7-15-2010

Caldwell v. Cometto Appellant's Reply Brief Dckt. 37157

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 37157-2009

Case No. CV07-01744

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

Plaintiffs/Appellants/Cross-Respondents

vs.

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

Defendants/Respondents/Cross-Appellants

APPELLANTS'/CROSS-RESPONDENTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Bonner

Honorable Charles Hosack, District Judge

Arthur B. Macomber
Macomber Law, PLLC
408 E. Sherman Ave., Ste. 215
Coeur d'Alene, ID 83814
Attorney for Appellants/Cross-Respondents

Brent C. Featherston
Featherston Law Firm, Chtd.
113 S. Second Ave.
Sandpoint, Idaho 83864
Attorney for Respondents/Cross-Appellants

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondents' procedural history improperly asserts facts due to be presented to and argued in the District Court in the second half of this bifurcated case. On page one of Respondents' Brief at paragraph three, Respondents claim "the property had no recorded access to [Plaintiffs] properties." Appellant/Plaintiffs will bring evidence in the second half of the bifurcated trial to show that Comettos' property and the neighboring property to the east were once one single property and the deeds properly include the 60-foot easement across Cometto's for the benefit of that eastern parcel. In footnote two of Respondents' Brief Respondents attempt to base their improper assertion on Comettos' title report, which certainly does not include the deeds to the dominant parcel, in this case the parcel to the east of Comettos. Further, Respondents assert in that footnote "no Amended Complaint is in the record." Appellant's pending Motion to Augment will include that Amended Request for Declaratory Judgment, which was in the record, see Volume 1, ROAs, at bottom of page eight: *Amended Request for Declaratory Judgment to Quiet Title and Injunction*, filed September 2, 2008; R. Vol. II, pp. 319-324. Respondents thus improperly characterize both the status of issues in the bifurcated case and the record itself. Respondents' cursory review of the ROAs in the Clerk's Record on Appeal at pages one through 15 would have shown this filing.

Respondents continue to mischaracterize Plaintiff/appellant's pleadings. On page two of Respondents' Brief at number two, Respondents characterize appellant's original prayer "that

Cometto[-Respondents] [are] responsible for additional improvements under Idaho Code 55-313 to meet Bonner County Private Road Standards Ordinance for Subdivisions adopted in 2006," when Plaintiff-Appellants' prayer at paragraph four requests the court declare Comettos "were and are responsible and liable for, pursuant to Idaho Code section 55-313, construction of the replacement access road to similar standards of construction of the road Comettos moved, or to current Bonner County Private Road Standards in effect at the date of this judgment." R. Vol. I, p. 25 (emphasis added); and see R. Vol. III, p. 467 at 2 (Defendants' characterization of issue). The significance of the word "or" should not be ignored by this Court as it was in the District Court when it declared that Bonner County Private Road Standards "do not apply." R. Vol. III, p. 507, para. 5. Making a road conform to a certain road standard does not mean the road is *required* to be to that standard, but only that government-approved road standards are good standards that uphold public safety and *should* be used. Plaintiffs-Appellants did not request in its prayer that the county ordinance be found to apply, but the standards found there would safeguard their ability to use the road and effect maintenance such that they could get home.

Further, Plaintiffs-Appellants believe Respondents will assert their position here because Plaintiff's attorney argued to the court that "Plaintiffs did not prevail on [prayer] number four." Tr. p. 406. The reason Plaintiffs did not prevail on prayer number four is because the court improperly did not conclude that Comettos were responsible and liable for construction of the replacement access road to similar standards of construction of the road they moved, pursuant to Idaho Code section 55-313. Idaho Code section 55-313 was not mentioned in the Amended Partial Judgment, but the district court ordered Respondents to remove items and not construct

items injurious to Appellants. R. Vol. III, pp. 508-510, paras. 11, 12, 13, 14, 18, and 19. However, even though the issue has been narrowed by Appellants' appeal, the reason for the removal of the trees is to allow Appellants to use the road without injury. R. Vol. III, p. 517 at para. 3(a); App. Br. pp. 9-16. Therefore, this issue is before this Court.

However well Defendants-Respondents' have been able to twist the issue at the trial level, the fact remains that what Plaintiff-Appellants' prayed for was that the road not "injure" Plaintiff-Appellants, see I.C. § 55-313, and that if the court did not order the Comettos to fix it that Plaintiffs be allowed to do so, which surely should be subject to the safe standards of the current Bonner County Private Road Standards. Tr. p. 338, L. 11-18. Further, Plaintiffs-Appellants' paragraph seven of that prayer requested they could "*construct* the easement to conform with the Bonner County Private Road Standards . . . all costs of which are judged to be attributable to Defendant Comettos based on Defendants' decision to move the road," resulting in injury to Plaintiffs-Appellants. R. Vol. I, p. 26.

