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Coward v. Hadley Respondent's Brief Dckt. 36981

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES COWARD and ANNE COWARD, husband and wife, Plaintiff-Appellant, v. CRYSTAL HADLEY, an individual, Defendant-Respondent.	DOCKET NO. 36981-2009 Bonner County Case No. CV-2007-1997 RESPONDENT'S BRIEF

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner

THE HONORABLE STEVE VERBY, DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

I. BRIEF NATURE OF THE CASE

The Plaintiff-Appellant, hereinafter COWARD, filed a Complaint seeking a prescriptive easement over property of the Defendant-Respondent, hereinafter HADLEY. Two (2) days before the trial, COWARD moved to amend to add theories of implied easement and of express easement.

II. COURSE OF THE PROCEEDINGS IN THE TRIAL

COWARD'S proceeding at trial was largely their facts on the claim of prescriptive easement, which was dismissed by the Court setting forth findings of fact, conclusions of law, and an Order in open Court and on the record. An Order of Dismissal was entered (R. p. 59), and the issues of easement by implication and express easement were retained for further determination.

There was no more of the trial, as the remaining issues were submitted on briefing from the parties. The Court issued a Memorandum Opinion (R. p. 79) that COWARD failed to prove entitlement upon the theories of prescriptive easement, implied easement, or express easement. Motions to reconsider were submitted and the Court issued an Amended Memorandum Decision and Orders on Post Trial Motions (R. p. 99) which again denied any relief to COWARD with additional findings and conclusions by the Court. Judgment in Favor of the Defendant and Against the Plaintiff was entered August 4, 2009. (R. p. 118).

HADLEY sought an award of attorney fees (R. p. 121), which was resisted by COWARD. (R. p. 132). The Court denied an award of attorney fees to HADLEY (R. p. 144). COWARD filed a Notice of Appeal. (R. p. 137) HADLEY filed a Notice of Cross-Appeal. (R. p. 140).

III. STATEMENT OF FACTS

COWARD'S paragraph C. Statement of Facts is short and concise; however, the Court's Amended Memorandum (R. p. 99) sets forth more accurate findings of fact, as paragraph A. 1 through 14, which is relied upon by HADLEY.

A map of the area in issue is Plaintiff's Exhibit 42, a copy of which is HADLEY'S Attachment A to this brief for reference. HADLEY'S Lot 1 is depicted as is COWARD'S Lot 2, which has markings showing the claimed easement as the strip in question.

The legal and factual issues start with the Court's findings of fact 1 and 2. (R. p. 99-100) that state,

1. Plaintiffs (Cowards) are the owners of Lot 2, Block JJ of the Laws addition to the City of Sandpoint. Defendant (Crystal HADLEY) is the owner of Lot 1, Block JJ of the Laws addition to the City of Sandpoint. The Coward's lot, the HADLEY'S lot, and the adjoining Lot 11, lying directly to the south of the Coward's, were owned by Freeman Daughters in 1922.

2. In 1922, by Instrument No. 53126, Daughters transferred Lots 1 and 2 to Ole Sletager with the following in the legal description: Lots One (1) and two (2) in Block "JJ" of Law's second Addition to Sandpoint, Idaho; provided, however, the party of the first part herein [Daughters] his heirs and assigns shall have a permanent right of way over and across twelve feet on the east side or end of each of said lots for the purpose of an alley.

In other words, in 1922 Freeman Daughters owned Lots 1, 2 and 11, all adjacent lots, in the City of Sandpoint, Bonner County, Idaho, and he kept Lot 11 and by Warranty Deed conveyed Lots 1 and 2 to Ole Sletager reserving a 12 foot wide easement on the east side.

In easement language, Lots 1 and 2 were the servient real estate and Lot 11 retained by Daughters was the dominant real estate. Daughters, 3 years later, conveyed the dominant estate, Lot 11, to Jack Blake, and the deed contained language also conveying the easement that Daughters had reserved over the 12 feet on the east end of Lots 1 and 2.

Sletager had acquired Lots 1 and 2 from Daughters, and as to Lot 1 and 2, neither Lot would have an easement over the other Lot because Sletager owned both Lots. An easement is the right to use the land of another. Ownership of Lot 1 and 2 was ultimately divided, as stated by the Court in its Findings of Fact, A. 5 (R. p. 100), that

> "Lot 2 was ultimately deeded to George and Alice Donahue, the Cowards' predecessors in interest, who were *not* conveyed any easement over Lot 1. Lot 2 in the chain of title has never had an appurtenant easement over Lot 1. Lot 2 was the Servient estate to an easement in favor of 11."

