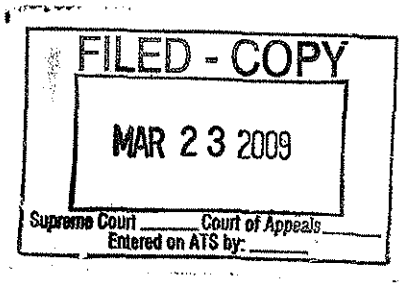
3-23-2009

Farr West Investments v. Topaz Marketing L.P. Respondent's Brief Dckt. 35494

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-3-239 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



BRIEF OF RESPONDENT

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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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.
5. Whether attorney fees and costs should be awarded to Farr West when this is simply asked to second guess the District Court ruling.

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.3 948, 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 Respondent because the appeal brought out all the legal mistakes in the law made by the district judge. Because of the above Respondent 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 DEFENDANT'S 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 the 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 did make further findings of fact as set forth in it's Memorandum Decision and Order. In fact, no new trial was ordered. In this case the matter was tried over approximately five (5) days with multiple on-site inspections by the court. The appellant did not like the result of the district court decision. With no "new trial" being ordered, Topaz may not go shopping for a different judge or hoped

for different result. The District Court correctly interpreted the *Liebelt* case. The judge therefore denied appropriately the motion to disqualify.

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 the 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. The District Court did exactly what was directed on the remand.

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 including those trespassed outside 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 cause, 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 important for this Court to look at the Clerk's Record on Appeal. 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. The Courts findings are supported in the record. Topaz wants this Court to second guess what the district heard, saw and observed.

Topaz grossly misstated the District Courts findings in the Memorandum Decision and Order of December 5, 2007. The District Court ruled:

The first issue is addressed by looking at the injuries to the land including: erosion, cuts made by Defendant in the land outside of the granted easement, removal and deposit of sail to and from Plaintiff's land, grading, cutting trees, placing gravel, removal of fences, and exceeding the scope of the easement. Damages to the property which are not compensable are the injuries

which are natural effect of creating or improving the easement. These include: grading, cutting trees, placing gravel and removal of obstructing fences within the easement. The Supreme Court has said that the easement may be modified according to the granted easement. *Ransom v. Topaz Marketing L.P.,* 143 Idaho 641,645 (2006). Thus this Court will not award any damages directly caused by these actions. However where the modifications constitute an enlargement of the use or an unreasonable increase in the burden of the easement on the subservient estate then the resulting injuries may be compensable. *Abbott v. Nampa School Dist. No 131,* 119 Idaho 544 (Idaho 1991). The Supreme Court in remanding this case has instructed how to compensate for excessive and unnecessary injuries. *Ransom,* 143 Idaho 641 at 644-645.

The injuries which are compensable because they are excessive and unnecessary are the permanent and temporary damages which do not naturally arise from the modifications of the easement. These include the erosion and sloughing caused by cuts made on Plaintiff's land and Defendants failure to install culverts or otherwise mitigate the altered and increased flow of water onto Plaintiff's land outside the easement. An example of this kind of injury to Plaintiff's land is found in the fact that 50% of precipitation does not percolate into the newly graveled area and thus causes erosion and water intrusion onto Plaintiff's land. The sloughing caused by the increase of water has rendered the land useless for building or cultivating. This is an unreasonable increase in the burden on the subservient estate and the Court feels that some damages should be awarded.

The second issue deals with computation of the damages to be awarded and requires the Court to distinguish between temporary and permanent damages. This case is unique because there is an overlap of the permanent and temporary injuries to the land. An example of this is the sloughing which has occurred on the land. The sloughing has caused some of the fill dirt to be washed down stream and lost forever, however the sloughing may be remedied as indicated by the proposals of Biggs Enterprises. While the injuries to the land which are continuing in nature and not abatable are permanent injuries, the continued sloughing can be abated if the land is put back to its natural state. This makes the distinction of the damages difficult as it fits both categories to an extent. The Court feels that the loss of the soil due to the erosion is a permanent injury to the land as far as that soil is unrecoverable. This has also made the land impossible to farm as the loss of soil proves detrimental to the objective. The sloughing has made the land useless, furthermore the soil which has been lost and the pristine nature of the land has been lost forever. Thus the loss of soil is a permanent injury.