Further, Plaintiff-Appellants' original request was for the right to reconstruct the road to proper standards of the old road, or Bonner County Private Road Standards, but Respondents Brief mischaracterizes Plaintiffs prayer "that Cometto be ordered to construct the replacement easement to Bonner County Private Road standards ordinance for Subdivisions." Resp. Br. at 5.

Finally, Respondents mischaracterizes Plaintiffs prayer on page three at paragraph seven of their brief stating, "that the easement is void as a matter of public policy pursuant to Idaho Code section 29-114." In reality, Plaintiff-Appellants' prayer was a request the court declare "the

easement agreements paragraph 13 is void and unenforceable as a matter of public policy, pursuant to Idaho code section 29-114." R. Vol. I, p. 27, para. 9. Just the paragraph.

Respondents' Brief on page three claims the court's Memorandum Decision defined "the easement rights consistent with Cometto's position." Resp. Br. P. 3. Appellants cannot fathom how this could be so, when the Amended Partial Judgment clearly called for Defendants-Respondents "not store or place any personal property, fences, locks, obstructions or other objects within the secondary easement described herein." R. Vol. III, p. 508 at 11. Defendants-Respondents also had to "remove and shall not reinstall the gate." R. Vol. III, p. 509 at 12. Also, Defendants-Respondents were ordered to remove their "cross-ditching or water bars upon the surface of the travelway [because they were] an unreasonable interference with the use of the travelway and will not be permitted." R. Vol. III, p. 510 at 19. Further, the court describes the boundaries of a significant secondary easement. R. Vol. III, p. 508 at 9 & 10. Finally, the court included in the secondary easement areas significant snow storage areas, and barred Defendants-Respondents from pushing snow into the travelway. R. Vol. III, pp. 508-509 at 12 & 14.

That Amended Partial Judgment, and the record behind it shows Defendants-Respondents purposefully placed obstacles to Plaintiffs-Appellants' reaching their home. It is not "consistent with Comettos' position" for the court to require Comettos to remove all those obstacles and refrain from further efforts to prevent Plaintiffs-Appellants from reaching their home. Defendants-Respondents' mischaracterizations of the record do not assist this Court.

This case is a request for the Court to declare the meaning of certain documents in order to quiet title to the dominant estate easements. The trial court bifurcated the case, so it could

hear arguments related to the Easement Agreement in the first half of the trial, and arguments related to existing deeds granting certain easements in the second half of the trial. R. Vol. III, p. 377 (J. Hosack's Memo. Decision).

II. STATEMENT OF FACTS

On page five at paragraph three of Respondents brief, Respondents attempt to paint Dr. Caldwell as cavalierly signing the document without proper scrutiny, but do not convey to the court that she had helped her brother purchase the property, which is why she had to sign the easement agreement in the first place. Tr. p. 46, L. 20-21.; p. 47, L. 6-12. Dr. Caldwell lived in Barrow, Alaska at the time the property was purchased. Tr. p. 15. The brother for whom she purchased the property moved in and lived there and was subject to the easement litigation. Tr. p. 49, L. 8-19. Mrs. Caldwell testified that she "scanned" the document because she understood she "was signing something very similar to the third draft," that she had read before. Tr. pp. 100, L. 18-25 and 101, L. 1-12; and see discussion at Tr. pp. 106-110. The trial transcript of Dr. Caldwell's testimony from pages 45 through page 186 provides adequate record of her veracity.

Throughout Respondents' statement of facts, they do not explain how Plaintiffs-Appellants' could use the snow storage areas without removing trees, and do not show facts refuting the damages to Plaintiff's vehicles that the trees and other removable property within the secondary easement area caused to Plaintiffs-Appellants' snow moving equipment. Tr. p. 216, l. 7 through p. 222, l. 12; R. Vol. III, pp. 401, 402, 404.

Respondents' Brief at page six states, "there is no 'Amended Complaint' allowed or filed in this action." However, Plaintiffs-Appellants' *Amended Request for Declaratory Judgment to*

Quiet Title and Injunction was filed with the court on September 2, 2008, but curiously not included with the court's record. Because it was delivered to both the District Court and opposing counsel pursuant to the civil rules, Plaintiffs-Appellants have submitted a Request to Augment.