ADDITIONAL ISSUES ON APPEAL

In addition to the Issues presented on Appeal by COWARD, as issues 1, 2 and 3, HADLEY presents the following additional issues:

4. LOT 11 IS THE DOMINANT ESTATE AND LOTS 1 AND 2 ARE THE SERVIENT ESTATE, LOTS 1 AND 2 BEING CONVEYED TO SLETAGER, SLETAGER OWNED BOTH LOTS AND AS A MATTER OF LAW COULD NOT HAVE AN EASEMENT OVER HIS OWN LOT 1 IN FAVOR OF HIS LOT 2.

5. DID THE DISTRICT COURT ERR IN DENYING ATTORNEY FEES TO HADLEY? THIS IS HADLEY'S ISSUE ON HER CROSS-APPEAL.

6. IS HADLEY ENTITLED TO ATTORNEY FEES ON APPEAL?

ATTORNEY FEES ON APPEAL - CLAIMED

HADLEY claims attorney fees on appeal pursuant to I.A.R. 41, the basis of which is that COWARD brought and pursued and this Appeal without a reasonable basis in fact or law, and from the facts presented is frivolous, unreasonable, and without merit. The basis of HADLEY'S claim for attorney fees is I.R.C.P. 54(e)(1), Idaho Code §12-121, and Idaho Code §12-123(a)(b-ii). COWARD'S conduct upon this appeal is frivolous in that it is not supported in fact or warranted under existing law, and can not be supported by a good faith argument to extend, modify, or reverse existing law.

ARGUMENT ON APPEAL

COWARD assigns three (3) issues presented on appeal. HADLEY responds to each, as follows:

ISSUE 1. Whether the Trial Court committed error when it determined that the fence line agreement extinguished any easement rights that COWARD may have had over HADLEY'S property?

HADLEY'S RESPONSE TO ISSUE 1:

a) The Trial Court did not err in determining that

the Agreement As To Boundary Line, Defendant's Exhibit D, extinguished (released) any easement rights of COWARD over HADLEY'S property.

b) Even if this determination was in error, it is irrelevant because COWARD had no easement over HADLEY'S property, either express or implied.

The Agreement As To Boundary Line, Defendant's Exhibit D, was signed, acknowledged, and recorded the last week of February, 2007, just nine (9) months before COWARD filed this action on November 29, 2007. COWARD'S Argument, Appellant's Brief, top of page 7, is that the Agreement does not extinguish or release COWARD'S claimed easement, because an easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. (citation given for *Backman v. Laurence*, 147 Idaho 390, 210 P.3d 765, 80). HADLEY agrees with the foregoing as an accurate statement of law; however, COWARD does not define or set forth Idaho law that an easement is an interest in land of another.

Schultz v. Atkins, 97 Idaho 770, 554 P.2d 948 (1996) at page 773 states,

> "The term "easement" has been variously defined and a detailed definition of the term is not necessary for the purposes of this opinion. However, an essential element of an easement is that it is "an interest in land in the possession of another". Restatement of Property §450 (1944).
>
> [3,4] Creation of an easement by express agreement requires that the agreement be in writing as an easement is an interest

> in real property. I.C. §9-503 *McReynolds v. Harrigfeld*, 26 Idaho 26, 140 P. 1096 (1914) ***".

Clearly, an easement is an interest in real property of another. Applying this definition to the instant action, COWARD claims an easement interest in the real property of HADLEY.

The District Court held that the Agreement As To Boundary Line was a release by agreement between the owner of the easement (COWARD) and the owner (HADLEY) of the servient tenement.

COWARD tries to narrow the full provisions of the Boundary Line Agreement, by referring to it as "the fence line agreement". COWARD states that the agreement pertains only to ownership of the parties' respective properties and does not pertain to easements. (Appellant's Brief, pg 7, last paragraph) HADLEY submits that COWARD is in error because an "easement" is an ownership interest in real property of another. COWARD claims an easement in the real property of HADLEY. COWARD'S Appellant's Brief pages 5-6 included language of the Agreement. The last provision of the Agreement that is a release of COWARD'S claimed easement to HADLEY'S Lot 1 is the provision that says,

> "***, and another other legal, equitable, or statutory doctrine does not apply to alter the legal descriptions, ownership, boundary, or title to the real estate of either party."

Applying this above quoted provision is that if COWARD had a claimed easement to HADLEY'S Lot 1 it would alter

HADLEY'S ownership and title because the claimed easement as an interest in HADLEY'S real estate would diminish her title and her ownership as it would create a servitude against HADLEY'S Lot 1 in favor of COWARD'S Lot 2 as the dominant estate. An easement would be an encumbrance against HADLEY'S real estate as the Servient real estate in favor of COWARD'S real estate at the dominant real estate.

In this action COWARD specifically claimed the easement they sought was an encumbrance on HADLEY'S Lot 1. The District Court, Findings of Fact 14 states,

> "Anne Coward subsequently recorded a Lis Pendens (Instrument No. 744377) as part of this action, in which she claimed an "encumbrance" on Crystal Hadley's Lot 1."

