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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID L. CALDWELL and KATHY C.)	Supreme Court Docket
CALDWELL, husband and wife;)	#37157-2009
LAWRENCE L. SEILER and THERESA)	
L. SEILER, husband and wife; PATRICIA)	
ST. ANGELO,)	Case No. CV. 07-01744
)	
Plaintiffs/ Appellant/Cross-Respondent,)	
)	
vs.)	
)	
THOMAS W. COMETTO and LORI M.)	
COMETTO, Husband and Wife, and DOES 1-5;)	
)	
)	
Defendants/Respondents/Cross-Appellants.)	

RESPONDENTS/CROSS-APPELLANTS' REPLY 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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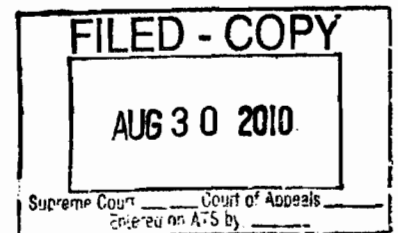


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I. PROCEDURAL HISTORY/STATEMENT OF FACTS

Perhaps the challenge for the Cross-Appellants, Thomas and Lori Cometto (“Comettos”), is that Appellants/Cross-Respondents’ (collectively “Caldwell”) original pleadings filed October 17, 2007¹, sought judicial relief and made factual allegations which were simply either not pursued or not supported by evidence at trial.

Similarly on appeal, Caldwell’s appellate arguments often do not match the facts present in the record and Caldwell’s appellate briefing often strays from the issues presented in their Notice of Appeal.

Comettos challenge the denial of attorneys’ fees and costs based upon the Trial Court’s finding that Caldwells prevailed in part by the Court granting a snow storage easement. (R. Vol. II, p. 502). Comettos seek an award of attorneys’ fees based upon the contractual provision contained in the Easement Agreement signed by both Comettos and Caldwell and recorded as Instrument No. 570303. (Plaintiffs’ Exhibit No. 25)

Counsel for Caldwell makes at least three (3) references in Caldwell’s Reply Brief to the Easement Agreement being “sloppily” prepared or failing to comply with Idaho law for not obtaining a surveyed description of the easement road. It bears noting, however, that the Plaintiff, Kathleen Caldwell, signed the document January 31, 2000, approximately one (1) month after Mr. and Mrs. Cometto signed the Easement Agreement. (Plaintiffs’ Exhibit No. 25, Defendants’ Exhibit “A”; R. Vol. I., pp. 58-59). Caldwell had just as much opportunity to demand a survey of

¹ Comettos’ initial brief mistakenly recited 2008 as the filing date. This erroneous date also appears in the Clerk’s Record, Table of Contents, p.1.

the easement roadway prior to executing and recording the Easement Agreement. They, likewise, chose not to incur the expense of a survey in late 1999 and instead chose to file their Complaint eight (8) years later seeking to rewrite or reinterpret the Easement Agreement as it suited them.

The Easement Agreement contains a clause entitling the prevailing party to attorneys' fees and costs. As a result, the issue before the Court on Comettos' Cross Appeal is whether they are or were prevailing parties in this matter. In regard to the Trial Court's Memorandum Decision entered in this matter, Comettos either prevailed on the claims brought by Caldwell or (in the case of secondary easement for snow storage easement claims, which were not pled) Comettos did not dispute Caldwell's right to the relief granted by the Court.

Caldwell asserts in their Reply Brief that Comettos could not have been prevailing parties because the Trial Court entered a Judgment prohibiting the placement of personal property within the secondary easement or within the snow storage easement. Again, the trial record does not support any conclusion that any of those activities, in fact, occurred prior to Caldwell's filing of their action. The Trial Court made no finding that Comettos had placed items within the secondary easement or that Comettos had obstructed any snow storage easement. The areas of snow storage easements designated by the Trial Court in its Memorandum Decision were areas in which no personal property or other objects exist.

