11-23-2009

Bratton v. Scott Clerk's Record v. 1 Dckt. 36275

VOLUME I

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife,

Plaintiffs-Appellants,

-vs-

JOHN R. SCOTT and JACKIE G. SCOTT, husband and wife,

Defendants-Respondents.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable RENAE J. HOFF, District Judge

Nancy J. Garrett
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD
P. O. Box 829
Boise, Idaho 83701

Attorney for Appellants

Shelly Cozakos Shannahan
PERKINS COIE, LLP
P. O. Box 737
Boise, Idaho 83701-0737

Attorney for Respondents

IN THE SUPREME COURT OF THE

STATE OF IDAHO

CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife,	)	
Plaintiffs-Appellants,	)	Supreme Court No. 36275
-vs-	)	
JOHN R. SCOTT and JACKIE G. SCOTT, husband and wife,	)	
Defendants-Respondents.	)	

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE RENAE J. HOFF, Presiding

Nancy J. Garrett, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., P.O. Box 829, Boise, Idaho 83701

Attorney for Appellants

Shelly Cozakos Shannahan, PERKINS COIE, LLP., P.O. Box 737, Boise, Idaho 83701-0737

Attorney for Respondents

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Other Claims

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6/28/2007	New Case Filed-Other Claims	Renae J. Hoff
	Summons Issued	Renae J. Hoff
	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Garrett, Nancy Jo Hopkins (attorney for Bratton, Charles E) Receipt number: 0253170 Dated: 6/28/2007 Amount: $88.00 (Check) For: Bratton, Charles E (plaintiff)	Renae J. Hoff
7/19/2007	Affidavit Of Service	Renae J. Hoff
	Affidavit Of Service	Renae J. Hoff
7/20/2007	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Perkins Coie Receipt number: 0257016 Dated: 7/20/2007 Amount: $58.00 (Check) For: Scott, John R (defendant)	Renae J. Hoff
	Def Motion for Partial Dismissal pursuant to IRCP	Renae J. Hoff
	Def Memorandum in support of mo for partial Dismissal	Renae J. Hoff
	Notice Of Hearing 8-31-07 9:00	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 08/31/2007 09:00 AM) Def Partial Dismissal	Renae J. Hoff
8/13/2007	Plt Response to Def mo for Partial Dismissal	Renae J. Hoff
8/23/2007	Order resetting motion hearing	Renae J. Hoff
	Hearing result for Motion Hearing held on 08/31/2007 09:00 AM: Hearing Vacated Def Partial Dismissal	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 09/05/2007 10:30 AM) Def Partial Dismissal	Renae J. Hoff
8/30/2007	Reply Memorandum in Support of Defendants' Motion for Partial Dismissal (fax)	Renae J. Hoff
9/5/2007	Hearing result for Motion Hearing held on 09/05/2007 10:30 AM: Interim Hearing Held Def Partial Dismissal	Renae J. Hoff
9/10/2007	Notice of Telephonic Status Conference (fax) 9-13-07	Renae J. Hoff
	Hearing Scheduled (Conference - Telephone 09/13/2007 09:00 AM) status	Renae J. Hoff
9/13/2007	Hearing result for Conference - Telephone held on 09/13/2007 09:00 AM: Motion Held status - IN CHAMBERS No clerk/No crt Rptr	Renae J. Hoff
10/9/2007	Hearing Scheduled (Pre Trial 05/05/2008 01:30 PM)	Renae J. Hoff
	Hearing Scheduled (Jury Trial 06/17/2008 09:00 AM) 3 day trial	Renae J. Hoff
	Order Setting Case for trial & PT	Renae J. Hoff
10/12/2007	Request For Trial Setting	Renae J. Hoff
10/26/2007	Notice of Intent to Take Default	Renae J. Hoff
11/2/2007	Motion for ruling on def mo to dismiss	Renae J. Hoff
	Notice Of Service	Renae J. Hoff
11/8/2007	Defendant's Motion to vacate trial setting (fax)	Renae J. Hoff
	Affidavit of shelly cozakos (fax)	Renae J. Hoff
11/16/2007	Def Response to Def mo to vacate trial setting	Renae J. Hoff
11/21/2007	Notice Of Hearing of def mo to vacate trial setting 1-24-08 9:00	Renae J. Hoff

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11/21/2007	Hearing Scheduled (Motion Hearing 01/24/2008 09:00 AM) mo to vacate	Renae J. Hoff
11/28/2007	Hearing Scheduled (Conference - Status 01/09/2008 01:30 PM)	Renae J. Hoff
	Notice of status conference 01/09/2008	Renae J. Hoff
12/5/2007	Notice of Service Re: Discovery	Renae J. Hoff
12/27/2007	Notice of Service of Discovery	Renae J. Hoff
1/9/2008	Plaintiff's Motion for Partial Summary Judgment	Renae J. Hoff
	Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment	Renae J. Hoff
	Affidavit of Charles Bratton in Support of Plaintiff's Motion	Renae J. Hoff
	Affidavit of Harold Ford in Support of Plaintiff's Motion	Renae J. Hoff
	Affidavit of Counsel in Support of Plaintiff's Motion	Renae J. Hoff
	Hearing result for Conference - Status held on 01/09/2008 01:30 PM: Interim Hearing Held - Motion for Partial Dismissall Granted/Motion to vacate JT Granted	Renae J. Hoff
	Hearing result for Jury Trial held on 06/17/2008 09:00 AM: Hearing Vacated 3 day trial - stip of counsel	Renae J. Hoff
	Hearing result for Motion Hearing held on 01/24/2008 09:00 AM: Hearing Vacated mo to vacate	Renae J. Hoff
1/14/2008	Amended Complaint Filed and Demand for JT	Renae J. Hoff
	Notice Of Service	Renae J. Hoff
	Notice Of Hearing 2-21-08 9:00	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 02/21/2008 09:00 AM) Plt mo Partial sum Judgment	Renae J. Hoff
1/15/2008	Stipulation to vacate trial setting & reset	Renae J. Hoff
1/23/2008	Order for Partial Dismissal	Renae J. Hoff
1/29/2008	Notice Of Taking Deposition of Charles E Bratton	Renae J. Hoff
	Notice Of Taking Deposition of Marjorie I Bratton	Renae J. Hoff
	Notice of Service Re: Discovery	Renae J. Hoff
1/30/2008	Amended Notice Of Taking Deposition of Charles E Bratton	Renae J. Hoff
2/1/2008	Notice Of Taking Deposition Duces tecum of John R Scott	Renae J. Hoff
	Notice Of Taking Deposition Duces tecum of JAckie G Scott	Renae J. Hoff
2/8/2008	Plt Motion to amend the complaint to Add Punitive Damages	Renae J. Hoff
	Affidavit of Charles Bratton in support of	Renae J. Hoff
	Memorandum in support of Plt mo to amend	Renae J. Hoff
2/11/2008	Notice Of Hearing 2-21-08 9:00	Renae J. Hoff
	Def Memorandum in opposition to plt motn for partial sum judg	Renae J. Hoff
	Affidavit of Shelly H. Cozakos in opposition to Plt motn for sum judg	Renae J. Hoff
	Affidavit of John R. Scott in opposition to Plt motn for sum judg	Renae J. Hoff
2/13/2008	Notice Of Service of Discovery	Renae J. Hoff
2/14/2008	Affidavit of Shelly H. Cozakos in opposition to Plt motn to amend compl to add punitive damages	Renae J. Hoff

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Date		Judge
2/14/2008	Def Memorandum in opposition to plt motn to amend the comp to add punitive damages	Renae J. Hoff
2/15/2008	Supplemental Affidavit of charles bratton (fax)	Renae J. Hoff
	Supplemental Affidavit of harold ford (fax)	Renae J. Hoff
	reply brief to pltf's motion partial summary judgment (fax)	Renae J. Hoff
	def errata's Memorandum in opposition to pltf's motion amend (fax)	Renae J. Hoff
	def erratas Memorandum in opposition to pltf's motion partial summary judgment (fax)	Renae J. Hoff
	Notice Of Taking Deposition amended marjorie bratton (fax)	Renae J. Hoff
2/19/2008	Amended Notice Of Taking Deposition of Marjorie I Bratton (fax)	Renae J. Hoff
2/20/2008	Reply to Plaintiffs Motion to Amend the Complaint to Add Punitive Damages	Renae J. Hoff
	Affidavit of Counsel in support of Plaintiffs Motion to Add Punitive Damages	Renae J. Hoff
2/21/2008	Hearing result for Motion Hearing held on 02/21/2008 09:00 AM: Motion Held Plt mo Partial sum Judgment/granted in part & denied in part/Mo to amend Complaint denied	Renae J. Hoff
2/22/2008	Amended Notice Of Taking Deposition Duces tecum Jackie G Scott	Renae J. Hoff
2/27/2008	Notice Of Service	Renae J. Hoff
2/28/2008	Notice Of Service	Renae J. Hoff
3/3/2008	Notice Of Service	Renae J. Hoff
3/5/2008	Notice Of Service	Renae J. Hoff
	Order RE: motion to Amend the comp to Add Punitive Damages (Denied	Renae J. Hoff
	Order RE; Motion for Partial Summary Judgment (Denied	Renae J. Hoff
3/10/2008	Motion for Reconsideration on motion for Partial Sum Judgment and Mo to amend the complaint to add punitive damages	Renae J. Hoff
	Affidavit of counsel in support of Plt mo for reconsideration	Renae J. Hoff
	Memorandum in support of mo for reconsideration	Renae J. Hoff
	Notice Of Hearing 3-24-08	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 03/24/2008 11:00 AM) mo for reconsideration on mo for sum judg & mo to amend comp	Renae J. Hoff
	Second Amended Complaint Filed	Renae J. Hoff
	Defendant's Motion to vacate trail setting	Renae J. Hoff
	Affidavit of Stuart Murray	Renae J. Hoff
	Affidavit of Shelly h. Cozakos in support of motn to vacate trial setting	Renae J. Hoff
	Notice Of Hearing Re: Defendants' motn to vacate trial setting March 24, 2008 at 11 am	Renae J. Hoff
/13/2008	Notice Of Service	Renae J. Hoff
/17/2008	Supplemental Affidavit of cynthia yee wallace (fax)	Renae J. Hoff
	Supplemental Affidavit of Cynthia L Yee Wallace in Support of Motion to Vacate Trial Setting	Renae J. Hoff
	Pltf's response to def's motion to vacate trial setting (fax)	Renae J. Hoff
	Pltf's Motion to strike supplemental affidavit of cynthia yee wallace (fax)	Renae J. Hoff