An easement for COWARD would create a "servitude" on HADLEY'S real estate. The case of *Seccombe v. Weeks*, 115 Idaho 433, 467 P.2d 276 (1989) further explains that,

> "An easement may be created by way of exception or by reservation. Technically, an exception is the withholding of title to a portion of the property conveyed by the grantor; a reservation creates some new right in favor of the grantor in the conveyed property, conceptually thought of as an express grant of the easement by the grantee. *See*, 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §§332, 334 (j. Grimes 1980 replacement). No particular forms or words of art are necessary; it is necessary only that the parties make clear their intention to establish a servitude. Regardless of the terms used, courts generally will attempt to ascertain the intention of the parties by referring not only to the language of the deed, but also to the circumstances attending the transaction and the condition of the property. *Id.*"

Seccombe v. Weeks,

115 Idaho 433, 467 P.2d 276 (1989)

An easement is also a conveyance which affects title to real property. *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2004) defines a conveyance stating,

> "[13] Idaho Code §6-101 is addressed to "conveyances" and "liens" which have not been recorded at the time a foreclosure action commences. The statute mandates that a foreclosure judgment is conclusive against the parties holding unrecorded conveyances or liens. Although not made applicable to I.C. §6-101, a "conveyance" is defined in Idaho Code Title 55, Chapter 8 as "[embracing] every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or encumbered, or by which the title to any real property may be affected, except wills."
>
> *West Wood Investments, Inc. v. Acord*, 141 Idaho 75 at p. 83 (2004), 467 P.2d 276 (1989)

ISSUE 2. Whether the language in the 1922 deed from Freeman Daughters to O.E. Sletager created an express easement appurtenant to COWARD'S lot which would allow COWARD access to the lot across the back of HADLEY'S lot?

HADLEY'S RESPONSE TO ISSUE 2: The answer to the issue phrased by COWARD is that the language in the 1922 deed from Daughters to Sletager could <u>not</u> as a matter of law create an express easement appurtenant to COWARD'S Lot 2 allowing COWARD access to the lot (lot 2) across the back of HADLEY'S lot (lot 1). This is based on a straight forward definition of *an* easement. When Daughters deeded Lots 1 and 2 to Sletager, Sletager then owned Lots 1 and 2 and Daughters retained and owned Lot 11. The express easement language was for a reserved easement over Lots 1 and 2 in favor of,

or appurtenant, to Daughters' Lot 11.

What easement would be created as between Lots 1 and 2? The answer is none because Sletager then owned Lots 1 and 2 and could access either lot any where or any place desired over these lots because both lots were owned by Sletager. It is by definition that an easement is an interest in land in the possession of another. (*Schultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948 (1976).

One can not have an easement in his own land. In other words, Sletager could not have an easement in favor of his Lot 2 over his own Lot 2.

It is simply not possible for a person to own both an easement and the property to which that easement attaches. In *Gardner v. Fliegel*, 92 Idaho 676, 771, 450 P.2d 990 (1969), *Fliegel* had been conveyed property by two separate warranty deeds. The deed covering the easterly portion of the property included the phrase "less a strip 30 feet wide of the east side for a roadway and all ditch rights of way. The ultimate issue presented at trial was to determine what the parties intended by the term "less a strip of land 30 feet wide off the East side for roadway". (*Gardner v. Fliegel*, 92 Idaho 767, 769. *Gardner* asserted that the 30 foot strip was excepted completely from the conveyances to *Fliegel*. *Fliegel* contended that they had been granted title to the thirty (30) foot strip, subject to an easement for a roadway. The Supreme Court ruled the language used was ambiguous, as on the one hand it expresses intent to retain

the fee to the strip in the grantor. On the other it expresses the intent to create an easement for roadway over the strip in favor of the grantor. The second expression of intent, i.e. to create an easement was inconsistent,

> "***for the reason that "an easement is defined as a right in the lands of another, and therefore one cannot have an easement in his own lands, ***Johnson v. Gustafson, 49 Idaho 376, 381, 288 P. 427, 429 (1930)".

Gardner v. Fliegel
92 Idaho 767 at 771, 450 P.2d 990 (1969)

The District Judge's findings of fact, paragraph A., 3 through 14, (Amended Memorandum Decision, R. pg 100-102) is a complete chronological recital of the subsequent conveyances of Lots 1 and 2 (Servient easement) and Lot 11 (dominant estate - to which the Daughters' reservation of easement was appurtenant).

> "Findings of Fact 4. First, three (3) years after 1922, Daughters transferred Lot 11 to Blake, the deed contained the following language:
>
> Also, a permanent right of way over and across twelve feet on the east side or end of Lots one (1) and two (2), Block "JJ" Laws Second Addition to Sandpoint, Idaho, for the purposes of an alley.

In other words, Lot 11 was conveyed by Daughters together with an easement that he has reserved over Lots 1 and 2 when he conveyed them to Sletager.

