

6-14-2010

# Caldwell v. Cometto Respondent's Brief Dckt. 37157

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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; PATRICIA ST. ANGELO,

Plaintiffs/ Appellant/Cross-Respondent,

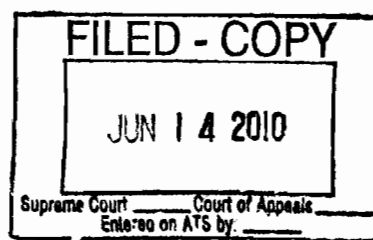
vs.

THOMAS W. COMETTO and LORI M. COMETTO, Husband and Wife, and DOES 1-5;

Defendants/Respondents/Cross-Appellants.

) Supreme Court Docket  
) #37157-2009

) Case No. CV. 07-01744



=====  
RESPONDENTS/CROSS-APPELLANTS' BRIEF  
=====

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

\_\_\_\_\_  
HONORABLE CHARLES HOSACK  
District Judge  
\_\_\_\_\_

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## **I. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

This action was commenced by the Appellants/Cross-Respondents, David L. Caldwell and Kathy C. Caldwell, Lawrence L. Seiler and Theresa L. Seiler, and Patricia St. Angelo, (hereinafter “Caldwell”) by Complaint filed October 17, 2008, against Respondents/Cross-Appellants, Thomas W. Cometto and Lori M. Cometto, husband and wife (hereinafter “Cometto”).<sup>1</sup>

This case arises from earlier litigation resulting in a Judgment in Bonner County Case No. CV-1997-1057. ( See Caldwell’s Exhibits Nos. 25 and 26.) That earlier litigation stemmed from a roadway which crossed the property owned by Cometto which served properties to the East of the Cometto property.

Prior to entry of the Judgment and Easement Agreement, (Caldwell’s Exhibits Nos. 25 and 26) the property had no recorded access to their properties. (See Cometto’s Exhibit B.)<sup>2</sup>

Cometto relocated the existing roadway to its current location and the litigation in 1997 filed by Caldwell’s predecessor in interest, Campbell, challenged Cometto’s right to relocated under I.C. § 55-313. (See Caldwell’s Exhibits Nos. 26 and 27.)

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<sup>1</sup> During the course of these proceedings, at each hearing and at trial, the only Plaintiffs who appeared and offered testimony were David L. Caldwell and Kathy C. Caldwell. The Plaintiffs Seiler and St. Angelo failed to appear at trial and refused to participate in depositions and pretrial discovery.

<sup>2</sup> Despite Caldwell’s assertion, there is no “unrecognized 60-foot easement” or any other easement of record across the Cometto property according to Cometto’s title report (Exhibit B). On the eve of trial, Caldwell filed new claims. The motion has never been granted and no Amended Complaint is in the record.

The 1997 litigation concluded with Cometto granting an easement over the relocated road in favor of all three (3) properties, which was recorded. (See Caldwell's Exhibit No. 25) ("Easement Agreement")

Kathleen Caldwell executed the final Easement Agreement incorporated into the Judgment in Bonner County Case CV-1997-1057.<sup>3</sup>

The Caldwell's Complaint or Petition sought several forms of relief as follows:

1. That Caldwell is entitled to a 30-foot wide easement and the right to widen the travelway constructed in 1997 to the full 30 feet;
2. That Cometto is responsible for additional improvements under Idaho Code 55-313 to meet Bonner County Private Road Standards Ordinance for Subdivisions adopted in 2006;
3. That Cometto be ordered to remove existing berms, ditches or other materials outside of the easement;
4. That Caldwell be allowed to relocate the easement to the historical location adjacent to the Cometto residence as litigated in the prior litigation;
5. That Cometto be ordered to construct the replacement easement to Bonner County Private Road Standards Ordinance for Subdivisions;
6. That Caldwell has a right and duty to maintain the easement road;

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<sup>3</sup> Mr. and Mrs. Caldwell purchased the unimproved 10-acre parcel immediately east of the Cometto parcel in 2004 subsequent to the Easement agreement. (See Caldwell's Exhibit No. 27.)