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3/19/2008	Motion to Shorten Time (fax)	Renae J. Hoff
3/24/2008	Notice of Service Re: Discovery	Renae J. Hoff
	Hearing result for Motion Hearing held on 03/24/2008 11:00 AM: Motion Denied mo for reconsideration on mo for sum judg & mo to amend comp and Motn to vacate trial setting	Renae J. Hoff
	District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages	Renae J. Hoff
4/7/2008	Order RE: Motion to Vacate trial Setting	Renae J. Hoff
	Hearing Vacated 6-17-08 Jury trial	Renae J. Hoff
4/9/2008	Second Request For Trial Setting	Renae J. Hoff
4/18/2008	Defendants' Response to Plaintiffs' Second Request for Trial Setting (fax)	Renae J. Hoff
4/23/2008	Notice of Status conference	Renae J. Hoff
5/5/2008	Hearing result for Pre Trial held on 05/05/2008 01:30 PM: Hearing Vacated DEF ATT TO APPEAR BY PHONE	Renae J. Hoff
	Hearing Scheduled (Conference - Status 05/20/2008 01:30 PM) Def Att to appear by phone	Renae J. Hoff
5/14/2008	Notice of change of address for Plt atty	Renae J. Hoff
5/20/2008	Hearing result for Conference - Status held on 05/20/2008 01:30 PM: Hearing Vacated Def Att to appear by phone- Plaintiff's attorney did not appear	Renae J. Hoff
6/30/2008	Hearing Scheduled (Jury Trial 09/03/2008 09:00 AM)	Renae J. Hoff
	Hearing Scheduled (Pre Trial 07/24/2008 11:30 AM)	Renae J. Hoff
	Order Setting Case for trial & PT	Renae J. Hoff
7/7/2008	Hearing Scheduled (Pre Trial 08/04/2008 11:00 AM)	Renae J. Hoff
7/8/2008	Second Order Resetting Case for pretrial 8-4-08	Renae J. Hoff
7/9/2008	Plt Supplemental Witness Disclosure	Renae J. Hoff
7/10/2008	Plts Motion to exclude Witnesses and Potential Evidence	Renae J. Hoff
	Memorandum in support of Plts Motion to exclude Witnesses and Potential Evidence	Renae J. Hoff
	Affidavit of Nancy Jo Garrett in support of Motion to Exclude Witnesses and Potential Evidence	Renae J. Hoff
	Notice Of Hearing 7/28	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 07/28/2008 02:30 PM) Motion to exclude Witnesses and Potential Evidence (Plt)	Renae J. Hoff
7/14/2008	Notice of Service Re: Discovery	Renae J. Hoff
7/21/2008	Defendants' Motion in Limine	Renae J. Hoff
	Memorandum in Response to Plaintiff's Motion to Exclude and in Support of Defendant's Motion in Limine	Renae J. Hoff
	Affidavit of Cynthia Yee-Wallae in Support of Defendants' Motion in Limine	Renae J. Hoff
	Defendant's Motion to Shorten Time for Hearing	Renae J. Hoff
	Notice of Hearing Re: Defendants' Motion in Limine	Renae J. Hoff

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7/25/2008	Amended Notice of Hearing Re: Defendants' Motion in Limine 8-25-08 (fax)	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 08/25/2008 02:30 PM) motn in limine	Renae J. Hoff
	Affidavit of Nancy Jo Garrett in Opposition to Defendants' Motion in Limine	Renae J. Hoff
	Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine	Renae J. Hoff
7/28/2008	Amended Notice of Hearing 8-4-08 (fax)	Renae J. Hoff
	Hearing result for Motion Hearing held on 07/28/2008 02:30 PM: Hearing Vacated Motion to exclude Witnesses and Potential Evidence (Plt)	Renae J. Hoff
	Second Amended Notice of Hearing Re: Defendants' Motion in Limine (fax)	Renae J. Hoff
7/30/2008	Supplemental Affidavit of Cynthia Yee-Wallace in Support of Defendants' Motion in Limine and in Opposition to Motion to Exclude (fax)	Renae J. Hoff
	Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine and in Further Support of Defendants' Opposition to Motion to Exclude (fax)	Renae J. Hoff
7/31/2008	Notice of Service Re: Discovery	Renae J. Hoff
8/4/2008	Hearing result for Pre Trial held on 08/04/2008 11:00 AM: Interim Hearing Held to exclude witnesses and potential evid. - motion to be addressed at trial	Renae J. Hoff
	District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages	Renae J. Hoff
8/5/2008	Notice Of Service	Renae J. Hoff
8/11/2008	Notice Of Taking Deposition Duces tecum of Stuart Murray	Renae J. Hoff
	Notice Of Taking Deposition Duces tecum of Ron Garnys	Renae J. Hoff
	Notice Of Service	Renae J. Hoff
	Amended Notice Of Taking Deposition Duces tecum of Stuart Murray	Renae J. Hoff
8/13/2008	Notice Of Service	Renae J. Hoff
	Amended Notice Of Taking Deposition Duces Tecum Cecil Vassar	Renae J. Hoff
	Notice Of Taking Deposition Of Stuart Murray	Renae J. Hoff
	Amended Notice Of Taking Deposition Duces tecum Steven Weilong	Renae J. Hoff
	Amended Notice Of Telephonic & Video Taped Depo Duces Tecum of Mary Vis	Renae J. Hoff
8/14/2008	Defendants' Motion to Bifurcate Trial (fax)	Renae J. Hoff
	Memorandum in support of def's motion to bifurcate trial (fax)	Renae J. Hoff
	Notice Of Hearing Re: Defendants' Motion to Bifurcate Trial-8-28-08 (fax)	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 08/28/2008 09:00 AM) to bifurcate	Renae J. Hoff
	Def's second Motion in limine	Renae J. Hoff
	Affidavit of cynthia yee	Renae J. Hoff
	Notice Of Hearing 08/28/2008	Renae J. Hoff
8/15/2008	Notice Of Service	Renae J. Hoff
8/18/2008	Answer to pltf's amended complaint and demand for jury trial (fax)	Renae J. Hoff
8/19/2008	Notice of Service Re: Discovery	Renae J. Hoff

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8/20/2008	Order on Plt Motion to Exclude and defendants Motion in Limine and Amending Pre-trial Deadlines	Renae J. Hoff
8/21/2008	Affidavit of Nathan R. Starnes in Opposition to Defendants' Second Motion in Limine	Renae J. Hoff
	Memorandum in Opposition to Defendants' Second Motion in Limine	Renae J. Hoff
	Memorandum in Opposition to Defendants' Motion to Bifurcated Trial	Renae J. Hoff
8/25/2008	Plaintiff's Pre-Trial Memorandum	Renae J. Hoff
	Plaintiff's Proposed Stipulated Facts Submission	Renae J. Hoff
	Plaintiff's Trial Witness Disclosure	Renae J. Hoff
	Plaintiff's Exhibit List	Renae J. Hoff
	Plaintiffs' Requested Jury Instructions	Renae J. Hoff
	Reply to Plaintiffs' Memorandum in Opposition to Defendants' Second Motion in Limine	Renae J. Hoff
	Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Bifurcate Trial	Renae J. Hoff
	Affidavit of Cynthia Yee-Wallace in Support of Reply to Plaintiffs' Opposition to Defendants' Motion to Bifurcate Trial	Renae J. Hoff
8/27/2008	Pltf's response to def's reply to pltf's memorandum in opposition to def's motion to bifurcate trial (fax)	Renae J. Hoff
	Pltf's response to def's reply to pltf's memorandum in opposition to def's second motion in limine (fax)	Renae J. Hoff
	Plaintiffs' Compliance with Pre-Trial Order (fax)	Renae J. Hoff
8/28/2008	Defendant's Trial Memorandum (fax)	Renae J. Hoff
	Defendants' Witness and Exhibit List	Renae J. Hoff
	Defendants' Poposed Jury Instructions	Renae J. Hoff
	Hearing result for Motion Hearing held on 08/28/2008 09:00 AM: Interim Hearing Held to bifurcate/limine-mo to bifurcate denied/mo in limine denied	Renae J. Hoff
	District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages	Renae J. Hoff
8/29/2008	Notice Of Taking trial Testimony by Video -taped Deposition of Sheriff Chris Smith	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 09/02/2008 09:00 AM)	Renae J. Hoff
	Notice Of Hearing 9/2/08 9:00 am	Renae J. Hoff
	Memorandum in Support of Defendants' Third Motion in Limine Re: Irrelevant and Prohibited Propensity Evidence	Renae J. Hoff
	Defendant's Third Motion i Limine Re: Irrelevant and Prohibited Propensity Evidence	Renae J. Hoff
	Memorandum in Support of Defendants' Motion for Clarification/Motion in Limine Re: Plaintiff's Declaratory Claim for an Implied Easement	Renae J. Hoff
	Defendant's Motion for Clarification/ Motion in Limine Re: Plaintiffs' Declaratory Claim for an Implied Easement	Renae J. Hoff