Subsequently Lots 1 and 2 were conveyed separately to new owners. Finding of Fact 5. (R. p. 100) states:

> "Lot 2 was ultimately deeded to George and Alice Donahue, the Cowards' predecessors in interest, who were not

> conveyed any easement over Lot 1. Lot 2 in the chain of title has never had an appurtenant easement over Lot 1. Lot 2 was the servient estate to an easement in favor of Lot 11."

Donahue as the owner of Lot 2, was not conveyed any easement when Lot 2 was separated from Lot 1. Donahue is a predecessor of COWARD in the chain of title to Lot 2. The District Court's Finding of Fact 5 is dispositive and is fatal to COWARD'S appeal issue 2, and the District Court expanded on the Lot 2 chain of title saying,

> Finding of Fact 9. (R. p. 101) "Alice Donahue, as a widow, deeded Lot 2 to Chapman (Instrument No. 117518), in 1968 without any conveyance of an easement in favor of Lot 2. Chapman deeded Lot 2 (Instrument No. 172403) in 1976 to Montgomery without any conveyance of an easement in favor of Lot 2."

For this appeal, COWARD, has not claimed the District Court made any errors in the Findings of Fact, at all. COWARD has accepted the findings of fact 1 through 14, which clearly demonstrate that Lot 2 never acquired any express easement at any time; more specifically Lot 1 and 2 were conveyed by Daughters in common ownership to Sletager, so as a matter of law Lot 2 could not have an appurtenant easement in its favor to go across Lot 1. When Lot 2 was separated from Lot 1, there could be "no" automatic appurtenant easement. Further no easement was ever conveyed or reserved in favor of Lot 2; as the District Court found (Finding of Fact, 5, second sentence, R. p. 101),

> "Lot 2 in the chain of title has never had an appurtenant easement over Lot 1."

ISSUE 3. Whether the language in the 1922 deed from Freeman Daughters to O.E. Sletager created an implied easement appurtenant to Coward's lot which would allow COWARD access to their lot across the back of HADLEY'S lot?

HADLEY'S RESPONSE TO ISSUE 3: The Idaho law of implied easements is such that the 1922 deed from Daughters to Sletager could not create an implied easement over Lot 1 for use by Lot 2. First, the elementary law of easements, previously set forth in this brief is that an easement is the right to use the land of another. In 1922 when Sletager acquired Lots 1 and 2, he owned both lots and could use his lots for access, or otherwise, in any location he desired. He could not, as a matter of law, have an easement, express, implied, or prescriptive over his own Lot 2 in favor of his own Lot 1.

Second, COWARD has not stated or set forth the Idaho law of implied easements. Rather, COWARD'S argument on implied easement seems to be set forth in paragraph B. starting on page 13 to the end of Appellant's Brief. COWARD'S case law and argument is set forth under a new and different theory of law, never raised or briefed as part of the District Court action.

COWARD'S Argument and law on the theory of an implied easement commences at paragraph B on page 13, and continues to the end of Appellant's Brief. COWARD makes no citation of Idaho law on implied easements. Rather, COWARD cites to Idaho law on dedication of a public way. This is *Smylie v.*

Pearsall, 93 Idaho 188, 191, 475 P.2d 427, 430 (1969) which holds that filing a plat showing streets and alleys on the plat and sales are made with reference thereto, constitutes a dedication of the "way" to public use. HADLEY does not dispute this case law, but her response is that such a theory and case law was not advanced at trial level, but rather for the first time on appeal. Further, COWARD states that "it follows" that when a grant is bounded by an alley an implied right to use that alley in all those who abut it arises. COWARD further states that, "This is not a novel theory, just one not specifically adopted in Idaho." In other words, this is not Idaho law!

The problem with COWARD'S statement that "it follows" that where a grant is bounded by an alley is not within the facts of the instant action. Lots 1 and 2 are not bounded by an alley on the Plat. (Plaintiffs' Exhibit 42 and Defendant's Exhibits C and Q).

COWARD'S only Idaho citation is to the *Smylie v. Pearsall* case, *supra*, on the effect of a dedication on a plat. COWARD presents no case law on "implied easements". COWARD'S remaining argument on page 14 is of a general string of citations from other jurisdictions, with no analysis of how they apply. Idaho has definite and specific law on implied easements, which is as follows:

An implied easement can arise from prior use or necessity. *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999) at 642 states that from prior cases it is clear that

there are two kinds of implied easements: (1) by way of necessity; and (2) implied from prior use. In 1922 Sletager was conveyed Lots 1 and 2, with the grantor (Daughters) reserving an easement over both lots for access to Daughters' remaining property Lot 11. Lot 11 is the dominant estate to which the reserved easement is appurtenant. The easement status at that time in 1922 as between Lots 1 and 2, is nothing. First, Sletager then owns Lots 1 and 2 and can "access" anywhere on either lot to and from the other lot. He as owner has no easement to use land of another. Neither necessity nor prior use existed. Further, the Idaho law of implied easement is:

A) The law on implied easement as a way of necessity is defined in *Burley Brick and Sand,* 102 Idaho 333, 629 P.2d 1116 (1981) is:

> "A way of necessity arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. It is a universally established principal that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway."