7. That the easement is void as a matter of public policy pursuant to Idaho Code § 29-114; and

8. For additional injunctive relief and attorneys' fees. (R.Vol.I, pp.10-13)

Caldwell's Complaint also contains several inflammatory references and accusations of coercion by Judge Michaud, killing of Caldwell's pet dog, shooting at Mr. Caldwell and damage to Caldwell vehicle tires, which were never supported by testimony or evidence at trial. (R.Vol.I, pp.23-25).

Trial was held September 2, 3, and 4 of 2008 and a Memorandum Decision was entered March 20, 2009, denying all of the remaining claims for relief sought in the Caldwell's Complaint and defining the easement rights consistent with Cometto's position. Most of Caldwell's claims were dismissed at the outset of trial or on Cometto's Rule 41 (b) Motion after Caldwell rested. (R.Vol.III, pp.376-390; Tr. pp.326-350).

On July 1, 2009, the Court entered a PARTIAL JUDGMENT based upon its prior memorandum decision. (R.Vol.III, pp.437-447).

On August 6, 2009, the Court entered an AMENDED PARTIAL JUDGMENT. (R.Vol.III, pp.473-482).

Thereafter the Trial Court certified, pursuant to Rule 54(b), the Amended Partial Judgment. (R.Vol.III, pp.498-499 and 505-515).

Caldwell filed a Notice of Appeal on November 19, 2009. (R.Vol.III, pp.516-518).

Cometto filed their Notice of Cross-Appeal on December 9, 2009. (R.Vol.III, pp.526-528).



On July 10, 2009, Cometto filed their Memorandum of Fees and Costs. (See Motion to Augment.)

On July 14, 2009, Caldwell filed their Memorandum of Costs and Affidavit of Arthur B. Macomber in Support of Memorandum of Costs.

On July 24, 2009, Caldwell filed an Objection to Disallow Cometto's Fees and Costs.

On July 28, 2009, Cometto filed an Objection and Motion to Disallow Caldwell's Fees and Costs.

On October 8, 2009, the Court entered an Order Disallowing Cometto's and Caldwell's Memorandum of Fees and Costs.

For reasons that are unclear, the Clerk's Record does not contain Cometto's Memorandum of Fees and Costs, and the Court's Order Disallowing Fees and Costs. Cometto has filed a Motion to Augment concurrent with this brief.

## **B. STATEMENT OF FACTS**

This case is relatively straightforward although it is profoundly complicated by the actions of Caldwell and the circuitous route chosen by Caldwell's counsel.

The Complaint on file sought numerous forms of relief not provided for in the original easement signed by Kathy Caldwell and recorded in the Bonner County Recorder's Office as Instrument No. 570303. Caldwell's Exhibit 25. ("Easement Agreement").

Mrs. Caldwell is educated as a doctor of veterinary medicine. (Tr., p.143, ll.4-6). Mrs. Caldwell admitted she signed the Easement Agreement but she only "scanned it" because she did not "feel like reading through" it again. She did not carefully read it, but believed that the reference to 30 feet meant a 30-foot-wide roadway, but did not "read the details". (Tr., p.106, ll.6-9; 19-25; Tr., p.107, ll.1-15).

Mrs. Caldwell testified that the sharp turn at the west entrance and east entrance to the Cometto property and reflected on the exhibits to the Easement Agreement were impossible to negotiate with large trucks. (Tr., pp.153, ll.1-12). Caldwell's testimony was impeached by the DVD video of Mr. Caldwell driving a tractor trailer across the same roadway. (Cometto's Exhibits H and I).

Both Mr. and Mrs. Caldwell conceded that the current roadway has not changed since the Easement Agreement was signed by Mrs. Caldwell. (Tr., p.161, l.22-p.162, l.6; p.227, ll.6-15).

In particular Mr. Caldwell testified as follows: "The running surface, the travel surface is substantially in the same location as it was before. .... " (Tr., p.227, ll.13-15).

Additionally, Mr. and Mrs. Caldwell testified that the roadway and its width has not substantially changed from 1999 until the date of trial and that several “mature”, “large” trees exist adjacent to the roadway and about 24 inches from the travelway, which existed in 1999. (Tr., p.228, ll.4-18; Tr. p.168, ll. 8-14).

