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IN THE SUPREME COURT OF THE STATE OF IDAHO

VILARR RANSOM, as trustee of the Vilarr B. Ransom Revocable Trust Plaintiff/Respondent, vs. TOPAZ MARKETING, L.P., and, DENNIS LOWER Defendants/Appellant.	Case No. CV-03-239 Supreme Court No. 35494
FARR WEST INVESTMENTS, Plaintiff/Respondent, vs. TOPAZ MARKETING, L.P., and MR. AND MRS. DENNIS LOWER Defendants/Appellant.	Case No. CV-03-240

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JAN 20 2009
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

BRIEF OF APPELLANT

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Franklin

HONORABLE DON L. HARDING
District Judge

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ATTORNEY FOR PLAINTIFF/RESPONDENT

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TOPAZ MARKETING, L.P., AND MR. AND MRS. DENNIS LOWER

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FILED THIS _____ DAY OF _____, 2009.

STEPHEN W. KENYON, Clerk

BY: _____
Deputy Clerk

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STATEMENT OF THE CASE

After the decision of the Supreme Court in the first appeal of this case, a motion was made to disqualify the judge without cause. Arguments were held and briefs were written. The district judge ruled it was not necessary for him to disqualify himself.

About a year later the district judge rendered a new decision which allegedly covered the issues the Supreme Court said needed to be addressed. Prior to this decision the district court made no contact with counsel, nor were any requests for information or even notice of what the court was doing ever given.

A motion for reconsideration of the decision was filed. The matter was argued and the motion was denied. From the above facts this Appeal was taken.

ISSUES ON APPEAL

1. Whether the District Court erred in not granting Defendant's motion to disqualify without cause.
2. Whether the District Court erred in not properly addressing damages.
3. Whether the District Court erred in not properly finding the value of the land.
4. Whether the District Court erred in its determination of the amount of land damaged.

STANDARD OF REVIEW

A district court's findings of fact in a court-tried case will be liberally construed on appeal in favor of the judgment entered, in view of the district court's role as trier of fact. *Western Heritage Ins. Co. v. Green*, 137 Idaho 832, 835, 54 P.3d 948, 951 (2002) (citing *Conley v. Whittlesey*, 133 Idaho 265, 269, 985 P.2d 1127 (1999); *Lindgren v. Martin*, 130 Idaho 854, 857, 949 P.2d 1061, 1064 (1997)). Review of the decision is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of

law. *Id.* If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Id.* However, this Court exercises free review over questions of law. *Id.*

ATTORNEY FEES ON APPEAL

Attorney fees may be awarded on appeal under I.A.R.41 and I.C. §12-121. Attorney fees should be awarded to the Appellant because the appeal brought out all the legal mistakes in the law made by the district judge. Because of the above Appellant should be deemed the prevailing party on Appeal. *Chadderdon v. King*, 104 Idaho 406, 659 P.2d 160 (Ct.App.1983).

ARGUMENT AND AUTHORITIES

A. FAILURE TO DISQUALIFY WITHOUT CAUSE

On January 3, 2007, the Defendant timely filed a Motion to disqualify the district judge who originally tried this case. (C.R.P. p.3) On May 30, 2007, the district judge issued a MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS'MOTION TO DISQUALIFY. (C.R. P. p.19-22) Basically the district court stated it did not need to disqualify itself because of its interpretation of the case of *Liebelt v. Liebelt*, 125 Idaho 302 (Ct.App. 1994) and judicial economy. (C.R.P. p.20) These two issues will next be examined to see if they are valid.