The Lots 1, 2 and 11 are all in the Amended Plat of Law's Second Addition (1904), a depiction of which is the Plaintiff's Exhibit 42. As is apparent, Lots 1, 2, and 11 are all contiguous to a Sandpoint, Idaho, City Street, Boyer

Avenue on their west side. This is shown from trial exhibits that are the Plat (Defendant's Exhibit Q), the Record of Survey, recorded May 20, 2000 as Instrument No., 564398 (Defendant's Exhibit C), and the Map (Plaintiff's Exhibit 42). Since all of Lots 1, 2, and 11 are adjoining Boyer Avenue, a public street, i.e. a highway, none of the lots have any necessity to have an implied easement.

B) The law on implied easement by way of implication is *Davis v. Peacock, supra,* 133 Idaho 637 at 642,

> "...(1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate..."
>
> *Davis v. Peacock*
> 133 Idaho 637 at 642 (1999)

COWARD presented no testimony or evidence of elements (2) and (3). There is nothing in the record as to (2) apparent continuous use before the 1922 separation of Lots 1 and 2 from Lot 11. Also, there is nothing in the record as to an implied easement because of necessity to the use of dominant estate. The opposite is true, Lots 1, 2 and 11 all adjoin Boyer Avenue, a public street, so there is no necessity, at all.

COWARD'S APPELLANT'S BRIEF HAS NO "CONCLUSION"

I.A.R. 35(a) requires the Appellant's Brief to have divisions under appropriate headings. I.A.R. 35 (a)(7) requires a heading of: Conclusion. A short conclusion

stating the precise relief sought. COWARD'S Appellant's Brief has no such heading and it has no statement, precise or otherwise of the relief sought.

Non-compliance with the I.A.R. on appellant's brief can result in the Supreme Court refusing to address the non-complied with I.A.R. In *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887 (1996) the cross-appellants listed in their initial brief on appeal as an additional issue on appeal an award of all costs incurred after their offer of judgment. Also, the appellant in its statement of issues in its initial brief on appeal requested an award of attorney fees. The Supreme Court did not address either of these because the briefs did comply with I.A.R. (a)(6).

In the instant action, COWARD has not complied with I.A.R. 35(a)(7). The case of *SE/Z Construction v. Idaho State University,* 140 Idaho 8, 89 P.3d 848 (2004) at page 14 specifically states that I.A.R. 35(a)(7) requires that an Appellant's Brief contain a short statement stating the precise relief sought. The respondent asserted that the appellant's brief failed to state what relief appellant seeks. The Supreme Court stated,

> "*** In its conclusion, the appellants' brief states: "the Court's original opinion should be withdrawn, and the State and ISU should be required to follow their own clear and unambiguous bid documents. The matter should be remanded to the trial court for determination of an appropriate remedy to which SE/Z is entitled under the circumstances." In the context of this appeal, this is a sufficient statement of the relief appellant seeks for

purposes of I.A.R. 35(a)(7)."

Unlike *SE/Z Construction v. Idaho State University, supra*, COWARD'S initial brief, its Appellant's Brief, has no Conclusion and it has no statement as to what, at all, relief is sought on appeal. The Supreme Court should not have the duty to search and review the record for errors or to give relief to COWARD on appeal. HADLEY requests that no relief be granted to COWARD on appeal because of the failure to comply with I.A.R. 35(a)(7).

HADLEY'S CROSS-APPEAL ISSUE OF ATTORNEY FEES AT THE DISTRICT COURT LEVEL

The District Court found HADLEY to be the prevailing party below, but declined to award attorney fees to HADLEY. HADLEY filed Defendant's Motion To Alter, Amend, Reconsider, And To Make Additional Findings And Conclusions Awarding Attorney Fees To The Defendant and Notice of Hearing and Oral Argument, which is in the record at R. p. 121-131. This Motion included a request to award attorney fees, with the supporting citations of law and an analysis of the facts presented and the results obtained. The basis of the request for attorney fees was Rule 54(a)(1) and Idaho Code §12-121. At the hearing on HADLEY'S Motion, the District Judge orally denied attorney fees on a conclusion basis, set forth at R. p. 136, and entered an Order Denying Defendant Hadley's Motion To Alter, Amend, Reconsider, And To Make Additional Findings And Conclusions Awarding Attorney Fees To The Defendant (R. p. 144-145). Neither the oral ruling nor the written Order of the District Court had any findings

setting forth the basis and reasons for denial of attorney fees to HADLEY, except address the result in the negative, i.e. the Court does not find that COWARD brought, pursued, or defended frivolously, unreasonably, or without foundation. (R. p. 145). Why not?