Despite this testimony, Caldwell, on appeal, asks that the Trial Court be reversed to allow removal of the trees in the secondary easement granted by the Trial Court, but not sought in Caldwell’s complaint, thereby widening the easement beyond that defined in the Trial Court’s Judgment and the Easement Agreement.

Caldwells simply reiterate their argument made at the trial level, that their rights exceed that defined in the Easement Agreement and that the Trial Court erred in not re-litigating the 1997 litigation under I.C.§55-313, and by disallowing tree removal outside the easement because it impacts Mr. Caldwell’s snowplowing with a dump truck and large plow. Caldwell argues that this Court should reverse the Trial Court and thereby expand the Caldwell easement to encompass more than that granted (and agreed to by Mrs. Caldwell) in the original Easement Agreement.

Caldwell further argues that the Trial Court erred by addressing and disallowing attorneys’ fees and costs in a “bifurcated action” though, to date, there is no “Amended Complaint” allowed or filed in this action. This begs the question of what claims remain for future litigation.

Finally, Caldwell argues that they are the prevailing parties and are entitled to fees and costs.

### C. STANDARD OF REVIEW

When this court reviews a lower court's decision, it determines whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. "A Trial Court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the Trial Court's role as trier of fact." Findings of fact based on substantial and competent evidence will not be overturned on appeal even in the face of conflicting evidence. It is the province of the district court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses.

Beckstead v. Price, 146 Idaho 57, 61, 190 P.3d 876, 880 (2008); quoting Anderson v. Larsen, 136 Idaho 402, 405, 34 P.3d 1085, 1088 (2001)[cites omitted]

On appeal, the Appellate Court exercises free review over the Trial Court's conclusions of law to determine whether the court correctly stated the applicable law and whether the legal conclusions are sustained by the fact in the record. Id.; Anderson, supra at 406.

"Findings of fact that are based on substantial evidence, even if the evidence is conflicting, will not be overturned on appeal." Id.

## II. ISSUES PRESENTED ON APPEAL

Caldwell states the following as issues on appeal:

- A. **Whether and to what extent the District Court's Amended Partial Judgment erred in denying plaintiffs the right to completely remove mature trees from the secondary easement areas for the purposes of maintenance of the travelway and roadway.**
- B. **Whether the District Court erred in issuing its Order on Motions for Costs and Attorneys Fees prior to the completion of the second half of the bifurcated case.**
- C. **Whether, and to what extent, the District Court's Order on Motions for Costs and Attorneys Fees issued on the initial half of this bifurcated case was correctly decided as to the substance thereof.**
- D. **Are Appellants (Caldwell) Entitled to attorney fees and costs on appeal, pursuant to Idaho Appellate Rule 41?**

Cometto wishes to re-phrase the issues presented on appeal as follows:

- A. **The District Court did not err in refusing to re-litigate issues pertaining to the relocation of the easement within the Cometto property resolved by the final Judgment in Bonner County Case No. CV-1997-1057.**
- B. **Whether the Trial Court was procedurally permitted to rule on Caldwell's and Cometto's cross-claims for attorneys' fees and costs.**
- C. **The Trial Court erred by failing to analyze the claims of the parties and erred in finding that both Cometto and Caldwell prevailed in part.**
- D. **Whether Caldwell is entitled to attorneys' fees and costs on appeal.**
- E. **Whether Cometto is entitled to attorneys' fees and costs on appeal.**

### III. ARGUMENT

**A. The District Court did not err in refusing to re-litigate issues pertaining to the relocation of the easement within the Cometto property resolved by the final Judgment in Bonner County Case No. CV-1997-1057.**

Although Caldwell's trial Counsel sought to litigate the 1997 relocation of the road, The Trial Court made clear at the outset of trial it would not allow Plaintiffs a second bite at the I.C. §55-313 issues resolved in the final judgment and Easement Agreement entered in 1999-2000. The Court defined the issue at the outset of trial and in the Memorandum Decision, as a determination of the width of the easement and any related easement rights granted in Instrument No. 570303 ("Easement Agreement"). (Caldwell's Exhibit No. 25).

In the Easement Agreement, Cometto conveyed easement across the Cometto property "located on the existing roadway" and as depicted on the Tucker Sketch attached to the Easement Agreement as Exhibit "A".