Other Claims

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8/29/2008	Affidavit of Cynthia Yee-Wallace in Support of Defendants' Motion to Strike and Exclude Testimony of Mary Vis	Renae J. Hoff
	Memorandum in Support of Defendants' Motion to Strike and Exclude Testimony of Mary Vis	Renae J. Hoff
	Defendant's Motion to Strike and Exclude Testimony of Mary Vis	Renae J. Hoff
	Memorandum in Support of Defendants Fourth Motion in Limine Re: Claims Not at Issue and Evedence During Bifurcated Trial	Renae J. Hoff
	Defendants' Fourth Motion in Limine Re: Claims Not at Issue and Evedence During Bifurcated Trial	Renae J. Hoff
9/2/2008	Memorandum in Opposition to Bifurcation of the Trial (fax)	Renae J. Hoff
	Plaintiffs' Supplemental Memorandum in Support of Implied Easement (fax)	Renae J. Hoff
	Plaintiffs' Request for Judicial Notice	Renae J. Hoff
	Memorandum in opposition to def's third motion in limine (fax)	Renae J. Hoff
	def's response to pltf's supplemental memorandum re: implied easement (fax)	Renae J. Hoff
	Defendants' Supplemental Proposed Jury Instructions (fax)	Renae J. Hoff
	Hearing result for Motion Hearing held on 09/02/2008 09:00 AM: Hearing Held	Renae J. Hoff
9/3/2008	Affidavit of Cynthia Yee-Wallace in Support of Defendants' Motion to Strike and Exclude Testimony of Mary Vis	Renae J. Hoff
	Order RE: Def Third Motion in limine RE: Irrelevant & Prohibited Propensity Evidence	Renae J. Hoff
	Hearing result for Jury Trial held on 09/03/2008 09:00 AM: Jury Trial Started	Renae J. Hoff
9/4/2008	Defendants' Second Supplemental Proposed Jury Instructions	Renae J. Hoff
	Verdict Form	Renae J. Hoff
9/5/2008	Motion for reconsideration (fax)	Renae J. Hoff
	Motion to Reconsider the September 4, 2008 Ruling or Alternatively, For Interlocutory Appeal	Renae J. Hoff
	Memorandum in Support of Motion to Reconsider the September 4, 2008 Ruling or Alternatively, For Interlocutory Appeal	Renae J. Hoff
	Motion for Ruling on Objections and to Strike Portions of Testimony of Chris Smith	Renae J. Hoff
	Memorandum in Support of Objection to Medical Evidence	Renae J. Hoff
	Affidavit of Cynthia Yee-Wallace in Support of Motion for Ruling on Objections and to Strike Portions of Testimony of Chris Smith	Renae J. Hoff
)/9/2008	Defendants' Fourth supplemental proposed jury instructions	Renae J. Hoff
	Plaintiffs' Second Supplemental Requested Instruction No. 1	Renae J. Hoff
	Lodged Transcript (9-5-08 Phase I - Trial)	Renae J. Hoff
)/10/2008	Plaintiffs' Third Supplemental Proposed Jury Instructions	Renae J. Hoff
	Proposed Special Verdict Form	Renae J. Hoff
)/11/2008	Defendants' Fifth Supplemental proposed jury instructions	Renae J. Hoff
	Supplemental Trial Brief	Renae J. Hoff

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Date		Judge
9/11/2008	Motion for Reconsideration	Renae J. Hoff
	Special Verdict Form	Renae J. Hoff
	Court's answer to jury question (Cout's exhibit #2)	Renae J. Hoff
	Jury Question (Courts exhibit #1)	Renae J. Hoff
9/12/2008	Hearing Scheduled (Conference - Status 09/15/2008 10:30 AM) telephonic conference	Renae J. Hoff
9/15/2008	Hearing result for Conference - Status held on 09/15/2008 10:30 AM: Motion Held telephonic conference- Hearing Held in chambers	Renae J. Hoff
9/16/2008	Defendant's Sixth Supplemental Proposed Jury Instructions	Renae J. Hoff
	District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: $4,000	Renae J. Hoff
	Estimated costs on Appeal - $4,000 for jury trial only. Estimate does not include pretrial or post-trial motion hearings	Renae J. Hoff
	Instructions to the Jury	Renae J. Hoff
	Damages Verdict Form	Renae J. Hoff
	Letter from juror #542 (Court's exhibit #3)	Renae J. Hoff
9/17/2008	def's second supplemental proposed jury instructions with numbers (fax)	Renae J. Hoff
	def's third supplemental proposed jury instructions with numbers (fax)	Renae J. Hoff
	def's fifth supplemental proposed jury instructions with numbers (fax)	Renae J. Hoff
	def's fourth supplemental proposed jury instructions with numbers (fax)	Renae J. Hoff
	Defendants' Proposed Revised Special Verdict Form (fax)	Renae J. Hoff
9/19/2008	Motion for Judgment Notwithstanding the Verdict	Renae J. Hoff
	Notice Of Hearing 10-16-08 9:30	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 10/16/2008 09:30 AM) Mo for Directed Verdict	Renae J. Hoff
9/24/2008	Defendants' Objection to Proposed Judgment (fax)	Renae J. Hoff
10/3/2008	Memorandum in support of def's motion for directed verdict and in the alternative in support of motion for summary judgment notwithstanding the verdict (fax)	Renae J. Hoff
	Supplemental Memorandum in Support of Defendants' Motion for Directed Verdict and in the Alternative in Support of Motion for Judgment Notwithstanding the Verdict (fax)	Renae J. Hoff
0/9/2008	Response in Opposition to Defendants' Motion for Directed Verdict or Alternative Motion for Judgment Notwithstanding the Verdict	Renae J. Hoff
0/16/2008	Hearing result for Motion Hearing held on 10/16/2008 09:30 AM: Motion Granted Mo for Directed Verdict	Renae J. Hoff
	District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages	Renae J. Hoff
1/17/2008	Order RE: Def Motion for Directed Verdict, Mo for Mistrial and Mo for Judgment Notwithstanding the Verdict	Renae J. Hoff
2/1/2008	Defendant's Memorandum of Costs and Fees (fax)	Renae J. Hoff

Other Claims

Date		Judge
12/3/2008	Affidavit of Shelly H Cozakos in Support of Defs MEMO of Costs and Fees	Renae J. Hoff
12/11/2008	Civil Disposition entered for: Scott, Jackie Genice, Defendant; Scott, John R, Defendant; Bratton, Charles E, Plaintiff; Bratton, Marjorie I, Plaintiff. Filing date: 12/11/2008 Judgment	Renae J. Hoff
	Case Status Changed: Closed	Renae J. Hoff
12/15/2008	Motion to Disallow and Objection to Defendants' Memorandum of Costs, Disbursements, and Attorney Fees (fax)	Renae J. Hoff
12/16/2008	Pltf's Memorandum of Costs and Fees and affidavit of atty affirming costs (fax)	Renae J. Hoff
12/23/2008	Plaintiffs' Memorandum in Support of Motion for New Trial (fax)	Renae J. Hoff
	Affidavit of Nancy Jo Garrett in Support of Motion for New Trial (fax)	Renae J. Hoff
	Plaintiffs' Motion for New Trial (fax)	Renae J. Hoff
12/24/2008	Plaintiffs' Memorandum in Support of Mo for New Trial	Renae J. Hoff
12/31/2008	Notice Of Hearing 1-22-09 (fax)	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 01/22/2009 09:00 AM) new trial	Renae J. Hoff
	Case Status Changed: Closed pending clerk action	Renae J. Hoff
1/2/2009	Motion to Disallow Plaintiffs' Costs (fax)	Renae J. Hoff
	Memorandum in support of Def Mo to Disallow Plt Costs & in Response to Plt Mo to Disallow and Objection to Def Memo of costs, Disbursements and atty fees (fax	Renae J. Hoff
1/5/2009	Notice Of Hearing 1-22-09 (fax)	Renae J. Hoff
1/15/2009	Def's Memorandum in opposition to pltf motion for new trial (fax)	Renae J. Hoff
1/22/2009	Hearing result for Motion Hearing held on 01/22/2009 09:00 AM: Motion Denied - motion for new trial	Renae J. Hoff
	Motion Denied - costs to Plaintiffs denied	Renae J. Hoff
	Motion Granted - costs & atty fees awarded to Defendants	Renae J. Hoff
	District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages	Renae J. Hoff
/2/2009	Order RE: Plt Motion for New Trial-DENIED	Renae J. Hoff
	Order RE: Memorandum of costs & fees	Renae J. Hoff
	Judgment RE: Costs and Atty fees $44,576.15 $9,753.41 favor of defendants	Renae J. Hoff
'3/2009	Motion to Stay Execution of Judgment (fax)	Renae J. Hoff
'20/2009	Motion to Stay Execution on Judgment Pending Appeal (fax)	Renae J. Hoff
23/2009	Notice Of Hearing 03-26-09 at 9:00am	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 03/26/2009 09:00 AM) Plntf's Motion to Stay Execution on JDMT Pending Appeal	Renae J. Hoff
12/2009	Filing: T - Civil Appeals To The Supreme Court ($86.00 for the Supreme Court to be receipted via Misc. Payments. The $15.00 County District Court fee to be inserted here.) Paid by: Garrett, Nancy Jo Hopkins (attorney for Bratton, Marjorie I) Receipt number: 0376386 Dated: 3/12/2009 Amount: $15.00 (Check) For: Bratton, Charles E (plaintiff)	Renae J. Hoff

Other Claims

Date		Judge
3/12/2009	Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: Nancy Garrett Receipt number: 0376388 Dated: 3/12/2009 Amount: $86.00 (Check)	Renae J. Hoff
	Bond Posted - Cash (Receipt 376389 Dated 3/12/2009 for 100.00)	Renae J. Hoff
	Appealed To The Supreme Court	Renae J. Hoff
	Plnt's / Appellants Notice of Appeal	Renae J. Hoff
3/19/2009	Defendants' Objection to Plaintiffs' Motion to Stay Execution of Judgment (fax)	Renae J. Hoff
3/26/2009	Hearing result for Motion Hearing held on 03/26/2009 09:00 AM: Hearing Vacated per Cozakos' office- To be renoticed- Plntf's Motion to Stay Execution on JDMT Pending Appeal	Renae J. Hoff
	Amended Notice of Hearing 4-23-09 (fax)	Renae J. Hoff
	Hearing Scheduled (Motion Hearing 04/23/2009 09:00 AM) stay execution of judg	Renae J. Hoff
4/1/2009	Defendants'/Respondents' Request for Additional Documents to be Included in Appellate Record (fax)	Renae J. Hoff

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and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV0706820C

COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, the above-referenced Plaintiffs, by and through their counsel of record, Brassey, Wetherell, Crawford & Garrett, and for a cause of action against Defendants, complains and alleges as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs Brattons are residents of Canyon County, Idaho.