HADLEY had submitted a total analysis showing how COWARD pursued the action and failed totally. HADLEY'S analysis is further presented herein.

The Complaint pled only one theory, which was an easement by prescription.

The Answer and Counterclaim alleged that COWARD had no express easement, easement by necessity, easement by implication, easement by prescription, or any other easement to use HADLEY'S real estate; further, that the Complaint and action was frivolous, unreasonable, and without merit and that HADLEY was entitled to recover her attorney fees from the COWARD. The Counterclaim, paragraph 11, alleged that by an Agreement as to Boundary Line, recorded February 26, 2007, Instrument No. 723577, COWARD had extinguished any interest for access or other legal or equitable doctrine and sought quiet title as to HADLEY'S real estate against COWARD, and it sought attorney fees.

The Trial was held September 29, 2008. For the trial, HADLEY filed Hadley's Trial Memorandum and Proposed Finding and Conclusions, filed September 16, 2008, which pointed out the elements and the inability of COWARD to prove a prescriptive easement. Further, the Agreement as to

Boundary Line provided that the possession, occupancy, or use of the real estate was by consent and no doctrine would apply to alter ownership or title to the real property.

COWARD'S, at trial, did not present any facts or law relative to the issue of a prescriptive easement; however, COWARD went to trial and proceeded on their prescriptive easement action. At the end of the trial on the prescriptive easement claim HADLEY moved for "non-suit" against COWARD, which was then taken under advisement by the Court. At the end of HADLEY'S defense to the prescriptive easement action the Court granted a Rule 41(b) involuntary dismissal; and alternatively entered findings of fact and conclusions of law in open Court, upon the record that HADLEY prevailed on the trial of the merits and the Complaint for prescriptive easement was dismissed. (See, Order Granting Defendant's Motion To Dismiss And Dismissing Plaintiffs' Cause Of Action For Prescriptive Easement)(R. p. 59). COWARD'S prescriptive easement claim was not supported by facts in their case to avoid a Rule 41 dismissal. In other words, from the "facts presented" by COWARD, their case was entirely devoid of any merit, i.e. frivolous, unreasonable, and without foundation.

COWARD'S Amended Complaint set forth claims of Express Easement and Easement by Implication, but COWARD'S Trial Brief, page 4, first sentence, admits:

"There is no Idaho case on this type of implied easement."

COWARD'S theory of implied easement was acknowledged to be unsupported by any Idaho case law, to which any facts could be presented for them to prevail. This indicates the frivolous, unreasonable, and without foundation nature of COWARD'S implied easement claim.

COWARD moved to amend and the Court permitted the filing of an Amended Complaint, which added, paragraph 4, that a 1922 deed, Instrument No. 53126, either by express terms or by an implied right, was created by that instrument.

There was no more "trial", and no more testimony was presented, only briefing was submitted to the Court.

THE DISTRICT COURT ERRED IN DENYING ATTORNEY FEES TO THE DEFENDANT BASED ON AN ANALYSIS OF A SINGLE ISSUE OF THIS MULTI-ISSUE ACTION. The Court's Amended Memorandum Decision, page 17, paragraph H, is the Court's analysis on HADLEY'S request for attorney fees under Idaho Code § 12-121 and Rule 54(e)(1). The Court cited the provisions of Rule 54(e)(1). The Court denied attorney fees to HADLEY by single analysis to what appears to be only the COWARD'S express easement theory by stating that what the parties to the 1922 deed intended by reserving an "alley" as a disputed question of fact, and it does not appear COWARD brought this action and pursued it frivolously, unreasonably, and without foundation in fact or law, as alleged by HADLEY.

This analysis of a single issue, express easement, makes no analysis of who prevailed "in the action" or of the

other issues of this action. The other issues were:

a. prescriptive easement

b. implied easement

c. Agreement as to Boundary Line

d. trespass

e. quiet title

HADLEY actually prevailed on all five (5) of these issues, and in the action, without COWARD ever presenting any fact or law to support prescriptive easement or implied easement.

As to the Prescriptive Easement - COWARD suffered a "non-suit" dismissal of this cause of action. In other words, this cause of action, the Complaint, was dismissed, as stated in Rule 41(b) because of the ground that "...upon the facts and the law the Plaintiff has shown no right to relief." In other words, the prescriptive easement action through trial, upon the facts presented, had no basis in fact or law, which is "without foundation".

ATTORNEY FEES ARE AWARDED TO THE PARTY THAT PREVAILS "IN THE ACTION" AS AN OVERALL VIEW, NOT A CLAIM-BY-CLAIM ANALYSIS.