Caldwell argues that they were entitled to more than the existing roadway including a right to remove all trees adjacent to, but outside of, the roadway. Caldwell takes issue with the Trial Court's determination that their easement rights were limited to the "existing roadway" as defined in the Easement Agreement signed by Mrs. Caldwell. In particular, Caldwell appeals the ruling that the mature trees (approximately 19) cannot be cut down or removed arguing that the Easement Agreement implicitly included those rights to the benefit of Caldwell.

At trial, Mrs. Cometto testified that she had no objection to the easement width including the ditching on either side of the roadway for both drainage, maintenance and snow storage. The roadway travels through several miles of forest service land and across forest service access, and

was primarily used as snowmobile access during the winter months while Caldwell began plowing about four (4) or five (5) years ago. Mrs. Cometto has no objection to the Caldwell's use of the roadway during the winter by plowing or any objection to storage of snow adjacent to the roadway. (Tr., pp.263-264; p.282, lls.18-19; p. 285, ll.23-25). Caldwell has alternative snow storage on their own property. (Memorandum Decision, R.Vol.III, pp.376-390; Tr, p.306, ll.12-24).

The Cometto position is well articulated in the following colloquy:

Q. ....When Mr. Caldwell plows snow and it rolls off the side of the plow adjacent to the road and into the ditches, do you have any problem with that?

A. No, I do not.

Q. On the other hand, when Mr. Caldwell or someone else chooses to plow snow up into a large pile either at the ends of your road or driveway or somewhere else on your property, is that a different issue in your mind?

A. Yes it is.

Q. Why?

A. Because there's other portions. Where he wants to, seems to be always where he knowingly has always known there is personal property or a building or whatever. It seems very on purpose.

Testimony of Lori Cometto, Tr., p.307, ll.3-16

Mrs. Cometto goes on to testify that the gate, yellow pickup and other personal property items have existed in their current location since 1997 to 1999 and have not obstructed in any fashion the existing roadway or travel on the road. (Tr., pp.292-309).

The Trial Court adopted in its Decision and Judgment the testimony of Mrs. Cometto that they did not object to Caldwell's snow storage in the ditching adjacent to the roadway and along the west line and in the northwest corner of their property (Tr., p.317, ll.20-p.318, ll.2; R.Vol.III, p.508)

**1. The Final Judgment and Memorandum Decision reflects Findings and Conclusions that Cometto did not dispute and that was supported by the historic use of the easement.**

The question of whether an instrument or easement is ambiguous is a question of law. C&G, Inc. v. Rule, 135 Idaho 763, 25 P.2d 76 (2001). The goal is to give effect to the intent of the original grantor from the plain language of the deed unless the deed or instrument is ambiguous, uncertain or doubtful, in which case the facts and circumstances surrounding the grant of easement may be considered to determine the intent.

Caldwell asserts that they think the intent of the Easement Agreement was to give them a 30 foot wide roadway despite the plain language of the Easement Agreement. They sought that relief in their Complaint. (R. Vol. I, Pp. 25-8)

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...

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.

Swanson v. Beco Construction Co.,  
145 Idaho 59, 63, 175 P.3d 748, 752 (2007)



In this case, the Easement Agreement defines the easement across the Cometto property as “located on the existing roadway which traverses the Cometto property”. The Trial Court found according to the plain language of the Easement Agreement and the actions of the parties and testimony of Mrs. Cometto. (R.Vol. I, pp. 49-55).

Although no reference is made within the Easement Agreement to secondary easements or snow storage easements, the undisputed testimony of Mrs. Cometto is that the Comettos do not, and have never, objected to snow storage, and that the existing road easement includes the adjacent ditches and Caldwell’s right to maintain the road. Mrs. Cometto went on to state that she had no objection to Mr. Caldwell storing snow along the west boundary between the roadway and her property line and at the west line and northwest corner of the roadway, but prior attempts by Mr. Caldwell to widen the road and remove trees caused conflict with the Comettos.

The court’s Findings and Conclusions summarized in the Amended Partial Judgment simply memorialized the right already granted in the Easement Agreement ten years ago and the secondary easement rights conceded by Mr. and Mrs. Cometto through prior usage and Mrs. Cometto’s testimony at trial.