The Supreme Court has instructed that the measure of these permanent damages be assessed by a computation of the fair market value of the land immediately prior to the injury and the fair market value of the land immediately following the injury. *Ransom,* 143 Idaho 641 at 645. The Plaintiffs have not proved any diminution of the property value as a result of the permanent injuries to the land therefore this Court cannot award such damages.

However, as mentioned above there are temporary injuries involved in this case as well. Examples of the temporary injuries involved in this care are

the cuts made on Plaintiff's land outside of the easement, without permission, the sloughing and pooling caused by the cuts, and the removal and deposit of soil onto Plaintiffs land. According to the estimate provided by Biggs, these can be restored to their natural state, drain pipes can be put in place to prevent pooling and measures can be erected which will prevent future sloughing and restore the land to its pre-injury state. Injuries which can be abated, are temporary in nature and can be compensated for by awarding the amount necessary to restore the land to its condition prior to the injury. The Supreme Court has stated, "[I]f the cause of the injury is abatable or preventable and the injury capable of rectification by reasonable restoration, i.e., not exceeding the damage to the property, the injury will be considered temporary and not permanent." *Alexko v. Union Pacific Railroad co.,* 62 Idaho 235, 240 (1941). Because the land here can be rectified the damages are only temporary. In actions of temporary injury to land, the owner is entitled to recover amount necessary to repair injury and put land in condition it was at time immediately preceding injury. *Powell v. Sellers,* 130 Idaho 122, (Ct. App. 1997). In regard to temporary injury to property, if the cost of restoration exceeds the value of the premises in their original condition, or in the diminution of market value, the latter are limits of recovery; however, because the goal of compensatory damages is reimbursement of the actual loss suffered, the rule precluding recovery in excess of the diminution of value is not of invariable application. *Ransom,* 143 Idaho 641 at 645, citing: *Nampa & Meridian Irrigation Dist.,* 139 Idaho 28 at 33-34 (2003).

In this case because there is overlap of the permanent and temporary injuries this court would award the amount submitted by Biggs Enterprises

which estimated the cost of repair to be $42, 685.00. This amount would remedy the temporary injuries and prevent any further permanent injuries to the land. However, it exceeds the value of the land because only approximately 7 acres were injured and the land is valued at $3,800 per acre for a total value of $26,600.00. The bid also addresses problems of both a permanent and temporary nature as it encompasses the filling of the cuts as well as remedying the loss of soil and continued sloughing. Plaintiff must prove the diminution of value in his property as a limit to compensatory damages for temporary damages as well as for permanent damages. *Id.* Plaintiff has failed to prove any. However, this seems to be one of the very situations which the Supreme Court had anticipated when the standards of the application of the diminution value limit was relaxed under *Nampa & Meridian Irrigation Dist.*. Id.

The land in its current condition is not suitable to build on, not is it capable of being cultivated. Despite the diminution of the land's value not being proved, the value of the land has been proved. Therefore, the Court will award the value in the amount of $26, 600.00. While this amount will not completely restore the Plaintiff's premises to their original conditions, this amount will help put the Plaintiff's land back to the condition which it once was and make it useful again. Thus, it will remedy the temporary damages while abating any future sloughing damages and it is in harmony with the parameters of the law and the Supreme Court's direction.

IT IS HEREBY ORDERED, DECREED AND ADJUDGED that based upon the findings and law set forth by the Supreme Court and the facts of this care, the Court hereby finds that the Defendant did in fact injure the Plaintiff's

land in excess of the modifications. The injury of soil rendered the property unsuitable for its natural use and is continuing in nature. The damages for the permanent injuries were not proved during the hearings and therefore the Court cannot award damages for the permanent injuries. Other injuries to the land resulting from Defendant's trespass are temporary in nature. Defendant is liable to the Plaintiff for the excessive and unnecessary damages caused by cutting the ditches and the sloughing and pooling that has resulted from the easement across the Plaintiff's property. The proper measurement of these damages is the cost to restore the land to its pre-injury state. To do so would cost $42,685.00, but because this exceeds the value of the property, the Court will reduce the award to the estimated value, that being $26,600.00

IT IS FURTHER ORDERED that the Defendant shall pay this account to Plaintiff with the statutory post judgment interest rate accruing from today.