2. Defendants Scotts are residents of Canyon County, Idaho.

3. The property in question is located in Canyon County, Idaho.

4. The Court has jurisdiction pursuant to Idaho Code § 1-705.

5. Damages meet the jurisdictional requirements and exceed $10,000.

5. Venue is proper in Canyon County, Idaho, pursuant to Idaho Code § 5-401.

II. ALLEGATIONS

6. The Brattons received an executed Warranty Deed for their current property in Middleton, Idaho, from Harold E. Ford and Janet B. Ford, husband and wife. The Warranty Deed is dated April 19, 1973, a true and correct copy of which is attached as Exhibit "A". Specifically, in part, the Warranty Deed conveyed 3.83 acres of land to Plaintiffs as known as Lot 32 of the Fruitdale Farm Subdivision, in Middleton, Idaho. Plaintiffs have subsequently used this land in connection with agricultural use for the care, feeding and stalling of their horses or livestock.

7. The Warranty Deed from the Fords to Plaintiffs also included a one-half share of water stock held in Canyon Hill Ditch Company and a one-half share of stock in Middleton Mill Ditch Company (See Exhibit "A").

8. The Warranty Deed also provides an easement for construction and maintenance of an irrigation ditch and for ingress and egress as follows:

> [A]long the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section e, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

9. Pursuant to this easement, Harold Ford installed a ditch for Plaintiffs that traversed Lot 40. At that time, sections of concrete pipe were laid intermittently in the ditch to keep its walls from eroding and to control the volume of water.

10. Subsequently, Harold Ford, deeded the Plaintiffs an additional 1 acre.

11. Since 1973, Plaintiffs, pursuant to the easement, have used the ditch for agricultural irrigation and have maintained the ditch, in which Plaintiffs regularly and continuously used a tractor to till the ground on both sides of the ditch, creating a total easement width area of 12 feet. In addition, Plaintiffs regularly sprayed or burned this 12 foot area every spring to keep the adjacent easement area in good condition, and also regularly burned and cleaned out the ditch itself. Further, Plaintiff was allowed to access and exit the area adjacent to the ditch with tractors and other equipment needed to maintain said ditch.

12. Harold Ford subsequently conveyed his interest to Lot 40 at the Fruitdale Farm Subdivision, via quit claim deed to Lois Rawlinson. This deed is dated January 2, 1996, and contains the Instrument Number 9600007, a true and correct copy of which is attached hereto as Exhibit "B".

13. After the January 1996 conveyance, Plaintiffs continued to utilize and exercise their easement as set forth above in the same manner as they had previously since 1973.

14. Genice Rawlinson, heir to Lois Rawlinson, later gift deeded Lot 40 of the Fruitdale Farm Subdivision to Defendants. A true and correct copy of this gift deed, Instrument Number 200557645, dated September 13, 2005, is attached as Exhibit "C". This gift deed specifically states that the property described therein is "subject to any incumbrance or easements as appear of record or by use upon such property." (emphasis added).

15. At or near the beginning of April of 2007, Plaintiff Charles Bratton accessed his easement and proceeded to perform the usual maintenance to include burning the ditch as well as burning the areas adjacent to the ditch within the 12 foot easement. The maintenance was

performed to clean out the ditch and adjacent area in preparation to receive water. This was done in accordance with Plaintiffs' customary practice.

16. At or near this time, Defendants John and Jackie Scott verbally threatened Plaintiff Charles Bratton, and shouted at him to get off their property or they would harm him. They also told him that he could not burn or spray anywhere on the easement, or otherwise access the property or utilize his easement rights. In connection with this action, Defendant Scott placed a "No Trespassing" sign on his property in the precise location where Plaintiff customarily accessed the easement.

17. On or around April 15, 2007, after the Defendants had threatened Plaintiff Charles Bratton, the Defendants then removed all or part of the concrete pipe culverts utilized by Plaintiffs in the ditch portion of the easement.

18. Based upon information received from the Defendants, Defendants have retained custody of the Plaintiffs' concrete pipe culverts.

19. On or about April 15, 2007, after the Defendants had threatened Plaintiff Charles Bratton, the Defendants destroyed the Bratton ditch.

20. On or about April 15, 2007, after the Defendants had threatened Plaintiff Charles Bratton, the Defendants attempted to create a new, smaller ditch, adjacent to and which incorporates the fence line between the Scott property and that of another landowner.

21. Since April 15, 2007, whenever Plaintiff has tried to access his easement, Defendant John Scotts comes out of his house and yells at him, runs toward him, runs up and down the adjoining fence line, and does so in a verbally and physically threatening manner.

22. Upon information and belief, Defendant has verbally and physically threatened the other neighbors who also have irrigation ditch easements.

23. Upon information and belief, Defendant has utilized a firearm to shoot a neighborhood pet that inadvertently crossed over onto his property.

24. Defendants' actions violated Plaintiff's easement rights, caused damages to Plaintiffs, violated the Plaintiff's right of privacy, prevented Plaintiffs from accessing their easement, prevented Plaintiffs from irrigating their property and general use of easement by tortuous stalking, and blocked Plaintiff's access to their easement and to obtain water for their agricultural property and livestock. Among other things, Plaintiffs' pasture has died, Plaintiffs have been forced to take remedial steps to feed, care for, and water their horses. Further, Defendant has cause Plaintiffs to fear for their safety and suffer severe emotional distress.

III. DECLARATORY RELIEF

25. Plaintiffs incorporate and reallege all preceding paragraphs as if set forth herein.

26. An actual case and controversy exists between Plaintiffs and Defendants with respect to Plaintiffs' rights to access and utilize the12-foot irrigation ditch easement, and the maintenance thereto.

27. Based upon information and belief, Defendants have taken the position that the ditch was rightfully removed by Defendant Scott from its long-term, thirty four (34) year location; and that the easement is only three feet in width, running adjacent to and incorporates the fence which is located on the property line between the Scotts' and another neighbor.

28. Plaintiffs have a recorded and express easement as granted by Harold E. Ford and Jeannette B. Ford. Plaintiffs also have an easement by implication from prior use, for the remaining nine feet in width on the easement, as there was unity of title, subsequent separation, continuous and regular use, and such use was reasonably necessary to the proper enjoyment of the easement by

Plaintiffs. Further, Plaintiffs have a right of access to and enjoyment of the easement by express terms and by implication.

IV. INJUNCTION

29. The Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

30. As a direct and proximate result of Defendants' action, Plaintiffs have suffered and will continue to suffer immediate and irreparable harm, injury, loss, and damage, including, but not limited to, the foreclosure of access to the easement and water rights, and the wrongful interference with their right to exclusive use, enjoyment, and possession of their 12 foot easement on Lot 40 of the Fruitdale Farm Subdivision.

31. As a result, Defendants should be precluded from verbally and physically threatening Plaintiffs or otherwise interfering with Plaintiffs' access and use of their easement on Lot 40 of the Fruitdale Farm Subdivision.

32. Given Defendants' dangerous propensity, hostility, use of a firearm on the property, as well as verbal and physical threats, Defendant should be precluded from entering the 12-foot easement area or from coming within 600 feet from Plaintiffs when Plaintiffs are on the easement, without prior court approval.

33. In addition, the Court should take all steps necessary to restore Plaintiffs to full possession of their easement rights, pursuant to Rule 65 of the Idaho Rules of Civil Procedure. Because of the Defendants conduct and actions, Plaintiffs are fearful of contact with the Defendants. Contact will be decreased by placement of a covered pipe or culvert ditch, as this type of ditch requires minimal maintenance. Therefore, Plaintiffs request that the Court grant injunctive relief that

would allow the placement of a covered pipe or culvert system across the easement area with all costs thereto paid by the Defendants.

34. In the alternative, the Court should require Defendants to return the easement to its prior status.

V. NEGLIGENCE AND/OR WILLFUL, WANTON, AND/OR INTENTIONAL CONDUCT

35. The Plaintiffs incorporate and reallege all preceding paragraphs as set forth herein.

36. Defendants owed a duty to Plaintiffs.

37. Defendants breached that duty, whether negligently, willfully, or intentionally, to Plaintiffs by the removal of Plaintiffs' concrete culverts, the filling in and changing Plaintiffs' ditch location, and by making verbal and physical bodily threats to Plaintiffs.