In fact, of the list of bold print items contained on page 10 of Caldwell's Reply Brief, not a single item therein was determined to have been an obstruction to or lying within the primary easement, secondary easement, or snow storage easement awarded by the Trial Court in its Memorandum Decision. The undisputed testimony at trial is that the earthen berms were in

existence in 1997 and 1998 for the most part and that those portions of the berm built more recently, in fact, increased the turning radius, rather than inhibit travel across the easement. (Tr. pp. 256-7, 258)

Further, Mrs. Cometto testified that the pickup truck has not moved since the road was constructed in 1997 and provided photographic proof. (Tr. pp. 294; Plaintiffs' Exhibit No. 29 and Defendants' Exhibit "F").

With regard to the gates, which were ordered by the Trial Court to be removed, the undisputed testimony is that the gate pre-existed Caldwells' purchase of the property and was installed in 1997. (Tr. p.277, L.17 - p.278, L.1) Additionally, Mrs. Cometto testified that the gate was purposely installed in such a manner so as to allow for its removal in such a manner that it would not interfere with any travel including heavy equipment transportation by loggers. (Tr.p. 278)

Mrs. Cometto testified that the gate has been removed by them during the winter months, leaving that portion of the roadway wide open for travel and snow plowing.

With regard to the cross ditching, Mrs. Cometto testified without rebuttal that it was placed in order to slow down others who sped across the easement through the Cometto property.

Mr. Macomber asked a number of questions to Mrs. Cometto about her allowing or disallowing the snow storage. Mrs. Cometto testified that, in fact, she specifically viewed the far west corner of the easement, between the easement and her property line, as an appropriate and reasonable place for Caldwell to store snow, which is, in fact, the snow storage area determined by the Trial Court in its Memorandum Decision. (Tr. p. 285, ll. 7-12, pp. 317-318; Memorandum Decision, R. Vol. III. p. 386).

In essence, the Court's decision adopted the activities of the parties and Mrs. Cometto's acquiescence to snow storage for the past eleven (11) years into a Judgment.

On each of the various claims asserted by Caldwell in their pleadings, the Trial Court declined to award the relief sought. The Trial Court's ultimate conclusion reflected in its Memorandum Decision and Final Judgment reflects the acquiescence and actions of the parties over the preceding decade. As a result, Caldwell obtained no relief on their claims and, therefore, did not prevail in any regard. Comettos, as Defendants, did prevail and are entitled to an award of fees and costs.

II. ARGUMENT

The Trial Court in an Order on Cross Motions for Attorneys' fees and Costs found that each party prevailed on their most significant claims holding that even though Mr. and Mrs. Caldwell had not prevailed on any of the claims pled in their Complaint, they did prevail in part by convincing the Court to "award" a secondary easement for snow storage. The Court also found that there were "inherent ambiguities in the access issues due to the absence of a recorded survey, a survey that either party could have obtained prior to the litigation and, indeed, prior to entering into and signing the original Easement Agreement some ten (10) or eleven (11) years prior. (R. Vol. III, p.502).

The determination of who is the prevailing party is one in which the Trial Court has discretion and the Trial Court's ruling will not be reversed in the absence of an abuse of the discretion. Suits v. First Security Bank, 125 Idaho 27, 35, 867 P.2d 260, 268 (App.1983).

The Trial Court's Order regarding cross motions for attorneys' fees made findings that Caldwell had prevailed in part "in the sense that they needed sufficient room for snow storage" offsetting the fact that Comettos prevailed on every claim stated in Caldwell's pleadings.

This finding by the Trial Court that Caldwell "prevailed" on a claim for secondary easements for snow storage is not supported by the record. As recited above, Mrs. Cometto testified that she had no objection and had never objected to Caldwell's right to store snow along the roadway and certain areas along the west and northwest portions of her property between her easement and the property line. Mrs. Cometto testified to an incident in 2003 or 2004 in which Caldwell attempted to unilaterally relocate the roadway on the Cometto property and law

enforcement was called to intervene. She also testified to Caldwell taking down trees on their property to widen the road. (Tr. pp. 318-320). Mrs. Cometto testified that she had no problem with the use of the adjoining ditching and west/northwest areas for snow storage so long as Caldwell restricted their use to the roadway. (Tr. pp. 265-266, pp. 300-303).

If the Trial Court's findings are not supported by substantial and complete evidence, the Appellate Court will reverse those findings. See Shore v. Peterson, 146 Idaho 903, 907, 204 P.3d 1114, 1118 (2009).

