turns that Comettos constructed when they moved the road, and with additional building and personal property storage alongside the road, plaintiffs have had to endure undue difficulty in using the easement to their benefit, on occasion being blocked from enjoying its benefits completely, such as during the winter season, and when attempting to move long steel beams onto their property, which was impossible due to those turns, and in having at least one plaintiffs' invitee denied entry by the Comettos. (Kathleen Caldwell Depo. Trans., Aug. 19, 2008, pending issuance.)

During deposition of Lori Cometto on August 20 2, 2008, Mrs. Cometto raised the issue of the safety of her children as the reason why they moved the road in the first place. She also mentioned drainage of water off the road and into her home, but that was more in the nature of an aside, with her children's safety being paramount. (Lori Cometto Depo., 8-22-08, pending issuance.) Attempting to compare conditions in 1997 to conditions in 2008, questions were asked regarding the nature of the medically diagnosed physical disability of Mrs. Cometto's children to sense the approach of oncoming motor vehicles. (Id.) Mrs. Cometto refused to answer any of those questions, raising a valid question as to the Cometto's intent in moving the easement and their intent in maintaining the obstructions preventing current plaintiffs from enjoying its benefits.

LEGAL ARGUMENT

1) I. C. § 55-313 Allows Comettos to Move Easement, But Not Injure Caldwells

Idaho Code section 55-313 states:

... [T]he person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands,

but such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.

There is no case law interpreting this statute. However, there are Idaho Statutes and case law beyond Idaho Code section 55-313 that indicates easement relocations should not injure another person or person(s) at Idaho Code sections 18-4308 and 42-1207. These laws and cases are related to appurtenances such as irrigation ditches and waterways, and they allow a servient owner to move them without "otherwise injur[ing] any persons or persons using or interested in such access." (I.C. § 55-313.)

2) Idaho Code 18-4308 (Criminal Code)

Idaho Code 18-4308 states:

... [T]he person or persons owning or controlling the said land, shall have the right at his own expense to change said ditch, canal, lateral, drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impeded the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral, drain or buried irrigation conduit . . .

In *Simonson v. Moon*, 72 Idaho 39 (1951), the court found the burden was on Plaintiffs to show they had provided Defendants with another ditch which would convey the water without injury to the dominant tenement Moon.

In *Simonson*, 72 Idaho at p. 46, the Defendants were deprived of the right heretofore enjoyed of irrigating through the branch ditch when the main lateral below B was in use by another party. The court found this to be an injury to the Defendants within the meaning of the statute.

In this case, the Comettos have constructed and continue to construct obstacles that make it impossible for the Caldwells to effectively use the easement. For example:

1. The Comettos have placed boulders at the East turn that prevents the passage of large trucks that need to reach the Plaintiffs' properties.

2. The Comettos have placed an earth berm on the East turn that causes flooding which makes the road into a mud pit at that turn and is not passable.

3. The Comettos have built an earth berm at the West end of the entrance of the easement and set up earth and rock berms preventing the easement road to be plowed; therefore, preventing the Plaintiffs from using the road during winter months when they have the right to use the road year round.

In *Simonson*, 72 Idaho at p. 48, the court found the Defendants had a secondary easement over the course of the ditches area for cleaning and maintenance.

In this case, the Plaintiffs have a secondary easement over the course of this road for the purpose of cleaning and maintenance, including winter snow storage maintenance. The Comettos have not allowed the Plaintiffs to maintain the easement road. The Comettos have blocked the snow storage areas with various items, including vehicles, boulders, fences, and buildings, thus preventing the maintenance of the road.

In *Simonson*, 72 Idaho at p. 48, the court found that Plaintiffs are to be required to provide Defendants with reasonable access to the upper part of the ditch, with the usual equipment, for cleaning and maintenance.

In this case, the Comettos have not permitted the Plaintiffs access to the road to repair the easement road for maintenance and cleaning of the easement. Comettos have placed rock, built buildings, left broken vehicles, built ditches across the road, and left debris along the side of the easement and have not permitted the Plaintiffs to keep the easement maintained and cleared for their use.

3) Idaho Code 42-1207 (Civil Code)

Idaho Code 42-1207 states:


...[T]he person or persons owning or controlling said land shall have the right at their own expense to change said

ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit . .

In *Abbot v. Nampa School District No. 131*, 119 Idaho 544 (1991), the court determined whether a stranger to an easement may use the easement pursuant to a license agreement with the easement holder without obtaining the consent of the servient estate's owner so long as the burden on the servient estate is not enlarged. The district court determined the modifications made to the Savage Lateral did not constitute an enlargement of the use or an unreasonable increase in the burden of the easement on the servient estate and so answered the question in the affirmative. "The placing of an irrigation ditch into a buried pipe [was] certainly a standard practice in [that] area and is not a peculiar or unusual undertaking." (Id.)

In this case, snow storage off of a roadway is required for the use of the road, and is a standard practice in this area for the winter months and is not a peculiar or unusual undertaking. Therefore, Caldwell's should not be blocked from storing snow during the winter, and Comettos must remove impediments off the roadway from areas that may be used as secondary easements during the winter.

DATED this 29th day of August, 2008.



Arthur B. Macomber
Attorney at Law

CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

TRIAL BRIEF ON SERVIENT RE-LOCATION OF THE EASEMENT WITHOUT INJURY AND DOMINANT TENEMENT MAINTENANCE USING SECONDARY EASEMENT

Brent C. Featherston
FEATHERSTON LAW FIRM
113 South Second Ave
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (FAX)

Bonner County Civil Clerk
Facsimile: 208-263-0896

Judge Hosack
Kootenai County Civil Clerk
Facsimile: 446-1138

☒ By personally faxing a true copy thereof to the person(s) at the facsimile telephone number for that party.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of August, 2008.


Judy Parmer
Paralegal