38. Defendants' conduct caused direct and proximate damage to Plaintiffs.

VI. TORTUOUS INTERFERENCE WITH RIGHT OF PRIVACY/ TORTUOUS STALKING

39. The Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

40. Defendants knowingly and maliciously engaged in a course of stalking conduct that seriously alarmed, annoyed and harassed Plaintiffs, causing them substantial emotional distress and caused the Plaintiffs not to be able to access their easement.

41. Defendants conduct caused Plaintiffs to be in reasonable fear of death or physical injury to Plaintiffs or their family member.

42. Defendants' actions caused damages to Plaintiffs.

VII. ATTORNEYS FEES AND COSTS

43. As a result of Defendants' actions and conduct, Plaintiffs have been required to retain the law firm of Brassey, Wetherell, Crawford and Garrett, in the instant matter and Plaintiffs therefore are entitled to recover their attorneys fees and costs for said representation pursuant to Idaho Code §§12-120 and 12-121 and I.R.C.P. 54.

44. Plaintiff reserves the right to amend this complaint to include a claim for Punitive Damages

45. WHEREFORE, Plaintiffs pray for relief as follows:

A. For a judgment against Defendants for any and all general and special damages in an amount to be proven at trial.

B. For declaratory relief in a judgment against Defendants setting forth that Plaintiffs have an express easement for 3 feet as set in its' original location by Mr. Ford, that Plaintiffs have a 12-foot wide easement by implication and use, and that Plaintiffs possess legal rights to access and utilize their 12-foot easement on Lot 40, and take all reasonable steps for the maintenance thereof.

C. For injunctive relief precluding Defendants from verbally or physically threatening Plaintiffs or otherwise interfering with Plaintiffs' access and use of their 12-foot easement on Lot 40; that Defendants be denied access to the Plaintiffs' easement unless they obtain prior Court approval; that Defendant be required to stay at a distance from Plaintiff of at least 600 feet; that Defendant be ordered to not carry a firearm when Plaintiff is on or near the easement; that Defendants be stopped from making/voicing verbal or physical threats against Plaintiffs; that Defendants be required to pay all costs for a covered pipe or culvert system to be placed the length of Plaintiffs' easement ditch; damage to the Plaintiffs' pasture; cost of hay and feed for livestock;

rental cost to pasture the Plaintiffs livestock while the pastor is reseeded; and any and all other damages proven at trial.

D. For attorneys fees and costs pursuant to Idaho Code §§ 12-120 and 12-121, and I.R.C.P. 54.

E. For such and other relief as the Court deems proper and equitable.

PLAINTIFFS DEMAND A TRIAL BY JURY PURSUANT TO RULE 48 OF THE IRCP

DATED this 27th day of June, 2007.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

STATE OF IDAHO)
) ss.
County of Ada)

Charles E. Bratton, being first duly sworn upon oath, deposes and states as follows:

That he is the Plaintiff in the above-entitled matter; that he has read the foregoing instrument, knows the contents thereof, and the facts therein are true and correct based upon his personal knowledge and belief.

Charles E. Bratton

Charles E. Bratton

SUBSCRIBED AND SWORN TO before me this 27th day of June, 2007.

TINA N. SMITH NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My commission expires: 5/10/08

EXHIBIT A

000011

WARRANTY DEED

For Value Received HAROLD E. FORD and JANET B. FORD, husband and wife,

the grantors, do hereby grant, bargain, sell and convey unto CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife,

the grantees the following described premises, to-wit: Canyon **County Idaho, to wit:**

PARCEL II:

A parcel of land in the FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being Lot 32 of said subdivision, consisting of 3.83 acres, more particularly described as follows:

BEGINNING at the quarter corner between Sections 3 and 10, Township 4 North, Range 3 West, Boise Meridian; thence North 0° 48' 00" East on the mid-section line 1326.5 feet to a point being the corner common Lots 32, 40, 33 and 41 of said subdivision and the real point of beginning; thence South 89° 06' 30" West along the line between Lots 33 and 32, 634.0 feet to a point; thence North 0° 45' 00" East along the West line of Lot 32, 331.8 feet to a point; thence North 89° 07' 40" East along the lot line between Lots 31 and 32, 634.3 feet to a point; thence South 0° 48' 00" West along the lot line between Lots 32 and 40, 331.6 feet to the real point of beginning; said Lot containing 4.83 acres more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including all water and ditch rights and rights of way for water and ditches.

Together with one-half share of water stock held in CANYON HILL DITCH COMPANY and one-half share of stock held in MIDDLETON MILL DITCH COMPANY.

Together with an easement along the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises; that said premises are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: April 19, 1973

Harold E. Ford

Janet B. Ford

EXHIBIT B

000013

INSTRUMENT NO. 9600007

QUITCLAIM DEED

For Value Received, HAROLD E. FORD, a single man dealing with his sole and separate property, hereinafter called the First Party, does by these presents remise, release and forever QUITCLAIM, unto LOIS RAWLINSON as her sole and separate property, of 23231 Freezeout Road, Caldwell, Idaho, hereinafter called the Second Party, and to Second Partys heirs and assigns, all title which first party now has or may hereafter acquire, in the following described real property, situated in Canyon County, State of Idaho, to-wit:

See exhibit "A" attached hereto and incorporated herein by this reference as though set forth in full.

Together with all water and ditch rights and rights of way for water and ditches appurtenant thereto.

First Party does hereby convey any and all right, title and interest, either contingent or vested and however arising, in and to the above-described real property that First Party may now have or may hereafter acquire.

TO HAVE AND TO HOLD, ALL and singular the said premises, together with any appurtenances thereto, unto the Second Party, and to Second Party's heirs and assigns forever.

IN WITNESS WHEREOF, The said First Party has hereunto set First Party's hand and seal this 2nd day of ~~December~~ January, ~~1995~~ 1996.

Harold E. Ford
Harold E. Ford.

STATE OF IDAHO, COUNTY OF CANYON } ss.

On this 2nd day of ~~December~~ January, ~~1995~~ 1996, before me, a notary public in and for said State, personally appeared HAROLD E. FORD, known to me to be the person whose name is subscribed in the within instrument, and acknowledged to me that he executed the same.

(Seal) STATE OF IDAHO NOTARY PUBLIC

Robin Stark
NOTARY PUBLIC FOR IDAHO
Residing at Caldwell
My Commission Expires: 3/10/2000

A parcel of land in the Fruitdale Farm Subdivision, Section 3, Township 4 North, Range 3 West of the Boise Meridian, Canyon County, Idaho, being Lot 40 of said Subdivision more particularly described as follows:

Beginning at the Quarter corner between Sections 3 and 10, Township 4 North, Range 3 West, Boise Meridian; thence North 0°48'00" East on the mid-section line 1326.5 feet to a point being the corner common to Lots 32, 40, 33 and 41 of said Subdivision and the real point of beginning; thence North 89°01'10" East along the line between Lots 40 and 41, 638.2 feet to a point; thence North 0°46'40" East along the East line of Lot 40, 331.5 feet to a point; thence South 89°01'40" West along the lot line between Lots 39 and 40, 638.0 feet to a point; thence South 0°48'00" West along the lot line between Lots 32 and 40, 331.6 feet to the real point of beginning.

96000007

RECORDED

'96 JAN 2 - AM 9 45

CANYON CNTY RECORDER

REQUEST Harold Ford

TYPE Deed FEE 6.00

EXHIBIT "A"

EXHIBIT C

000016

GIFT DEED

For Value Received Love and Affection
GENICE RAWLINSON, a single person, do hereby convey, release, remise and forever gift unto JACKIE G. SCOTT and JOHN R. SCOTT whose current address is: P. O. Box 577, Middleton, Idaho 83644 the following described premises, to-wit:

A parcel of land in the FRUITDALE FARMS SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being lot 40 as the same is shown on the official plat of said Subdivision on file in the office of the County Recorder of Canyon County, Idaho, more particularly described as follows:

BEGINNING at the Quarter corner between Sections 3 and 10, Township 4 North, Range 3 West of the Boise Meridian; thence

North 0° 48'00" East on the mid-section line a distance of 1,326.5 feet to a point being the corner common to Lots 32, 40, 33, and 41 of said Subdivision and the REAL POINT OF BEGINNING; thence

North 89° 01'10" East along the line between Lots 40 and 41, a distance of 638.2 feet to a point; thence

North 0° 46'40" East along the East line of Lot 40 a distance of 331.5 feet to a point; thence

South 89° 01'40" West along the Lot line between Lots 39 and 40 a distance of 638 feet to a point; thence

South 0° 48'00" West along the Lot line between Lots 32 and 40 a distance of 331.6 feet to the REAL POINT OF BEGINNING.

More commonly known as 23231 Freezeout Road.

together with all tenements, hereditaments, water. water rights, ditches, ditch rights, easements and appurtenances thereunto belonging or in anywise appertaining, and subject to any encumbrances or easements as appear of record or by use upon such property.

Dated September 13 2005

Genice Rawlinson
Genice Rawlinson, a single person

STATE OF IDAHO, COUNTY OF Washington

On this 13th, day of September 2005, before me, a notary public in and for the said State, personally appeared GENICE RAWLINSON known to me to be the persons whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Patricia Darratt
Notary Public
Residing at Caldwell, Idaho
Commission Expires 7-07

NOTARY PUBLIC STATE OF IDAHO

RECORDED
2005 SEP 14 AM 11 17
CANYON CNTY RECORDER
G NOEL HALES
DEPUTY
FEE 30

2005576845

Shelly H. Cozakos, Bar No. 5374
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

DEFENDANTS' MOTION FOR PARTIAL DISMISSAL PURSUANT TO I.R.C.P. 12(B)(6)

Defendants John R. Scott and Jackie G. Scott ("the Scotts") by and through their attorneys of record, Perkins Coie LLP, hereby submit the following motion to dismiss Plaintiffs' claim for tortious stalking pursuant to Idaho Rule of Civil Procedure 12(b)(6). This motion is supported by the Scotts' memorandum in support, filed contemporaneously herewith. Oral argument is requested.