In Shore v. Peterson the court found in favor of Peterson on his affirmative defenses of accord and satisfaction, but determined that Peterson was not shown to be a prevailing party on a second affirmative defense of conversion. The Idaho Supreme Court affirmed the Trial Court's ruling in favor of Peterson and against Shore, but reversed the Trial Court's finding that Peterson was not a prevailing party and remanded to the District Court to determine an award of costs and fees where Peterson prevailed on the overall claims.

The Trial Court's exercise of discretion is weighed to consider whether the Trial Court:

- (1) Perceived the issue as one of discretion;
- (2) Acted within the outer boundaries of this discretion consistently with the legal standards applicable to the specific choices available to it; and
- (3) Reached its decision by an exercise of reason.

American Pension Services, Inc. v. Cornerstone Home Builders, LLC,
147 Idaho 638, 641, 213 P.3d 1038, 1041 (2009)

In Peterson, the Trial Court was reversed by the Idaho Supreme Court because of an

inaccurate factual finding that failed to note the plaintiffs' claims for conversion were dismissed after the presentation of their case in chief and as a result rendered the Trial Court's decision inconsistent with a finding by the Trial Court that Peterson had not prevailed. Shore v. Peterson, 146 Idaho 903, 914, 204 P.3d 114, 1125 (2009).

On appeal the Appellate Court reviews the Trial Court's findings to determine "whether the evidence supports the findings of facts and whether the findings of facts support the conclusions of law". American Pension Services, Inc. v. Cornerstone Home Builders, LLC, 147 Idaho 638, 641, 213 P.3d 1038, 1041 (2009) quoting Watson v. Watson, 144 Idaho 214, 217, 159 P.3d 851, 854 (2007).

The Trial Court's finding is as follows:

The Court finds that both parties prevailed on their most significant claims. Caldwell's 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 Caldwell's were not necessary.

R. Vol. III, p. 502

The Court's finding quoted above that Caldwell's prevailed "in the sense" that they obtained a snow storage easement is not supported by the record. First, Caldwell did not plead a right to snow storage in the adjacent ditching or along the west boundary as was awarded by the Court. Rather, Caldwell's pled a right to a 30-foot-wide easement and the consequent right to widen the road to that full 30-foot width. (R. Vol. I, p. 5 ¶¶ 1 and 2; p. 27 ¶ 8). Caldwell's also pled a right to relocate the easement and that Comettos were required to build the easement to a

County Subdivision Road Ordinance Standard adopted in 2006.

The testimony of Mrs. Cometto established that they had no objection to and never had obstructed Mr. and Mrs. Caldwell's right to use the ditching and the west boundary area as snow storage sites. Mrs. Cometto also testified and the easement agreement reflects that the easement rights established in the Easement Agreement included the appurtenant ditching adjacent to the roadway. In fact, the Trial Court noted the language included on the sketch attached to the Easement Agreement "ditches added". Mrs. Cometto testified that she understood the easement to include the adjacent or appurtenant ditches for necessary drainage or snow storage. (Tr. p. 307, ll. 3-6).

Mrs. Cometto also testified that it was her belief that the Easement Agreement established the Caldwell's rights as to the existing roadway and that that existing roadway included the adjacent ditches or drainages devices. (Tr. p. 312, ll. 6-10) Furthermore, Mrs. Cometto testified that the roadway depicted on the sketch attached to the Easement Agreement in 1999 fairly and accurately reflected the existing roadway at that time and as it currently existed as of the time of trial. (Tr. p. 312, L.18 - p. 313, L. 20) The Trial Court found that the current road does not vary from the "existing roadway" granted in the Easement Agreement. (R. Vol. III, p. 381).

I.C.R.P. Rule 54(d)(1)(B) provides that "in determining the prevailing party, the Court must consider the resultant Judgment or Judgments obtained" and must determine who is the most prevailing party. I.R.C.P. Rule 54(d)(1)(B)(2010). "In doing so, the Court should examine (1) the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) the extent to which either party prevailed on each issue or claim". Jerry J. Joseph, C.L.U.