The Case of *Eighteen Mile Ranch v. Nord Excavating*, 141 Idaho 716, 117 P.3d 130 (2005) states:

> "...In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action'. That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis."

In *Eighteen Mile Ranch v. Nord Excavating*, 141 Idaho 716 at 719, the Supreme Court referred to the fact that various defendants "incurred no liability", as being "the most favorable outcome that could possibly be achieved".

In the instant action, HADLEY incurred no liability, COWARD prevailed on none of their three (3) theories of easements; prescriptive, implied, or express, HADLEY prevailed in trespass and quiet title. In other words, HADLEY received the most favorable outcome that could be achieved, demonstrating that COWARD'S entire action and defense was frivolous, unreasonable, and without foundation.

As stated in the Court's Amended Memorandum Decision, page 11, paragraph C.,

> "The Cowards released any claimed right to lot 1 when they signed the Agreement on February 2007".

Having agreed in writing to extinguish any claimed right to HADLEY'S real estate, within nine (9) months time they filed this action, Complaint, on November 29, 2007, seeking a claimed easement right and they recorded a Lis Pendens, January 14, 2009, Instrument No. 744377 (Plaintiff's Exhibit 32) in which they claimed that they had an "action encumbering" HADLEY'S real estate.

The Court's analysis of COWARD'S express easement claim as involving "a disputed question of fact" does not shed any light on the fact that was supposedly disputed, nor was there a disputed fact on COWARD'S express easement claim, it failed as a matter of law.

ATTORNEY FEES ON APPEAL - ARGUMENT

HADLEY seeks attorney fees on appeal pursuant to I.A.R. 41 based on Idaho Code §12-123 and Idaho Code §12-121. Idaho Code §12-123 applies as COWARD has acted without a reasonable basis in fact or law, and Idaho Code §12-121 applies as COWARD'S acts on appeal are frivolous, unreasonably, or without foundation. These statutes apply because COWARD'S issues are nothing more than asking the appellant court to second guess the trial court. On COWARD'S first (1) issue presented on appeal, COWARD'S argument is that their action for a prescriptive easement, express easement, and implied easement does not affect HADLEY'S ownership or title; and, therefore that language of the Agreement As To Boundary Line, Defendant's Exhibit D, could not extinguish or release their claims against HADLEY and HADLEY'S real estate because an easement is only the right to use the land of another. COWARD'S response and argument to this issue shows that an easement is an interest in real property that affects and encumbers the title and ownership of the real property. COWARD does not recognize this on the appeal, but as pointed out by the District Court, in Findings of Fact 14, "Anne Coward subsequently recorded a Lis Pendens (Instrument No. 744377) as part of this action, in which she claimed an "encumbrance" on Crystal Hadley's Lot 1." An "encumbrance" of a claimed easement by the lawsuit clearly affects HADLEY'S ownership and title to Lot 1, which was agreed to be extinguished or

released by the express language of the Agreement. COWARD'S Issue 1 is unreasonable, frivolous, without foundation, and is without a reasonable basis in fact or law.

As to COWARD'S second (2) issues presented on appeal wherein they claim the 1922 deed for Lots 1 and 2 from Daughters to Sletager wherein Daughters reserved an easement over Lots 1 and 2, also created an express easement in favor of Lot 2 to cross over Lot 1. This argument totally ignores that Lot 1 and 2 were both then owned by Sletager, who could cross over and use either property wherever desired without an easement. The Idaho law is that the owner of property can not have an easement in his own property, because the definition of an easement is the right to use property of another person. Issue 2 is unreasonable, frivolous, without foundation, and is without reasonable basis in fact or law.

COWARD'S third (3) issue on appeal is that the 1922 deed from Daughters to Sletager created an implied easement appurtenant to COWARD'S lot (Lot 2) which would allow COWARD access to their lot across HADLEY'S lot (Lot 1). First of all, COWARD'S Appellant's Brief does not set forth any law on "implied easements". The 1922 conveyance would not create an implied easement in favor of Lot 2 over Lot 1 because Sletager then owned both Lots 1 and 2. None of the elements of an implied easement, either by prior use or by necessity, existed and COWARD has not briefed that legal theory. As is shown in HADLEY'S Response to Issue 3, there can be no implied easement. COWARD'S issue 3 is

unreasonable, frivolous, without foundation, and has no reasonable basis in law or fact.

COWARD has not referred to any finding of fact or conclusion of law in the District Court's Amended Memorandum Decision that is in error, nor has COWARD asked for any relief on appeal.

CONCLUSION

HADLEY seeks relief on appeal to recover attorney fees and costs against COWARD.

HADLEY also seeks relief on her Cross-Appeal that the District Court erred in denying recovery of HADLEY'S attorney fees against COWARD.

The appeal by COWARD should be denied and dismissed with attorney fees and costs to HADLEY. On HADLEY'S cross-appeal the matter should be remanded to the District Court to award attorney fees to HADLEY for the action, trial, and matters at the District Court level.