The district court stated Plaintiffs objection to the motion to disqualify was well taken because the *Liebelt* case was "authority to deny the motion because the case was not remanded for a new trial, merely for additional finding of fact. This court agrees, and therefore denies the motion". (C.R.P. p.20) The district court went on to say "The Idaho Court of Appeals reached the same conclusion in *Liebelt*. There, the Court held the rule did not apply when a case was remanded for additional findings of fact, 125 Idaho at 305. The Court of Appeals held that it is

not a "new trial" for operation of the rule. This case was also remanded for additional finding of fact, not for a new trial. In that regard this case and *Liebelt* are very similar, and similar results should obtain. The court will not grant the motion to disqualify." (C.R.P. p. 20)

The Supreme Court stated this case was remanded for "further proceedings consistent with this opinion". *Ransom v. Topaz*, 143 Idaho 641, 647 (2006). The Supreme Court also stated "the case must be remanded back to the district court for further findings of fact." *Id.* at 645. The district court conducted no further findings of fact.

The district court erred by misinterpreting I.R.C.P. Rule 40(d)(1). The basic premise of the rule is set forth under Rule 40(d)(1)(A). It states "any party may disqualify one (1) judge by filing a motion for disqualification, which shall not require the stating of any grounds therefore, and such motion for disqualification, if timely, shall be granted." The rule then goes on to tell what one must do in various circumstances, i.e. what is the time limit to file, when there are multiple parties, or new parties, or a new judge, or a new trial, or an alternate judge or how to serve a judge the notice and finally the exceptions to the rule. (Rule 40(d)(1)(B)(C)(D)(E)(F)(G)(H)(I)) Rule 40(d)(1)(F) simply states what one does when a new trial is ordered, nothing more. It certainly does not say if the Supreme Court remands a matter back to the trial judge the trial judge cannot be disqualified. The rule simply states how to disqualify the Judge if a new trial is ordered in the remand by the Supreme Court. The basic premise of the rule still applies, i.e. one may disqualify a judge without cause. "the purpose of the rule permitting disqualification of a judge without cause is "to insure a fair tribunal by allowing a party to disqualify a judge thought to be unfair or biased."" (In the matter of the application of: *Herb Arthur dba Herb's Towing, Herb Arthur v. Shoshone County*, 33 Idaho 854, 857(App.) citing *Jahnke v. Moore*, 112 Idaho 944, 946 (Ct.App.1987).

The district court also misinterpreted the *Liebelt* case. This misinterpretation probably arose from the following language found in *Liebelt*: "However, we did not remand the case for a "new trial". As our opinion makes clear, we remanded the case for the limited purpose of having the magistrate make additional written findings on particular issues of fact which had already been tried before him. Accordingly, Rule 40(d)(1)(F) did not apply to grant Kenneth an automatic right to disqualify the magistrate without cause". The above language is somewhat ambiguous. No new trial was ordered so obviously Rule 40(d)(1)(f) is not applicable. However the language does imply since the Supreme Court did not order a new trial and only ordered written findings of fact one cannot be granted, even if timely request is made, a disqualification of the trial judge. To follow this interpretation is absolutely contrary to Rule 40(d)(1)(A) and the purposes of the rule found in the above cited cases of *Arthur* and *Jahnke*.

The motion to disqualify was also denied in the *Liebelt* case because it was not timely filed.

The district court also denied the motion to disqualify on the grounds of judicial economy. Neither the Rules nor the cases speak of judicial economy. They speak of judicial fairness. The day judicial fairness gives way to judicial economy will be a sad day indeed.

B. DAMAGES

In the Supreme Court's opinion it remanded the case because the district court "improperly measured actual damages for Lower's trespass." *Ransom v. Topaz*, 143 Idaho 641, 647 (2006). The Supreme Court stated there were two separate matters the district court did wrong and thus must conduct "further proceedings consistent with this opinion" to complete the matter. *Id.* at 647. Those two matters are as follows: (1) The district court "failed to distinguish between damages attributable to Lower's permissible trespass to create or maintain an access road and damages attributable to excessive intrusion exceeding the scope of the easement" and, (2) to

distinguish "between costs to repair temporary damage and an award of damages for permanent damage to the property". *Id.* at 647. Unfortunately the district court erred when it attempted to measure the actual damages and those errors shall next be considered.