Insurance Associates, Inc. v. Vaught, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (App.1990). See also: Sanders v. Lankford, 134 Idaho 322, 325, 1 P.3d 823, 826 (App.2000).

In this matter, the Trial Court did not evaluate the claims for relief and the resultant relief granted. If done, the Trial Court should have determined that Caldwell's multiple claims for relief were completely denied in the Final Judgment and Memorandum Decision and, therefore, Comettos were the prevailing party on each issue or claim sought in the Caldwell's Complaint. The actual result obtained in relation to the relief sought is that Caldwells obtained a Judgment clarifying rights they already possessed and exercised for storage of snow in the adjacent ditches and along the west boundary line of the Cometto property, all claims to which Mrs. Cometto stated she had no objection. In essence, the Trial Court has used this "relief", which was not sought by Caldwell in their Complaint, nor objected to by Cometto, as a way of finding that Caldwell "prevailed" against Comettos. The testimony establishes that Comettos never contested (either by past conduct or in their testimony or pleadings in this case) Caldwell's rights to the secondary easement in the adjacent ditch and the right to store snow along the west boundary.

Much of the trial testimony was devoted to Caldwell's attempt to show that Mr. and Mrs. Cometto have interfered with snow storage along the east leg of the easement by placement of personal property items. The testimony, in fact, established those personal property items had existed in those locations for more than a decade going back prior to or concurrent with the construction of the current roadway in 1997. The Trial Court did not grant Caldwell relief in the form of snow storage easements on the east portion of Cometto's property noting that Caldwell could store snow on their own property to the east of Comettos. (R. Vol. III, p. 385).

Additionally, the testimony established that this issue was precipitated by Mr. and Mrs. Caldwell's attempt to forcibly reconstruct the road on the east leg so as to avoid the ninety degree (90°) turn and exit straight through an existing fence constructed by Mr. and Mrs. Cometto onto the ten (10) acre property now owned by Caldwell. When the Comettos objected or would not provide their consent to Caldwell's request to do so, Caldwells attempted to do so forcibly requiring law enforcement involvement. (Tr. pp. 266, 270-271).

The Trial Court's conclusion that Caldwell in some fashion prevailed on claims that were not pled and to which the Comettos did not object, does not support the Trial Court's finding that Caldwell prevailed in part.

This Court should reverse the Trial Court's denial of attorneys' fees because the Trial Court's finding that Caldwell prevailed in part is not supported by the evidence.

III. CONCLUSION

Based on the foregoing, the Cross-Appellants, Cometto, ask this Court to reverse the Trial Court's finding that Caldwell prevailed in part.

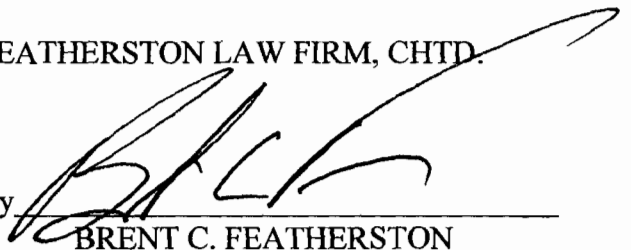
This Court is respectfully asked to remand the matter with instructions to award Comettos fees and costs incurred at trial.

For the reasons set forth in Cometto's prior briefing, Comettos request attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 26th day of August, 2010.

FEATHERSTON LAW FIRM, CHTD.

By



BRENT C. FEATHERSTON

Attorney for Respondents/Cross-Appellants

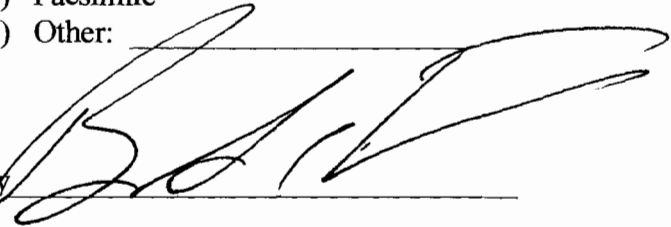
CERTIFICATE OF MAILING

I hereby certify that on the 21st day of August, 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
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- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile
- Other: _____

By

A handwritten signature in black ink, appearing to be "B. A. M.", is written over a horizontal line. The signature is stylized and cursive.