DATED: July 20, 2007.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 20, 2007, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett
Bradley S. Richardson
BRASSEY, WETHERELL, CRAWFORD & GARRETT, LLP
203 W. Main St.
P.O. Box 1009
Boise, ID 83701-1009
FAX: 344-7077

Hand Delivery	____
U.S. Mail	✓
Facsimile	____
Overnight Mail	____

Chas A. Hemler for
Shelly H. Cozakos

Shelly H. Cozakos, Bar No. 5374
SCozakos@perkinscoie.com
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL PURSUANT I.R.C.P. 12(b)(6)

Defendants John R. Scott and Jackie G. Scott, by and through their attorney of record, Perkins Coie LLP, hereby submits the following memorandum in support of their Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6).

I. INTRODUCTION & BACKGROUND

Defendants John R. Scott and Jackie G. Scott ("the Scotts") are neighbors of the Plaintiffs Charles and Marjorie Bratton ("the Brattons"). This action arises out of the Brattons' unfounded allegations that the Scotts have denied them the use of an easement, namely, an irrigation ditch running over the Scotts' property that delivers water to the

Brattons' adjoining property. The Brattons' Complaint and Demand for Jury Trial ("Complaint"), filed on June 28, 2007, contains claims for declaratory and injunctive relief, negligence, and for "tortuous interference with right of privacy/tortuous stalking." As set forth below, the claim for stalking fails as a matter of law pursuant to Rule 12(b)(6) and thus, it must be dismissed. No Idaho courts have found that a private right of action for tortious stalking exists nor did the Idaho Legislature intend to create a private cause of action. Because the Brattons' claim is without basis in law, the Scotts respectfully request that the above claim be dismissed pursuant to Idaho Rule of Civil Procedure 12(b)(6).

II. ARGUMENT

A. Legal Standard for Motion to Dismiss

Under Idaho Rule of Civil Procedure 12(b)(6), the court must determine whether "[a]fter viewing all facts and inferences from the record in favor of the non-moving party . . . a claim for relief has been stated." *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 106 P.3d 449, 453 (2005) (citations omitted). "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.'" *Id.*

B. Plaintiffs' Claim For "Tortuous Interference with Right of Privacy/Tortuous Stalking" Is Not A Private Right Of Action In Idaho[1]

The Brattons claim that the Scotts stalked them and caused them to be in reasonable fear of death or physical injury. (Complaint, ¶¶ 40-42.) The wording of the Brattons' claim closely mirrors Idaho's criminal stalking statute, found at Idaho Code § 18-7906.[2] This claim

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[1] "Tortuous" is defined as "marked by repeated twists, bends , or turns" or "marked by devious or indirect tactics." Merriam-Webster's Collegiate Dictionary 1242 (10th ed. 2000). Defendants assume that Plaintiffs' claim relates to Plaintiffs' alleged tortious conduct, and as such, Defendants will hereinafter refer to the claim as tortious interference with a right of privacy or tortious stalking.

[2] Idaho Code § 18-7906 defines stalking in the second degree as when a person "knowingly and

must be dismissed because, in enacting this statute, the legislature did not include any provisions for a private cause of action for tortious stalking nor is there any evidence of a legislative intent to do so. *See* Idaho Code § 18-7906. Moreover, no Idaho court has recognized any such private cause of action. *See Pollitt v. CSN Int'l*, 2007 WL 294249 (D.Idaho, 2007).

To create a private cause of action based upon a current statute, Idaho courts have recognized the following principles found in the Restatement (Second) of Torts:

> When a legislative provision protects a class of persons by proscribing or required certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purposes of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action, or a new cause of action analogous to an existing tort action.

White v. Unigard Mut. Ins. Co., 112 Idaho 94, 101, 730 P.2d 1014, 1021 (1986) (quoting the Restatement (Second) of Torts § 874A (Tort Liability for Violation of Legislative Provision) (emphasis added)). With regard to this issue, the Idaho Supreme Court has also stated that if a statute is silent, then the courts "may recognize a private right of action only when it is necessary to assure effectiveness of the statute." *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 926, 90 P.2d 1228, 1233 (1995). However, "[i]n the absence of strong indicia of a contrary legislative intent, courts must conclude that the legislature provided precisely the remedies it considered appropriate." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176, 923 P.2d 416, 421 (1996) (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers*,

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maliciously: (a) Engages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress; or (b) Engages in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member."

453 U.S. 1, 15 (1981)).

No such legislative intent can be found with regard to Idaho Code § 18-7906. In 2004, the Idaho Legislature passed House Bill No. 668, which amended existing law to provide for stalking in the first and second degree, codified as Idaho Code §§ 18-7905 and 18-7906 respectively.[3] The Statement of Purpose in House Bill 668 is silent with regard to creating a private cause of action for stalking. A search of the legislative committees' minutes regarding House Bill No. 668 was devoid of any reference to creating a private cause of action for tortious stalking. Therefore, it is certain that the legislature had no intent to create a private right.

Furthermore, the legislature specifically provided a punishment for criminal stalking. Idaho Code § 18-7906(3) provides that stalking in the second degree is punishable up to one year in county jail or a $1,000 fine. On this basis, there is no indication that an additional civil remedy is necessary. "Otherwise, courts must conclude 'that the legislature intended to enact a civil code companion to the criminal code.'" *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176, 923 P.2d 416, 421 (1996) (where the Idaho Supreme Court upheld dismissal of a private claim based on Idaho's criminal statute for obstruction of justice).

Significantly, one Idaho court has expressly rejected tortious stalking as a private cause of action. In *Pollitt v. CSN Int'l*, attached hereto as Exhibit A, the federal district court granted partial summary judgment against a plaintiff who alleged a claim for tortious stalking, finding in part that no cause of action for tortious stalking exists in Idaho.[4] 2007 WL 294249, at *6. The plaintiff alleged that the defendant had directed others to follow or

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[3] House Bill 668 can be found at: http://www3.state.id.us/oasis/2004/minidata.html.

[4] Interestingly enough, one of the defendants in *Pollitt* was represented by the same firm as the current counsel for the Brattons.

watch her on several occasions. She brought claims for invasion of privacy and for tortious stalking, among other things. The district court granted the defendants' motion for partial summary judgment on the basis that it was inappropriate to create a new cause of action for tortious stalking. *Id.* at *7. The court noted that the plaintiff failed to cite to any legislative history that supported her position that creating a new cause of action would further the purposes behind the criminal stalking statute. *Id.* As shown above, the Brattons are similarly unable to show any legislative history to support their alleged claim for tortious stalking.

Because it is clear that the legislature had no intent to create a private cause of action for criminal stalking, the Brattons' have no basis to assert such a claim here. Idaho courts have never recognized a private right of action. Therefore, the Brattons' claim fails as a matter of law and must be dismissed.

III. CONCLUSION

The Scotts' respectfully request that their motion to dismiss pursuant to I.R.C.P. 12(b)(6) be granted.

DATED: July 20, 2007.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 20, 2007, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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U.S. Mail	✓
Facsimile	____
Overnight Mail	____

Shelly H. Cozakos

Only the Westlaw citation is currently available.

United States District Court,
D. Idaho.
Lori Ann POLLITT and James George Pollitt,
husband and wife, Plaintiffs,
v.
CSN INTERNATIONAL, a California corporation,
Calvary Chapel of Twin Falls,
Inc., an Idaho corporation, Michael R. Kestler, and
John Does 1 through 25,
Defendants.
No. CV 05-524-S-MHW.

Jan. 29, 2007.

Grant T. Burgoyne, Mauk and Burgoyne, Boise, ID, for Plaintiffs.

Michael E. Kelly, Lopez & Kelly, J. Nick Crawford , Brassey Wetherell Crawford & Garrett, Michael P. Stefanic, II, Anderson Julian & Hull, Boise, ID, for Defendants.

MEMORANDUM DECISION AND ORDER

MIKEL H. WILLIAMS, United States Magistrate Judge.

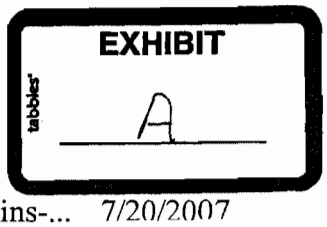
*1 Currently pending before the Court is Defendant Kestler's Motion for Partial Summary Judgment (Docket No. 43), filed August 25, 2006; Defendant CSN International's Motion for Partial Summary Judgment (Docket No. 54), filed November 9, 2006; Defendants Kestler and CSN's Motion to Strike Affidavit of Frank "Butch" Veenstra, II (Docket Nos. 73 and 79), filed, respectively, January 3 and 5, 2007. For the following reasons, the Court will grant in part and deny in part the Defendants' Motions for Partial Summary Judgment and grant in part and deny in part the Defendants' Motions to Strike.

I.
Background

On February 7, 2006, Plaintiffs Lori Ann Pollitt ("Mrs.Pollitt") and James George Pollitt ("Mr.Pollitt") (collectively, "Plaintiffs") filed their Amended Complaint (Docket No. 13) against Defendants CSN International ("CSN"), Calvary Chapel of Twin Falls, Inc. ("Calvary Chapel"), and Michael R. Kestler ("Kestler"), alleging numerous claims including violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Idaho Human Rights Act ("IHRA"), as well as, *inter alia,* fraud, intentional interference with contract, negligence, breach of fiduciary duty, invasion of privacy, trespass, conversion, assault and battery, intentional/negligent infliction of emotional distress, tortious stalking, unjust enrichment and loss of consortium. CSN is a non-profit, Christian radio ministry and California corporation which Kestler founded. He also has served as Vice President and President of the corporation and is on the Board of Directors. Kestler is also President of and a Pastor at Calvary Chapel.