IT IS SO ORDERED. Dated this 5th day of December, 2007, Don L. Harding, District Judge.

C. VALUE OF LAND

There was testimony the land had a value of $3,800.00 per acre. This figure was stated by Bob Rauzi a general partner of Farr West. 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) 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 $3,900 per acre the judge made no determination about how much property was actually damaged or what the value of the property was".

The Defendant, Mr. Lower, offered to purchase 20 acres of the land owned by Farr West situated near his easement of $650.00 an 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 an written appraisal to support his opinion. (Tr. 4/27/05, p. 140-141) and (exhibit QQ). That figure is without merit and the District Court rejected that absurd "appraisal". The District Court determined the value to be approximately $3,800 per acre.

D. AMOUNT OF LAND DAMAGED

There was proof seven to ten acres of the land were damaged. The evidence of the amount of land damaged was given by Thomas Kass Biggs. His testimony was based on his going to the property and inspecting the land and estimating the cost to repair the damage and trespass created by Topaz.

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 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.

The land impacted was approximately 7 acres of the entire tract of land. Topaz would have the court award damages in a graffiti case by saying only a few bricks were damaged and bricks are only .60¢ each. The result would be absurd. This is the only evidence of the amount of land damaged. The district court could, in its discretion, adopt this finding.

REQUEST FOR ATTORNEY FEES

"Attorney fees can be awarded on appeal under [I.C. §12-121] only if the appeal was brought or defended frivolously, unreasonably, or without foundation." Topaz Marketing, L.P., and, Dennis Lower, have simply asked this Court to second guess the district court and in doing so has pursued this appeal unreasonably and without foundation in light of the long-standing law on issues of boundary by agreement and has not presented this Court with any basis in fact or law to reverse the district court's decision.

CONCLUSION

Dennis Lower (Topaz), trespassed outside of the description of the easement. Dennis Lower (Topaz) changed the flow pattern of runoff and drainage waters causing damage and injury to property owned by Farr West. The cost to correct the trespass and water damages was determined to be approximately $45,000.00. The case was considered by the Supreme Court and was remanded for the District Court, not for a new trial but to determine additional findings with regard to the damages calculations. That is precisely what Judge Harding did. The trial itself had already occurred for a five (5) day period. Judge Harding was familiar with the property in that he had personally

inspected the property on at least three (3) occasions. It is therefore submitted that under I.R.C.P rule 40 (d)(1)(F) no disqualification of the judge is required or appropriate. Topaz should not be permitted to engage in judge shopping.

Regarding the issue of damages. The court in its detailed Memorandum Decision and Order, determined the approximate acreage involved, the value of the land, and the damage that occurred to Farr West. The determination is supported by the record, and is supported by the case of *Nampa & Meridian Irrigation Dist.*, 139 Idaho 28, 72 P.3d 868 (2003), The Court's analysis is consistent with the proofs submitted. If a person were to spray graffiti on a public building the cost of repair would be that reasonable amount necessary to restore the building to its condition prior to the damage caused. The damages awarded for the clean up should be the actual cost of the clean up not the value of the individual sixty (60) bricks that were damaged by the paint as is advocated by Topaz.

It is submitted that Topaz is simply asking this Court to second guess the District Judge who has personally inspected the property regarding the loss, injury and damages as such it would be appropriate to award cost and fees on the appeal to Farr West. Therefore the District Courts determination of damages should be sustained and the ruling upheld.

RANDALL KLINE
Attorney for the Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March, 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:

Kenneth E. Lyon, Jr., Esq.
Attorney at Law
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