The Trial Court’s ruling should be affirmed.

**2. There is no issue raised by the pleadings on or appeal supporting Caldwell’s argument that the court failed to follow Idaho Code §55-313.**

Much of the Caldwell’s brief is spent discussing the history of Idaho Code § 55-313 and its supposed similarities to Idaho Code § 42-1207 and Idaho Code § 18-4308. This insistence by Caldwell and/or their counsel on litigating those issues raised in the preceding litigation

approximately thirteen (13) years ago was addressed by the Trial Court at the outset of trial as barred by res judicata, collateral estoppel or claim preclusion.

Not only were the easement right, title and interest determined in the prior quiet title proceedings and Easement Agreement, but additionally claims that might have been made in that prior proceeding are barred by the disposition and final Judgment. See: Aldape v. Akins, 105 Idaho 254, 260, 668 P.2d 130, 1336 (App.1983); Watkins v. Peacock, 145 Idaho 704, 184 P.3d 210, 213 (2008).

In this instance, the prior final Judgment and Easement Agreement resolved questions regarding compliance with Idaho Code § 55-313. The testimony establishes that it was Mr. and Mrs. Cometto's movement of the road in 1997 from their home to its current location that instigated the litigation with Caldwell's predecessor, Mr. and Mrs. Campbell, and St. Angelo's predecessor, Mr. and Mrs. Crum (CV-1998-00867).

As a result, all of Section V. A. of the Caldwell brief is an inexplicable attempt to re-litigate those issues resolved by Judgment and the Easement Agreement.

The Trial Court made clear at the outset of trial that the issue at trial concerned only the interpretation of the Easement Agreement and the existing road that the parties agreed to in 1999 when the Easement Agreement was signed. (Tr.p.20, ll.10-12).

The Trial Court should be affirmed on these points raised by Caldwell.

**3. The Trial Court properly prohibited removal of existing trees outside of the travelway easement and within the adjacent secondary easement.**

Caldwell desires to remove approximately nineteen (19) mature, existing trees growing outside the road easement. The trees existed in 1999 when the Easement Agreement was signed.

Mr. Caldwell testified that the trees in question were anywhere from two (2) feet to several feet off of the roadway at the time they purchased the property in 1999 and at the time the Easement Agreement was executed by his wife, Mrs. Caldwell. (Tr.p.228, ll.9-25 p.229, ll.1-4). Mr. Caldwell testified that the trees make it difficult for him to plow the roadway with the vehicle he currently uses for plowing. The Trial Court found that that Caldwell failed to support these claims by a preponderance of the evidence. Order Denying Motion to Amend, R. Vol. III, P. 434-6.

There is, therefore, no basis to determine that the court erred in interpreting the Easement Agreement to prohibit removal of the existing, mature trees outside of the roadway easement and within the secondary easement designated for drainage, ditching and snow storage.

The Appellants Caldwell has simply reiterated their disagreement with the Trial Court's findings of fact. This Court should affirm the Trial Court's ruling on this issue and award attorneys' fees and costs to Cometto on appeal.

**B. Whether the Trial Court was procedurally permitted to rule on Caldwell's and Cometto's cross-claims for attorneys' fees and costs.**

Counsel for Caldwell incorrectly represents that the Trial Court granted Plaintiffs' (Caldwell) Motion to Amend Pleadings and bifurcated the proceedings. Based upon this incorrect statement, Caldwell argues the Trial Court should not have awarded attorneys' fees and costs.

On August 27, 2008, the Plaintiffs (Caldwell) filed a Motion to Amend Pleadings to Conform to Evidence. (R.Vol.II, pp.319-324). Caldwell's Motion was never scheduled for hearing and claims numerous additional causes of action based on supposed recorded easements.

On the first day of trial, the Trial Court clearly stated it would defer or reserve until after trial any hearing or consideration on Caldwell's Motion to Amend, essentially bifurcating the proceedings, if the Trial Court were to grant a Motion to Amend in post-trial proceedings. (T.p.11, ll.8-17, p.12, ll.9-14 and p.23, ll.6-8).

The record reflects that no Amended Complaint has been filed and no Motion to Amend has been granted or even noticed for hearing.