In regards to the first matter set forth above, the district court ruled there were a number of damages which did arise from the modifications of the easement. Those include erosion, sloughing caused by cuts made on Plaintiff's land out side the easement, removal and deposit of soil on Plaintiff's land, failure to install culverts, and mitigate the altered and increased flow of water onto Plaintiff's land outside the easement. As a result of the above the district court gave two examples of the injury caused, i.e. "50% of precipitation does not percolate into the newly graveled area and thus causes erosion and water intrusion onto Plaintiff's land and the sloughing caused by the increase of water has rendered the land useless for building and cultivating". (C.R.A. p.24, last paragraph)

The main issue relating to these findings is the question of whether they are supported by any facts. Before going into these issues it is import for this Court to look at the Clerk's Record on Appeal. It will reveal the only thing heard by the district court prior to its Memorandum Decision & Order filed on 12-5-07 were matters relating to Appellant's Motion to Disqualify. No new evidence was requested by the district court nor was any hearing held concerning what need be done because of the remand. The probable reasons for this are set out in the district court's Memorandum Decision and Order Denying Defendant's Motion to Disqualify. (C.R.A. p.19-21) In this decision the district court stated "The decision of the Idaho Supreme Court does not order a new trial. It remands the case back to this Court for additional findings of fact on the measure of damages for trespass. This Court has previously heard the evidence in this case and made the findings which are to be supplemented. This Court is in the best position to make those

additional findings". (C.R.P. p. 20) From these statements it is apparent the Court did not want, and thought it did not need, any more hearings or evidence. This would seem to mean only evidence given in the original trial can be relied on by the district court to reach its facts and conclusions.

Having set forth the district court's distinction between damages done in the permissible trespass and those done by the impermissible trespass, the Court then moved to the second matter requested by the Supreme Court. This issue broadly distinguishes between cost of temporary damages and permanent damages.

The district court found the Plaintiff did not prove any permanent or temporary damages. (C.R.W. p.27, line 3) The Court then went on to say under the authority of *Nampa & Meridian Irrigation Dist. No.131*, 139 Idaho 28 (2003), since the value of the land had been proven the Court could award damages. The Court awarded $26,600.00 for damages. (C.R.W. p.27, 2d paragraph) This sum was determined by finding "approximately 7 acres were injured and the land is valued at $3,800 per acre for a total value of $26,600.00". (C.R.W. p.26, last full sentence) This ruling by the district court creates the issue as to whether a court can assess damages if none were proven by the Plaintiff. The district court says it can assess damages even if Plaintiff did not prove any damages under the authority found in *Nampa & Meridian Irrigation Dist. No.131. Id.*

In its first statement under ANALYSIS the Supreme Court stated the general rule that "a trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous". *Nampa & Meridian Irrigation Dist. No.131. Id at 32.* The district court found Plaintiff had not proven any permanent or temporary damages. It is assumed these finding of fact would not be set aside.

However, the district court later went on to say that while no permanent damages were proven the Court was going to award temporary damages, saying the cost to restore the land to it's pre-injury state was more than the land's value so the Court would reduce the award "to the estimated value, that being $26,000.00". (C.R.W. p.27-28, under the Court's Order) The court in the *Nampa* Case does not say if no damages were proven by the Plaintiff the trial court can, without proof, assess damages.

In the *Nampa* case, after reviewing the measure of damages to land which was permanently injured or temporarily injured, the Supreme Court went on to say "the rule precluding recovery of restoration costs in excess of the diminution in value is not of invariable application". *Id. at 34.* Assuming any of this is relevant, which this writer believes it is not because of the prior ruling of the district court, what is the meaning of the words "diminution in value is not of invariable application"? The Supreme Court cited authority from which the meaning is derived.