Respondents did not file a counterclaim in this case. Respondents did not procure a survey when reaching settlement in the prior litigation, as required in Idaho. (*Bethel v. Van Stone*; 120 Idaho 522, 528, 817 P.2d 188, 194 (1991); and see R. Vol. II, pp. 282 (J. Hosack comments re survey) and 356-357 (J. Hosack's Order re Survey). Issues of Idaho Code section 55-313 may have been litigated in the prior case, but the judgment did not include any determination related to that statute, because the case ended in settlement by some parties signing the Easement Agreement. R. Vol. I, p. 19 (citing facts related to settlement in Bonner County Case No. CV-97-01057). Even if it had, the present facts are that Respondents continued and continue to alter the easement up to and after the filing of the present case in ways that injure Plaintiff-Appellants, see Section IIA hereinbelow.

III. ISSUES PRESENTED ON APPEAL

Amazingly, Respondents declined to respond to Plaintiffs-Appellants' appeal, but "Cometto wishes to re-phrase the issues presented on appeal as follows . . ." Resp. Br. at p. 8. Plaintiffs-Appellants strongly believe that if Respondents desired to control the issues on appeal, they should have appealed. Since they did not, and Respondents choose not to respond to Plaintiffs-Appellants' issues on appeal, Plaintiffs-Appellants' request this Court strike Respondents' Brief as nonresponsive and decline to hear it.

Alternatively, this court could rule that Respondents did not properly respond to Plaintiffs-Appellants' first question on appeal, the right to completely remove mature trees from the secondary easement areas; show Respondents second query related to whether the trial court was procedurally permitted to rule on attorneys fees and costs, which was not presented by Plaintiffs-Appellants on appeal, as a cross-appeal; and similarly consider Respondents third, fourth and fifth issues as cross-appeals, because they clearly present areas of argument that are different in content or scope than Plaintiffs-Appellants' issues.

Plaintiffs-Appellants' respond to Defendants-Respondents' brief as follows.

A. Appellants presented to this Court the question "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 travel way and roadway."

Respondents' Brief addressed this issue only on page 14 of its Brief at section three.

Respondents mischaracterize the testimony of Mr. Caldwell in their Brief, referring this Court to the trial transcript's page 228 and 229. Resp. Br. p. 14. Respondents alleged, "Mr. Caldwell testified that the trees in question were anywhere from 2 feet to several feet off the roadway . . ." Id. However, the actual testimony includes this colloquy:

> Respondents Counsel: And did I understand correctly that you said [the trees] are anywhere from at a minimum two (2) feet to several feet off of the roadway?
>
> Mr. Caldwell: I think a minimum of two (2) feet is generous, but we can go there.
>
> Respondents counsel: Is there some that are on the roadway?
>
> Mr. Caldwell: There are some that whose trunks come straight out of the ground right next to the tire tracks.

Tr. pp. 228, L. 22-25, p. 229, L. 1-4. Thus, what Defendants-Respondents characterize as Caldwell's testimony is actually Defendants-Respondents' counsel's question and not Caldwell's testimony.

It is important to understand that in the colloquy above Respondents' counsel and Mr. Caldwell have defined the roadway as the travel surface only, and not any secondary easement area. Tr. pp. 226, L. 15-25, 227, L. 1-5. This definition is different from the District Court's definition, which is that the definition of the term "roadway" includes "both the travelway and a secondary easement adjacent to each side of the travel way." R. Vol. III, pp. 507-508 (Am. Part. Judge); R. Vol. III, p. 382 (Memo. Decision.)

Now Mr. Caldwell's testimony above is clear. Tree trunks "come straight out of the ground right next to the tire tracks," and within the secondary easement as found by the District Court. R. Vol. III, p. 508; Tr. pp. 216, L. 19-25, 217, L. 1-25, 218, L. 1-11. Further, in some areas next to the travelway, "[t]here aren't any breaks; it is just trees." Tr. p. 218, l. 5. Mr. Caldwell's testimony at trial was that there are approximately thirty (30) trees "that impede [his] snowplowing operations" on the north leg of the easement. Tr. p. 217, L. 12-23. This tree count does not include trees within the areas the trial court designated as snow storage areas, or on the other two legs of the easement.