Plaintiffs allege that Kestler, as an officer of CSN and President of Calvary Chapel, sought out a sexual relationship with Mrs. Pollitt and, with CSN's and Calvary Chapel's knowledge and cooperation, lured her from her home in Dallas, Texas to Twin Falls, Idaho on pretense of offering her a job at CSN although there was no need for her services. Upon her arrival in Twin Falls, Plaintiffs assert Kestler made repeated sexual advances towards Mrs. Pollitt that she dismissed. It is further asserted that Mrs. Pollitt was subject to retaliation by being discharged from her job.

Defendant Kestler and Defendant CSN filed motions for partial summary judgment on August 25, 2006, and November 9, 2006, respectively, seeking summary judgment on Plaintiff's claims of invasion of privacy, trespass, conversion, trespass to chattel/conversion, assault, battery, and tortious



stalking. Defendant Calvary Chapel has joined in these Motions. (Docket No. 67).

As to her invasion of privacy claim, Mrs. Pollitt maintains that Kestler persuaded her to disclose personal and private matters to him, including details about her marriage and sex life and that he also discussed with her personal matters and problems of his own. Kestler also discussed the two of them dating. (Affidavit of Lori Ann Pollitt in Opposition to Defendants Kestler and CSN's Motion for Partial Summary Judgment Filed on August 25 and November 9, 2006, "L. Pollitt Aff.," ¶ 5; Affidavit of Grant T. Burgoyne in Opposition to Defendants Kestler and CSN's Motions for Partial Summary Judgment Filed on August 25 and November 9, 2006, "Burgoyne Aff.," Exhibit D, Deposition of Lori Ann Pollitt, "L. Pollitt Dep.," pp. 44-47, 70-88, 107-112.) These alleged conversations occurred before and during Mrs. Pollitt's employment at CSN. Kestler denies asking her some of these questions of a personal nature. (Burgoyne Aff., Ex. B, Deposition of Michael R. Kestler, "Kestler Dep.," pp. 386-391.) As to her invasion of privacy claim and trespass claim, Plaintiff alleges that her house located on Fairway Street in Twin Falls, Idaho was broken into twice during 2004. (L. Pollitt Aff. ¶¶ 27, 28, 33.) Mrs. Pollitt stated in her deposition that she did not have "direct evidence who in the world it was" that broke into her home. (L. Pollitt Dep. 520:6-7.) As to her conversion claim, Mrs. Pollitt alleges that the second time her house was broken into, $120 in cash was stolen. (L. Pollitt Aff. ¶ 28.) In regards to her trespass to chattel/conversion claim, Mrs. Pollitt alleges that after she moved to Las Vegas in the summer of 2004 and reconciled with Mr. Pollitt, she was followed and the rear window of their car was broken out. (L. Pollitt Dep., 298:16-21.) Kestler was in Las Vegas to speak at a religious event at the time this happened. (*Id.,* Kestler Dep., 334:16-24.) Also as to this claim and her assault and battery claims, Mrs. Pollitt maintains that in March 2004 on a return trip to Twin Falls, after visiting Mr. Pollitt in Las Vegas with her kids, someone had loosened the lug nuts on her Suburban's right, front wheel causing the vehicle to shake violently. (L. Pollitt Dep., 235:9-236:4.) As to her tortious stalking claim, Mrs. Pollitt cites to many instances of being followed while in Twin Falls and in Nevada, sometimes by members of the Calvary Chapel church and she was also informed by people involved in the church that she was being watched. [FN1] Mrs. Pollitt also states she received obscene and anonymous phone calls and that many people who were affiliated with CSN or Calvary Chapel drove up and down her street honking their horns, and that a hangman's noose was made from a rope and hung in a tree in her front yard. Jeff Pruitt, who was Mrs. Pollitt's boyfriend during her separation from her husband, was also followed and told by people within the church that he and Mrs. Pollitt were being watched. (L. Pollitt Aff., ¶¶ 15-17, 19-27, 29-31, 34- 35; Pollitt Aff., Ex. B, Transcript of CDs (phone conversation between Mrs. Pollitt and Robert Casper held on November 17, 2004), pp. 61-69; L. Pollitt Dep., pp. 144-45, 271-276, 337-355; Kestler Dep., pp. 249-251, 262-273; Affidavit of Peter Delicata, "P. Delicata Aff.," ¶¶ 5-6; Affidavit of Maxine Delicata, "M. Delicata Aff.," ¶¶ 5-6; Burgoyne Aff., Ex. E, Deposition of Jeff Pruitt on September 7, 2006, "Pruitt Dep. I," pp. 60-65; Burgoyne Aff., Ex. F., Deposition of Jeff Pruitt on October 11, 2006, "Pruitt Dep. II," pp. 4-13, 18- 23, 26-50).

> FN1. Specifically, in the transcript of her phone conversion with Bob Casper, Mr. Casper indicated that members of CSN would try to run Mrs. Pollitt out of town because of her allegations against Kestler.

II.
Standard of Review

***2** Motions for summary judgment are governed by Federal Rule of Civil Procedure 56. Rule 56, which provides in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

When reviewing a motion for summary judgment, the proper inquiry is whether "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A moving party who does not bear the burden of proof at trial may show that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp v. Catrett,* 477 U.S. 317, 325 (1986). Once the moving party meets the requirement of Rule 56 by either showing that no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). It is not enough for the [non-moving] party to "rest on mere allegations or denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.,* at 250. "When determining if a genuine factual issue ... exists, ... a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability." *Id.,* at 254. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

In determining whether a material fact exists, facts and inferences must be viewed most favorably to the non-moving party. To deny the motion, the Court need only conclude that a result other than that proposed by the moving party is possible under the facts and applicable law. *Aronsen v. Crown Zellerbach,* 662 F.2d 584, 591 (9th. Cir.1981).

The Ninth Circuit has emphasized that summary judgment may not be avoided merely because there is some purported factual dispute, but only when there is a "genuine issue of material fact." *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 500 (9th Cir.1992). The Ninth Circuit has found that in order to resist a motion for summary judgment,

> the non-moving party: (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

***3** *British Motor Car Distrib. Ltd. v. San Francisco Automotive Indus. Welfare Fund,* 882 F.2d 371, 374 (9th Cir.1989).

III.
Defendants CSN and Kestler's Motions for Partial Summary Judgment

Both Defendants CSN and Kestler have moved for partial summary judgment, with Defendant Calvary Chapel joining in the motions, on Mrs. Pollitt's claims of invasion of privacy, trespass, conversion, trespass to chattel/conversion, assault, battery and tortious stalking. The Defendants' argument with regards to all these claims except tortious stalking is that Mrs. Pollitt has no personal knowledge or direct evidence that Kestler, as an agent of CSN and Calvary Chapel, either committed any of these acts himself or directed others to commit these acts. In response to this argument, Mrs. Pollitt admits she did not personally see Kestler's tortious acts but that there is "other direct evidence, and a great deal of circumstantial evidence, of his tortious conduct." (Plaintiff Lori Ann Pollitt's Memorandum in Response to Defendant Kestler and CSN's Motions for Partial Summary Judgment Filed on August 25 and November 9, 2005, "Pollitt's Response," p. 2 (Docket No. 68).) The "circumstantial evidence" that Mrs. Pollitt points to includes her allegations that she was fired from her job after she rebuffed Kestler's romantic advances, that she was followed and watched by members of Calvary Chapel and CSN employees, that she was the object of obscene and anonymous phone calls, as well as various other allegations. Defendants urge that Plaintiff's "circumstantial evidence" fails to provide any logical link of how those events are linked to the events underlying the causes of actions.

The Court agrees with Defendants on Mrs. Pollitt's

"circumstantial evidence" argument in relation to the claims of trespass, conversion, trespass to chattels/conversion, assault and battery. Mrs. Pollitt points to many isolated events that occurred and does not provide a tie between those events and Defendants, other than the ongoing disagreement regarding Mrs. Pollitt's employment. Although circumstantial evidence is sufficient evidence to prove one's claims, the mere fact that certain events happened, supported only by allegations that it was the Defendants behind the events, is not enough to survive summary judgment. The fact that other acts may have been committed by Defendants is not enough to keep the claims that have no evidentiary link to Defendants alive. The Court will now address each claim specifically.

A. Invasion of Privacy

Under Idaho law, invasion of privacy occurs when "one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private concerns or affairs." *O'Neil v. Schuckardt,* 112 Idaho 472, 477, 733 P.2d 693, 698 (1987). Such intrusion must be highly offensive to a reasonable person. *Id.* There does not need to be a physical invasion but there must be something in the nature of a prying or intrusion. *Id.* Additionally, this cause of action does not depend upon publicity given to the person whose interest or affairs are invaded. *Uranga v. Federated Publications, Inc.,* 138 Idaho 550, 553 67 P .3d 29, 32 (2003).

***4** Mrs. Pollitt claims her privacy was invaded because Kestler persuaded her to disclose personal and private matters to him and because her house was broken into. The breaking in will be discussed under the trespass claim below. As for the other aspect of this claim, that Kestler, with the knowledge of Calvary Chapel and CSN, persuaded Mrs. Pollitt to disclose her personal and private matters to him, there are factual disputes that exist. Mrs. Pollitt claims that Kestler asked her intimate questions about her marriage and sex life, encouraged her to get divorced and disclosed personal matters of his own. Kestler does admit discussing some personal things with Mrs. Pollitt, such as her marriage problems and his, but denies the more intimate conversations of a sexual nature.