The *Orndorff* Case stated "Restoration costs may be awarded even though they exceed the decrease in market value if there is a reason personal to the owner for restoring the original condition or where there is reason to believe that the parties will, in fact, make the repairs". *Orndorff v. Christian County Builders*, 217 Cal.App.3d 683, 266 Cal.Rptr. 193, 195 (Ct.App.1990). The *County of Weld* Case explained this doctrine to greater length. "Market value before and after the injury is ordinarily a rule applied to measure damages to real property. Since the goal of the law of compensatory damages is reimbursement of the plaintiff for the actual loss suffered, there may, of course, be instances in which repair or restoration costs may be a more appropriate measure such as (1) where the property has no market value, (2) where repairs have already been made, or (3) where the property is a recently acquired private residence and the plaintiff's interest is in having the property restored, repair costs will more effectively

return him to the position he was in prior to the injury". (*The Board of County Commissioners of the County of Weld, State of Colorado v. John P. Slovek, Sr., John P. Slovek, Jr., Gary W. Slovek and Michael S. Slovek* , 723 P.2d 1309, 1314 (Colo.1986)

None of the above applies to this case. The Plaintiffs' bought the land "with the intent of building some summer cabins up there for us as the members of the group and possibly over on this particular area that we are talking about, selling this area and some of the frontage ground. We wanted to be back more over the hill, back into the background and so we were contemplating using this as a way to recap part of our investment. As has been stated, there is some very good ground there. There is also a hill that sluffs. The ground that is very good is back up against the trees." (R.T. day 3 of trial, testimony of Mr. Earnest Robert Rauzi, p. 166, L.7-13) No cabins were built and no land was sold prior to the trial. As stated, the good land was up against the trees. This was not land involved in the litigation. The land in litigation was below the hill that sluffs. During the first appeal of this case all of the Plaintiffs' land was sold. This land bought by the Plaintiffs' was investment land bought with mainly the idea of making more money. The potential abuse of this measure of damages was set out in the *County of Weld* case where it was stated "obviously, to the extent that a property owner is allowed to recover costs of restoration that are greater than the diminution in market value, there is the possibility that the owner will receive a monetary windfall by choosing not to restore the property and by selling it instead, profiting to the extent that restoration costs recovered exceed the diminution of market value". (*County of Weld, Id.* p.1317) In its motion for reconsideration the district court was requested to have the Plaintiff disclose the amount received from the sale of the land. (C.R.A. p.35) The district court denied the request. (C.R.A. p. 39) It is for these reasons the

principles involving restoration costs are not applicable and these cases and their rulings certainly do not allow a trial court to award damages which have not been proven.

Even though the district court stated the Plaintiff had not proven any permanent or temporary damages it went ahead and awarded $26,600 in damages to Plaintiff. As pointed out earlier it did this by saying the land was worth $3,800.00 per acre and multiplying it by 7, the alleged number of acres damages. These findings are not only contradictory to the Courts own findings but are also an abuse of the Court's discretion. In the three part test to determine an abuse of discretion the district court failed to meet the second part of the test. See *Bybee v. Isaac*, 1788 P.3d 606, 145 Idaho 251 (2008). In this regard the district court did not act within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it. More examples of this abuse are contained in the following topics marked C and D.

C. VALUE OF LAND

There was no testimony the land had a value of $3,800.00 per acre. This figure was stated by Bob Rauzi. He said the land had been owned since 1983, it had been up for sale for approximately 5 years, no one had put any earnest money on the land and its asking price was $3,800.00 per acre. (Tr. 7/21/04, p.168-169) Mr. Rauzi also testified, as owner of the land, he thought the land was worth $10,000.00 to $50,000.00 an acre. (Tr. 7/21/04, p.167) He based his values of the Franklin County property on property located in Island Park. (Tr. 7/21/04, p. 166) It should also be noted in the original decision of this case by the Supreme Court, the Court also erred by stating "while there is some indication in the record that the property was about ten acres in size and was valued at approximately $3,800 per acre the judge made no determination about how much property was actually damaged or what the value of the property was".