The Trial Court entered a Memorandum Decision after trial and subsequently certified the Judgment.

I.R.C.P. Rule 54(d)(5) provides that at any time after the verdict of a jury or a decision of the court any party who claims costs may file and serve on adverse parties a Memorandum of Costs and that a Memorandum filed prematurely shall be considered timely. I.R.C.P. 54(d)(5)(2009).

In this case, there are no additional issues or any Amended Complaint before the Trial Court or before this Court, which would set forth additional issues to be decided and, therefore, the final Judgment disposing of the claims set forth in Caldwell's October 17, 2007 Complaint is the final Judgment of the only claims pending in this action.

Caldwell further argues certain federal cases of Association of Frigidaire Model Makers v. General Motors Corporation, 51 F.3d 271 (6<sup>th</sup> Cir. 1995) and Liberty Mutual Insurance Company v. Wetzel, 424 U.S. 737 (1976). Both cases are distinguishable as matters in tort where liability was

bifurcated from the damage claims. “If an order or judgment ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties, the instrument constitutes a final judgment. Opportunity, LLC v. Ossewarde, 136 Idaho 602, 38 P.3d 1258 (2002); quoting Davis v. Peacock, 133 Idaho 637, 641, 991 P.2d 362, 366 (1999)

In this case, all of the matters plead in Caldwell’s Complaint filed October 17, 2007, have been adjudicated with the Trial Court dismissing or denying all of Caldwell’s claims.

As such, the Partial Judgment was a Final Judgment of the issues and it was, therefore, procedurally appropriate for the Trial Court to determine an award of fees and costs.

Assuming arguendo that additional claims exist, not yet articulated by Caldwell in an Amended Complaint, the Trial Court’s determination of fees and costs was still procedurally appropriate, as all issues of interpreting the Easement Agreement are resolved.

The Easement Agreement in question provides in pertinent part as follows:

12. In the event that any dispute arises regarding the interpretation, application, breach or enforcement of the provision of this Agreement, then the prevailing party in such dispute shall be entitled to recover their attorneys’ fees and costs incurred, including attorneys’ fees and costs incurred on appeal.

Caldwell’s Exhibit No. 25, p.3, ¶12

The Trial Court’s Memorandum Decision and subsequent Judgment reflect a complete and final ruling on the respective rights of the parties under the Easement Agreement. It is, therefore, a final and complete disposition of that issue and award of attorneys’ fees and costs is an appropriate consideration.

The unspecified (and heretofore unfiled) Caldwell claims under certain “recorded” documents may also entitle a party to seek fees and costs, but that does not prohibit the Trial Court’s ruling on fees in the current action.

There is no legal basis for the Court to defer a determination of the prevailing party and award attorneys’ fees and costs accordingly.

**C. The Trial Court erred by failing to analyze the claims of the parties and erred in finding that both Cometto and Caldwell prevailed in part.**

The Trial Court’s determination of prevailing party is one in the discretion of the court.

The Trial Court’s discretion is reviewed on appeal, in the following manner:

When examining whether a Trial Court abused its discretion, this Court considers whether the Trial Court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason.

Shore v. Peterson, 146 Idaho 903, 915,  
204 P.3d 1114, 1126 (2009)

The Supreme Court reversed the Trial Court’s finding of no prevailing party in Shore v. Peterson, where Peterson prevailed on his affirmative defense of accord and satisfaction, though he had not prevailed on other claims for relief.

The Trial Court is required to consider the final judgment in relation to the relief sought by the respective parties and the extent to which each party prevailed upon each issue or claim in determining a prevailing party, though the Court need not apportion its award for each claim. Chenery v. Agri-Lines, Corp. 106 Idaho 687,693, 682 P.2d 640, 646 (App. 1984).

Despite Cometto's argument at hearing on September 4, 2009, the Trial Court did not perform this analysis in determining a prevailing party. On October 8, 2009, the Trial Court determined that Caldwell prevailed in part, in written findings, as follows:

The Court finds that both parties prevailed on their most significant claims. Caldwells prevailed in the sense that they need sufficient room to keep the road plowed during the winter. Comettos prevailed on their most significant claim that the broader claims of relief of the Caldwells were not necessary. However, for each party to prevail, the Court had to order a survey and do an extensive view of the premises to craft the Court's Opinion.