Respondents' Brief then claims the trial court "found that Caldwell failed to support [his claims regarding the trees as interfering with plowing] by a preponderance of evidence." Resp. Br. p. 14. However, the trial court's preponderance of the evidence remark was related to flooding or adequate pitching, and not trees. R. Vol. III, p. 435.

Appellants contend the trial court erred when it declined to allow Appellants to remove trees within the secondary easements, both the secondary easement on the side of the travelway and the secondary easements for snow storage. The trial court's Memorandum Decision stated, "there is no dispute that the snows of 2007-2008 narrowed the travelway such that normal plowing efforts were insufficient to keep it open." R. Vol. III, p. 384. The court then stated, "Caldwell testified that after the snow levels overwhelmed the plowing efforts, he was able to keep the road open for a period of time by using snowblower truck. However Caldwell testified the snowblower hit a rock placed alongside the travelway, which damaged the snowblower, at which point Caldwells were unable to keep the road open." Id. Mr. Caldwell also testified that in addition to the rocks Comettos placed alongside the roadway to prevent travel, trees interfered with his plowing operations and damaged one of his vehicles. Tr. p. 207, L. 20-25; p. 218, L. 6-12.

The court's Memorandum Decision initially stated, "there is insufficient basis for the court to designate areas for piling snow, other than along the travelway." R. Vol. III, p. 385. But then, three sentences later, the court allows Comettos to externalize the costs of their road to neighboring properties stating, "there is no evidence as to why any snow storage piling area has to be on the Cometto property." Id. This idea was based on the present fact that the Caldwell's own the abutting parcel to the east of Cometto's. If that ruling stands, then Comettos will have successfully externalized the cost of the relocation of their easement to the neighboring property, regardless of ownership. This does not make sense, either logically or ethically.

Plaintiffs-Appellants contend that the court erred in acquiescing to the Comettos' constructing and continually altering a road and intentionally storing personal property (Tr. p. 221, L. 14-23; p. 133, L. 3-14) resulting in **inadequate snow storage** (R. Vol. III, p. 386; Tr. p. 66, L. 12-17, trial testimony referring to a new pole barn (Nov. 2007) where snow was previously stored), including the placement of **berms** (Tr. p. 53, L. 7-24; p. 63, L. 20-24; p. 66, L. 2-11; p. 75, L. 7-14; p. 199, L. 6-9; p. 211, L. 4-25 and p. 212, L. 1-22), **boulders** (R. Vol. III, p. 384; Tr. p. 73, L. 17-22; p. 131, L. 12-22), **piles of rocks** (Tr. pp. 64, L. 19-25 and 65, L. 1-8), **cross-ditching** (R. Vol. III, 510; Tr. p. 76, L. 11-23; pp. 79, L. 22-25 and p. 80, L. 1-3; p. 85, L. 3-6; p. 132, L., 2-4), **a pickup truck** (Tr. pp. 184, L. 17-25; p. 204, L. 12-21; p. 205, L. 19-25), **fencing** (Tr. pp. 203, L. 22-25, p. 204, L. 2-7.), **gates** (R. Vol. III, 508-509; Tr. p. 64, L. 6-18), and **an obstructive road location** designed to impede snow storage and travel by its proximity to trees (R. Vol. III, pp. 387, 508; Tr. pp. 55, L. 14-25 and 56, L. 1-5; pp. 207, L. 20-25 and 208, L. 1-9; p. 216, L. 19-25; p. 217, L. 1-25; p. 218, L. 1-11), and then externalizing the costs to neighboring properties such that Plaintiffs-Appellants cannot reach their residence on a year-round basis. Tr. pp. 222, L. 11-12; p. 396(b); p. 409, L. 11-19.

Plaintiffs-Appellants will address Defendants-Respondents inaccurate contention regarding relitigation of the earlier case. The fact is that since the year 2000, and up to the present date, Defendants-Respondents have continued to alter the physical attributes of the easement, such as through the construction of fencing, installation of ditches across the roadway, creating earthen and rock berms, and a building to prevent use by Plaintiffs-Appellants through the strategic placement of obstacles designed to prevent use of the easement. Plaintiffs-

Appellants' argument at trial was not an attempt to relitigate events prior to the year 2000, but a desire to have the court require defendents-Respondents to stop re-constructing the easement in the present to Plaintiffs-Appellants' detriment. In addition to injuries to Plaintiffs-Appellants by having to litigate this case due to the sloppy manner in which the prior 1997 case was finalized, the Idaho Code section 55-313 injuries are obvious and acknowledged by the District Court's Amended Partial Judgment. R. Vol. III, pp. 476-478.