(*Ransom v. Topaz*, 143 Idaho 643, 645.) While this hint of the amount and value of the land is interesting, it is not based on any facts. This may also be a reason the district court erroneously placed a value of $3,800.00 per acre on the land. The law must be kept in mind. "Generally, the Plaintiff in a trespass action has the burden to prove a causal connection between the Defendant's alleged wrongful conduct and the Plaintiff's injury, as well as the extent of the injury sustained." *Nelson v. Holdaway Land and Cattle Co.*, 107 Idaho 550, 552, 691 P.2d. 796 (Ct.App.1984). "Damages, and the amount thereof, must be proven to a reasonable certainty." *Wing v. Hulet*, 106 Idaho 912, 919 (Ct.App.1984)

The defendant, Mr. Lower, offered to purchase 20 acres of the land owned by Farr West situated near his easement for $650.00 per acre. (Tr.7/21/04, p.116)

Mr. Allen E. Burris, who was qualified as an expert in land appraisals, testified the Farr West land had a value of $600.00 per acre, and he provided a written appraisal to support his opinion. (Tr. 4/27/05, p.140-141) and (exhibit QQ)

No other testimony was presented as to land values. All of these land values were based on pre-trespass values. No values were testified to as to pre-trespass and post-trespass. Presumably that is why the district court found no damages had been proven.

The district court breached its discretion when it awarded damages based on the asking sale price at the time of trial. Certainly asking price has nothing to do with fair market value of land. One of the reasons for remand of the first appeal of this case was "the court failed to determine the fair market value of the land". (*Ransom v. Topaz Marketing, L.P.* 143 Idaho 641, 645) The only real evidence given as to the fair market value of the land was given by the appraiser, Mr. Burris, who testified the land had a value of $600.00 per acre. This is the value the court should have placed on the land prior to the trespass. There was no testimony as to market value after the

trespass. Thus the court had no evidence of any decrease in market value of the land and could not then compare any decrease in land value with restoration costs.

D. AMOUNT OF LAND DAMAGED

There was no proof seven acres of the land were damaged. The only evidence of the amount of land damaged was given by Thomas Kass Biggs. His testimony was based on a picture he was looking at and went as follows:

Q. Okay. And how many acres does that involve, do you know?

A. I would approximate maybe 6, 7 acres. I am not good with land.

Q. If I were to represent to you that this whole thing from here to here, around where the trees are and down here is approximately 7 acres?

A. Okay.

Q. Then you are talking about maybe a fourth of it at the most?

A. Yeah. I would say so. Maybe a third

Mr. Biggs' testimony implies there was damage to land, i.e. he intended to repair, one-fourth of seven acres, or 1.75 acres. This is the only evidence of the amount of land damaged. The district court could, in its discretion, adopt this finding. The district court did abuse its discretion by saying a total of seven acres was damaged.

CONCLUSION

The district court improperly handled the remand heretofore ordered by the Supreme Court. The first error was in denying the motion to disqualify without cause. If the motion had been granted and a new judge appointed to hear the case the odds are the case would have been resolved and no appeal filed.

The Supreme Court asked the district court to do two things. The district court tried to do these two things but ended up in a quagmire. It found the Plaintiff had not proven any permanent or temporary damages. Then the court reversed itself and assessed damages using the wrong amount of land damaged and incompetent evidence supporting the court's value of the land before the trespass. There was no evidence of the lands decrease in value after the trespass.

It is requested the district court's decision be partially set aside and the case dismissed with prejudice because there was no proof of any permanent or temporary damages. In the alternative this court could remand the case with an order to award damages by valuing the land at $600.00 per acre and multiplying this by 1.75 acres for the sum of $1,050.00. This would be more cost effective for all the parties than a remand to determine the exact damages.

Dated this 15th day of January, 2009.

Kenneth E. Lyon, Jr.
Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of January, 2009, in accordance with the Idaho Rules of Civil Procedure and Appellant Rules, I mailed two true and correct copies of the foregoing Brief to the following by placing the same in the U. S. Mail, postage prepaid thereon:

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