. . . The absence of a survey at the time of the original Easement Agreement is not a basis for determining a prevailing party in the current litigation.

R.Vol.III, pp.502-503

In this matter, Caldwell's complaint sought a thirty (30) foot wide easement and the right to construct the road to that width, or alternatively, to reposition the road to its prior location (when Caldwell's predecessors had no recorded easement) and re-litigate Idaho Code §55-313. Caldwell also sought a variety of other matters including a determination that the indemnity provision was void under Idaho Code §29-114 and removal of certain "obstructions" from the easement. The Court denied all of Caldwell's pled claims, with many dismissed prior to trial or at the close of Caldwell's case. The trial testimony established that no obstructions were in the travelway easement. The only matter determined in the Memorandum Decision was that the width of the ingress/egress easement is the travelway (which, by all witnesses' testimony, is unchanged since 1999) and granting Caldwell a secondary snow storage easement conceded in

Mrs. Cometto's testimony as reasonable and necessary though not request by Caldwell in their pleadings.

The Trial Court erred as a matter of law in not analyzing the specific claims of Caldwell and Cometto. If the Trial Court had done so, the analysis would have revealed that Caldwell did not prevail on any claim set forth in their Complaint. By contrast, Cometto's Answer pled that Caldwell's easement rights were defined in the Easement Agreement as confined to the existing road which both Cometto and Caldwell concede is unchanged since 1999. Mrs. Cometto testified she has never objected to snow storage along and adjacent to the road as long as Caldwell stays on the road, and she volunteered the portions of the Cometto property for snow storage on the west side and northwest corner of the road, that the Trial Court awarded as a secondary easement for snow storage. (Tr. p.282., ll. 8-19; p. 285, ll.23-25; p. 286, p. 306, ll. 12-25; Tr. p. 307, ll. 3-6).

Later, Mrs. Cometto testified that she understood that the 1999 Easement Agreement included the adjoining ditches. (Tr., p.312, ll.6-25).

This conflict stems from Mr. Caldwell's attempt to forcibly relocate the east exit/entrance of the roadway and consistent attempts to fall trees and widen the roadway in 2004. Cometto placed a rock or boulder at the southeast corner of the road and a panel wood fence on the property line at the northeast corner of the road to try to contain Mr. Caldwell from expanding or relocating the road on the Cometto property. (Tr., p. 310, ll. 5-24; p. 312, ll. 2-5; pp. 274-275; p.314).



Caldwell concedes in their testimony that they did not read the Easement Agreement when signing it in early 2000 and hoped to renegotiate a wider or different easement later. Failing that, Mr. Caldwell engaged in a forcible trespass by trying to punch a new road out of the Cometto property and requiring law enforcement assistance. (Tr..pp. 300-303; p.314; p.321). Finally, Caldwell filed this suit making sweeping claims, all of which were rejected by the Trial Court.

Cometto was the prevailing party and should have been awarded fees and costs.

**D. Whether Caldwell is entitled to attorneys' fees and costs on appeal.**

For the reasons set forth above, the Trial Court's findings concerning the secondary easement should be affirmed subject only to a reversal of the Trial Court's denial of Cometto's attorneys' fees and costs.

Caldwell claims attorneys' fees on appeal (Appellant's Brief, Section VI). Caldwell does not cite the court to any statutory authority, only claim fees pursuant to Idaho Appellate Rules 35 and 41.

Where a party fails to cite any statutory or contractual authority for attorneys' fees and only cites the Idaho Appellate Rules, no fees shall be awarded on appeal. Mortensen v. Stewart Title, 2010 W.L. 1643997 (Idaho, 2010).

When issues are cited on appeal, but not supported by law, authority or argument, they will not be considered. Langley v. State, 126 Idaho 781, 784, 890 P.2d 732, 735 (1995); see also PHH Mortgages Services Corp. v. Perreira, 146 Idaho 631, 641, 200 P.3d 1180, 1190 (2009).

The Idaho Appellate Rules without citation to applicable statutory, contractual or other case law, are insufficient to support a claim of attorneys' fees on appeal. See Athay v. Stacey, 142 Idaho 360, 371, 128 P.3d 897, 908 (2005).