Apparently recognizing the impropriety of allowing the Comettos to engage in obstructive behavior and then externalize the costs to neighboring parcels, the court's Memorandum Decision provided an area for new snow storage:

> At the northwest corner, in the area between the outside of the curve in the travelway and Cometto west boundary line, Caldwells would be permitted to plow snow into the area between outside the edge of the curve in the travelway and the west property line of the Cometto property, should unusual levels of snow accumulation overwhelm normal snow plowing.
>
> At the west end of the Cometto Easement there is another 90-degree corner, with a structure erected to the outside of the curve. At this location the travelway has widened to twenty-eight (28) feet. Caldwells would be entitled to utilize the area between the westerly edge of the curve in the travelway and the west property line for purposes of snow storage. Comettos are required to remove the [vehicle] gate and man gate to allow Caldwells access to the inside of the curve for purposes of snow storage at the west end of the Cometto Easement.

R. Vol. III, p. 386. The trial court did not grant Plaintiffs-Appellants' request to remove any trees in the above stated areas, or on the 3-foot wide secondary easements along the main travelway. However, the testimony shows clear and convincing evidence, where only a preponderance is required, that the removal of existing, mature trees within the secondary easement should be ordered.

Therefore, the court should find that trees need to be removed to allow year-around maintenance of the roadway, so Plaintiffs-Appellants can reach their home, and that a remand is proper so the trial court can take factual evidence related to which trees should be removed.

B. Appellants presented to this Court the question "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."

Defendants-Respondents attempt to "re-phrase the issue []" to be "whether the trial court was procedurally permitted to rule on Caldwells and Comettos' cross-claims for attorneys' fees and costs." Resp. Br. p. 8. Defendants-Respondents base their claim that the court was procedurally admitted to rule on the idea that the case was not bifurcated (Resp. Br. p. 14), that there is no pending issue of interpretation of certain deeds regarding a 60-foot easement across Comettos' property (Id. at 15), and that Plaintiffs-Appellants never filed an *Amended Request for Declaratory Judgment* with the court. Id.

However, this is not true.

Plaintiffs-Appellants filed their *Amended Request for Declaratory Judgment* with the court on August 29, 2008, and the court recorded its receipt into the record on September 2, 2008, which was the first day of trial. R., Vol. I, p. 8, 326; Tr. p. 8, L. 1-2. The *Amended Request* does not appear in this Court's record, but Plaintiffs-Appellants' Motion to Augment is pending.

This court case was bifurcated by the trial court. Tr. p. 347, l. 19. This was the understanding of the parties' counsel and the court, specifically acceded to by Defendants-Respondents' counsel at the conclusion of the three-day trial in September of 2008. At close of testimony, Defendants respondent's counsel requested "the court to close the evidence on this

phase of the trial to the extent you can with what that addresses." Tr. p. 397, L. 15-17. The second phase of the trial was to be the court's assessment of the language and the deeds related to the 60-foot wide easement. Tr. p. 8, L. 2-7.

Plaintiffs-Appellants do not deny that there is language indicating that the court was set to rule on the motion for bifurcation at the end of close of evidence of the first half of the bifurcated trial. Tr. p. 12, L. 9-19. However, it appears the court ruled on that motion at the close of Plaintiffs' case, or during its discussion and ruling on Defendants-Respondents' Rule 41(b) motion to dismiss, because prior to Defendants-Respondents putting on their case in chief the court stated, "the matter is already bifurcated . . .." Tr. p. 347, l. 19. This is why the court entitled its document an Amended **Partial** Judgment. R. Vol. III, p. 505, emphasis added.

The court restated its understanding that the case had been bifurcated during proceedings on cross-motions for costs and attorneys fees September 4, 2009, as recorded beginning at page 401 of the trial transcript. The trial court stated, "[a]s counsel remember, the court did bifurcate the claim . . .." Tr. p. 435, L. 18-19. Further, after a brief explanation, the court stated, "if there is an appeal somebody is going to have to come into the court and make some motion to move it forward. Otherwise, the bifurcated portion would kind of sit there until the appeal gets resolved." Tr. p. 438, L. 4-8.

Plaintiffs-Appellants have not filed any motion with the District Court to initiate the second half of this bifurcated action prior to the conclusion of this appeal related to the first half of the bifurcated case. The reason this motion has not been filed is because Plaintiffs-Appellants believe all the parties need a financial breather, and secondarily, as the trial court stated, with a

ruling on fees and costs "the parties know where they are in litigation to date." Tr. p. 436, L. 24-25.