RESPECTFULLY SUBMITTED this 25th day of March, 2010.

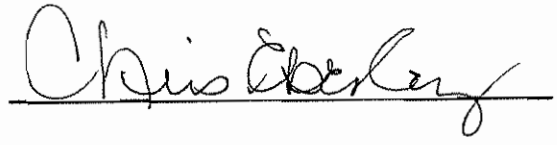
Gary A. Finney

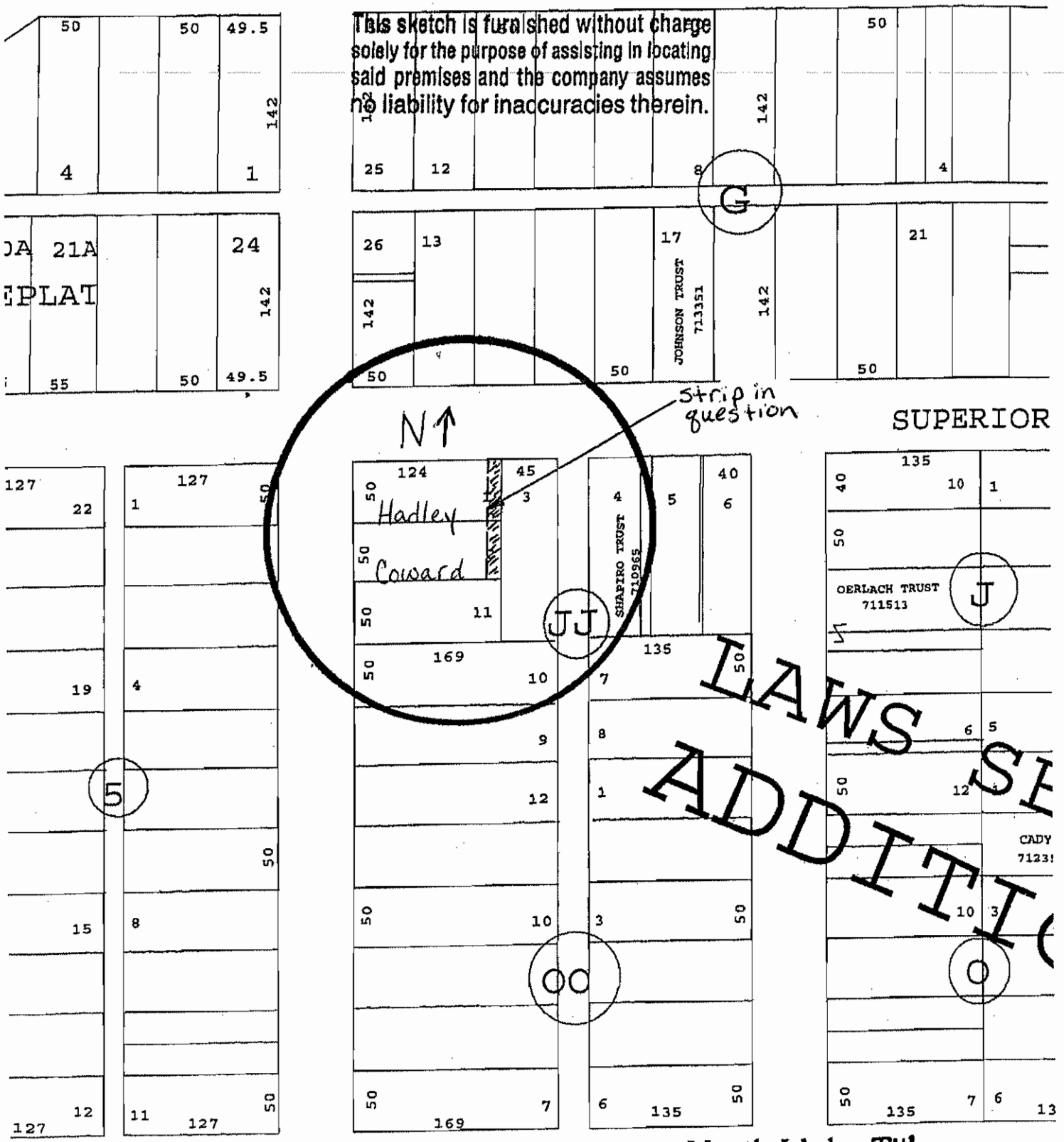
GARY A. FINNEY
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 25TH day of March, 2010, two (2) true and correct copies of the foregoing RESPONDENT'S BRIEF, were mailed, U.S. Mail, postage prepaid, and were addressed to:

Arthur M. Bistline
Law Office of Arthur M. Bistline
1423 N. Government Way
Coeur d'Alene, Idaho 83814





ATTACHMENT "A"

PLAINTIFF'S EXHIBIT 42
CV 07-1997