Caldwell does briefly recite that the Easement Agreement contains a provision for attorneys' fees on appeal. However, Caldwell did not prevail on a single claim arising from the Easement Agreement.

The issues appealed by Caldwell concern the secondary rights determined by the Trial Court from Mrs. Cometto's testimony. Caldwell argues in post trial motions and on this appeal, the right to remove trees within the secondary easement awarded by the Trial Court. This claim was neither pled nor argued by Caldwell in their Complaint or at trial.

Further, these secondary easement rights were not defined nor provided for in the Easement Agreement and, therefore, the attorneys' fees provision contained therein does not apply since it was not an "interpretation, application of, or breach or enforcement of" the provisions of the Easement Agreement. Caldwell's Exhibit 25.

This Court should deny Caldwell's claim for attorneys' fees and costs on appeal.

**E. Whether Cometto is entitled to attorneys' fees and costs on appeal.**

The Appellants Caldwell have proffered nothing new to this Court in terms of legal issues or errors in the court's findings that were not raised before the Trial Court. (See Cometto's Motion to Augment.)

Pursuant to Idaho Code § 12-120(3), Cometto is entitled to reasonable attorneys' fees on appeal where a contract or agreement provides such as in Section 12 of the Easement Agreement.

Further, Idaho Code § 12-121 allows Cometto an award of attorneys' fees as a prevailing party on appeal where the action is brought or pursued frivolously, unreasonably or without foundation. Idaho Code § 12-121(2010).

An award of attorney's fees under this statute is appropriate if the appellant simply invites the Appellate Court to second guess the Trial Court on conflicting evidence.

Benninger v. Derifield, 145 Idaho 373, \_\_\_\_\_  
179 P.3d 336, 341 (2008)

When an appeal simply disputes the Trial Court's factual findings, which are supported by substantial, although conflicting, evidence, the appeal is considered frivolous and an award of attorney's fees is proper under I.C. § 12-121.

Electric Wholesale Supply Company v. Nielson,  
136 Idaho 814, 828, 41 P.3d 242, 256 (2001)

In this matter, Caldwell is inviting the Appellate Court to second guess District Judge Hosack's determination that the mature trees cannot be removed from the secondary easement area.

Caldwell does not cite this Court to any error of law to support their position on appeal. Caldwell has offered no new legal basis to overturn the District Court's decision on appeal. Further, Caldwell has not demonstrated any reversible error in the court's Findings of Fact but, rather, ask this Appellate Court to second guess the Trial Court's findings.

Cometto is entitled to an award of attorneys' fees and costs on appeal.

**IV. CONCLUSION**

For the reasons set forth herein, this Court is asked to affirm the Trial Court's Memorandum Decision and Amended Partial Judgment entered October 8, 2009 and award Cometto their attorneys' fees and costs on appeal.

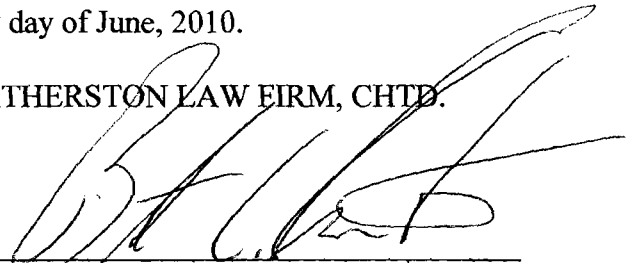
On Cometto's Cross-Appeal, this Court is respectfully asked to reverse the Trial Court's Order of October 8, 2009 finding that Cometto was not a prevailing party and remand with instructions to award Cometto attorneys' fees and costs pursuant to the Easement Agreement and Idaho law.

On their Cross Appeal, Cometto requests attorneys fees and costs on appeal.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June, 2010.

FEATHERSTON LAW FIRM, CHTD.

By



BRENT C. FEATHERSTON

Attorney for Respondents/Cross-Appellants

**CERTIFICATE OF MAILING**

I hereby certify that on the 11<sup>th</sup> day of June, 2010, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

ARTHUR MACOMBER,  
408 E. Sherman Avenue, Ste. 215  
Coeur d'Alene, Idaho 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile
- Other: \_\_\_\_\_

By 