However, as Plaintiffs-Appellants argued in their initial brief to this Court, they now believe a final ruling on attorneys fees and costs must account for Plaintiffs-Appellants prayer in their *Amended Request for Declaratory Judgment*, including the ruling regarding the second half of the bifurcated case, and that a premature ruling after only the court's Amended Partial Judgment would be prejudicial to Plaintiffs-Appellants, because it would "load the dice" against both parties regarding the action's outcome as a whole.

C. Appellants presented to this Court the question "[w]hether, 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."

This question by Plaintiffs-Appellants encapsulates the final three of the Comettos' "re-phrase[d]" questions. Plaintiffs-Appellants maintain their primary argument that the court should not make any decision regarding fees and costs until the end of the entire lawsuit. *Chenery v. Agri-Lines, Corp.*, 106 Idaho 687, 693, 602 P.2d 640, 646 (App. 1984). Plaintiffs-Appellants believe Respondents got it correct when they stated, "the Trial Court is required to consider **the final judgment** in relation to the relief sought by the respective parties . . .." Resp. Br. p. 17, emphasis added.

The entire structure of our civil litigation system allows the filing of the complaint and the amendment of complaints to conform with evidence determined to be true during the discovery process. This is why the "prevailing party" rule has to await a **final** judgment, especially if the case is bifurcated. It would be nonsensical for the court system to require

plaintiffs to pray for explicit legal outcomes, or liquidated damages amounts, in their initial complaint in order to find they had prevailed to the penny. Also, Idaho uses the "well-pleaded complaint" rule as do her federal courts. This doctrine is based on the idea that not all details will be known when a complaint is initially filed, and the courts reserve specific outcomes or damages amounts to the final judgment.

Plaintiffs-Appellants requested this court quiet title to their easement and grant an injunction. The District Court's Amended Partial Judgment did in fact, by negative injunction, bar Respondents from using their property in a way that impedes the Plaintiffs-Appellants use of the easement. R. Vol. III, pp. 476-478. Also, this Court required the parties to obtain a survey. R. Vol. II, pp. 282 (J. Hosack comments re survey) and 356-357 (J. Hosack's Order re Survey). The interesting part about this ruling is that if the survey had been procured by Respondents in the 1997 litigation, *according to Idaho law at the time*, there is a possibility that this litigation could have been avoided, except for Respondents' continued alteration of the conditions under which my clients were allowed by Respondents to use the easement.

Conversely, Respondents made no counterclaim. R. Vol. I, pp. 49-54. Certainly they asked nothing and they take nothing. R. Vol. III, p. 494. Respondents claim that by blunting or avoiding some of Plaintiffs-Appellants' specific complaint prayer items, that Respondents should be the prevailing party, and, in fact, "that Caldwell did not prevail on *any* claims set forth in the Complaint." Resp. Br. p. 19. This cannot be so, as stated in the paragraph above. Plaintiffs-Appellants believe this court will find they have prevailed, and if this court decides to not await the final judgment, that Plaintiffs-Appellants should be awarded all their fees and costs.

IV. CONCLUSION

Plaintiffs-Appellants respectfully request this Court recognize Plaintiffs-Appellants right to remove mature trees from the secondary easement areas for purpose of maintenance of the travel and roadway. Additionally, Plaintiffs-Appellants request this Court find the District Court erred by issuing a fees and costs ruling prior to a final judgment in this bifurcated case. Alternatively, if this court finds it was proper for the court to issue a fees and costs ruling after only one half of the bifurcated case, that it find Plaintiffs-Appellants were the prevailing party, and that Respondents owe them their entire fees and costs.

Respectfully submitted this 13th day of July 2010.

Arthur B. Macomber
Macomber Law, PLLC
408 E. Sherman Ave., Ste. 215
Coeur d'Alene, ID 83814
Counsel to Appellants/Cross-Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 13th day of July 2010, I caused to be served two true and correct copies of the foregoing APPELLANTS'/CROSS-RESPONDENTS REPLY BRIEF by Certified U.S. MAIL with postage prepaid addressed to:

Brent C. Featherston
Featherston Law Firm, Chtd.
113 S. Second Ave.
Sandpoint, Idaho 83864
Telephone: 208-263-6866
Facsimile: 208-263-0400
Attorney for Respondents/Cross-Appellants

Arthur B. Macomber
Attorney for Appellants/Cross-Respondents