The Court must draw reasonable inferences from the facts presented in favor of the nonmoving party. In doing so, the Court determines that there are genuine issues of material fact between the two parties as to what these conversations entailed and these factual issues could reasonably be resolved in favor of either party. In addition to the factual questions of what the conversations entailed, it would be a question for the jury whether these conversations would be considered "highly offensive to a reasonable person." Summary judgment on this claim is denied.

B. Trespass

According to Idaho law, the requirements for a common law trespass cause of action include: "(1) an invasion (2) which interferes with the right of exclusive possession of the land, and (3) which is a direct result of some act committed by the defendant." *Mock v. Potlatch Corp.,* 786 F.Supp. 1545, 1548 (D .Idaho 1992). *See also Moon v. North Idaho Farmers Ass'n,* 140 Idaho 536, 541, 96 P.3d 637, 642 (2004). Generally, an interference with one's right of "exclusive possession" involves an entry onto the land. *Mock v. Potlatch Corp.,* 786 F.Supp. 1545, 1548 (D.Idaho 1992).

To support her trespass claim, Mrs. Pollitt states that her house on Fairway Street in Twin Falls, Idaho was broken into twice. No genuine issues of material fact relating to this claim have been presented so it is appropriate to resolve this claim on summary judgment. The simple fact that her house was broken into without more is not sufficient to survive summary judgment. Mere allegations are not enough to deny summary judgment to the moving party. To make a claim for trespass, a plaintiff must show the invasion that occurred was a direct result of an act by the defendant. Mrs. Pollitt has not shown that the breaking in of her home was a direct result of any act by any of the Defendants. Summary judgment will be entered in favor of the Defendants on this claim.

C. Conversion

Conversion requires a "distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with his rights therein." *Torix v. Allred,* 100 Idaho 905, 910, 606 P.2d 1334, 1339 (1980). Mrs. Pollitt's conversion claim stems from on the $120 in cash that was stolen when her house was broken into. As stated above in relation to the trespass claim, Mrs. Pollitt has presented no genuine issues of material fact. All she states in support of her conversion claim is that $120 was stolen from her home. There is no dispute about this fact, making this claim appropriate to be resolved at the summary judgment stage. Mrs. Pollitt does not provide any link to the Defendants besides her allegations that this was done by, or at the direction of, Kestler. Mere allegations are not sufficient to withstand summary judgment. As there is no factual dispute and Mrs. Pollitt has provided no link to the Defendants on this claim, summary judgment will be entered in favor of the Defendants.

D. Trespass to Chattels/Conversion

***5** The law stated in the above two causes of action applies to this claim as well. Mrs. Pollitt's trespass to chattel/conversion claim is based on the rear window of her and her husband's car being broken out while she was visiting Mr. Pollitt in Las Vegas. Kestler was in Las Vegas speaking at a religious event when this event occurred.

The only evidence Mrs. Pollitt has in support of this claim is the fact that the rear window of the vehicle was broken out. It is undisputed that this occurred. No evidence links the Defendants to the window being broken into, other than the fact that Kestler was in the same city at the time this occurred. As there are no factual disputes and mere allegations are not enough to survive summary judgment, summary judgment should be entered in favor of the Defendants on this claim. The other aspect of Mrs. Pollitt's trespass to chattels/conversion claim will be discussed in the next section.

E. Assault and Battery

According to the Idaho Civil Jury Instructions, in order to prove assault, a plaintiff must show: (1) the defendant acted intending to cause a harmful or offensive contact with the person of the plaintiff, or an immediate fear of such contact; and (2) as a result, the plaintiff feared that such contact was imminent. IDJI2d 4.30. Battery consists of "an intentional, unpermitted contact upon the person of another which is either unlawful, harmful or offensive." *Neal v. Neal,* 125 Idaho 617, 622, 873 P.2d 871, 876 (1994). The intent needed for battery is the intent to commit the act, not the intent to cause harm. *Id.*

Mrs. Pollitt's assault and battery claims, along with her trespass to chattels/conversion claim, rest on an incident that occurred on a return trip from Las Vegas, Nevada to Twin Falls, Idaho, in which the lug nuts on Mrs. Pollitt's Suburban's right, front wheel had been loosened causing the vehicle to shake violently. No genuine issues of material fact exist on these claims and they are appropriate for summary judgment. There is no evidence showing that any of the Defendants loosened the lug nuts or directed someone else to do so. Without anything to link Defendants to these events and there being no genuine issues of material fact, summary judgment for Defendants is appropriate.

F. Tortious Stalking

All parties agree that Idaho has not recognized the tort of stalking. Defendants urge that since Idaho has not recognized this cause of action, Mrs. Pollitt's claim must fail. They also argue that even if the Court finds such a cause of action, it must still fail because Mrs. Pollitt has set forth no evidence that Kestler, or others at his direction, undertook any action that could constitute "stalking." Mrs. Pollitt maintains in response that pursuant to principles in the Restatement (Second) of Torts, violation of Idaho's criminal stalking statute (I.C. §§ 18-7906-7906) creates tort liability. [FN2] Restatement (Second) of Torts § 874A states:

> FN2. I.C. § 18-7906 defines the crime of stalking in the second degree as occurring when "the person knowingly and maliciously: (a) Engages in a course of

> conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress; or (b) Engages in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member."

***6** When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purposes of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action, or a new cause of action analogous to an existing tort action.

The Idaho Supreme Court has recognized these principles set forth in this Restatement section. *See Brock v. Board of Directors, Independent School Dist. No. 1,* 134 Idaho 520, 522, 5 P.3d 981, 983 (2000). In discussing these principles from the Restatement, the Idaho Supreme Court has also stated: "In the absence of strong indicia of a contrary legislative intent, courts must conclude that the legislature provided precisely the remedies it considered appropriate." *Yoakum v. Hartford Fire Ins. Co.,* 129 Idaho 171, 176, 923 P.2d 416, 421 (1996). When the statute is silent, "courts may recognize a private right only when it is necessary to assure effectiveness of the statute." *Foster v. Shore Club Lodge, Inc.,* 127 Idaho 921, 926, 90 P.2d 1228, 1233 (1995). In none of these cases cited by Mrs. Pollitt has the Idaho Supreme Court actually created a new private cause of action based on an existing statute. However, Mrs. Pollitt urges that although none of these cases recognized tort remedies for statutory violations, the statutes in those cases involved protecting the general public, whereas the criminal stalking statutes are designed to protect a special class of persons and a tort remedy would further the purpose of these statutes. Additionally, Mrs. Pollitt notes that the *Brock* and *Foster* courts recognized that civil and/or administrative remedies already existed so tort remedies were not necessary.

In reply, Defendant Kestler points out that Mrs. Pollitt has failed to establish that Kestler's actions constituted a violation of I.C. §§ 18-7905-7906 and also failed to establish what the elements of a tortious stalking claim are and how those elements would be satisfied in this case. Additionally, Defendant Kestler maintains that even if such a cause of action exists, Mrs. Pollitt has failed to provide factual support of such a claim because she has failed to provide a link that Kestler directed, or was personally involved with, any of these activities where Mrs. Pollitt was followed, watched, etc. Defendant CSN maintains that tortious stalking is not a viable cause of action in Idaho and that Mrs. Pollitt has not provided any relevant authority to support creating a new cause of action.

The Court notes from its examination of the law from other jurisdictions, that some states recognize a statutory tort of stalking and other states have specifically rejected creating a tort of stalking. For example, both California and Texas recognize a tort or civil action for stalking. *See* Cal. Civ.Code § 1708 .7; Tex. Civ Prac. & Rem. §§ 85.001-.005. Other states, such as Georgia and Washington, which have statutes prohibiting stalking, have refused to create a private cause of action. *See Troncalli v.. Jones,* 514 S.E.2d 478, 481 (Ga.Ct.App.1999) ("Although OCGA § 16-5-90 [defining the offense of stalking] establishes the public policy of the state, nothing in its provisions creates a private cause of action in tort in favor of the victim"); *Sanai v. Sanai,* 2005 WL 1172437 at *18 (W.D.Wash.2005) (Washington statute providing victims with a method of obtaining civil anti-harassment protection orders does not create a private civil action for harassment).

***7** The Court does not find it appropriate to create a new cause of action for tortious stalking in this case. The case does not rise or fall on this one claim. Even with this cause of action dismissed, the case will still proceed. Additionally, the Court notes that the invasion of privacy claim might be broad

enough to encompass Mrs. Pollitt's allegations in support of her "tortious stalking" claim. The Idaho Supreme Court has recognized the principle described by the Restatement (Second) of Torts that a new cause of action can be created if it furthers the purposes of the legislation. However, Mrs. Pollitt did not cite to any legislative history which would support her position of what the Idaho legislature had mind when it enacted the criminal stalking statute and that creating a private right of action would further such purposes.

Without showing how a private cause of action would further a legislative purpose behind the criminal stalking statute and the fact that Mrs. Pollitt may be able to bring her "stalking" allegations into her invasion of privacy claim, the Court will not create a new "tortious stalking" civil cause of action and will grant summary judgment to Defendants on this claim. Future development of the law in this area is best left to the Idaho courts in a more appropriate case.

IV.
Defendants' Motion to Strike

Defendants have moved to strike the affidavit of Frank "Butch" Veenstra, II and portions of Mrs. Pollitt's affidavit. Defendant Kestler argues that the Veenstra Affidavit should be stricken because it is vague, ambiguous, not relevant to any of Plaintiffs' claims, highly circumstantial and otherwise not admissible as evidence. Kestler urges that the Veenstra Affidavit does not set forth any facts supporting Mrs. Pollitt's allegations that Kestler committed tortious acts against her but rather alleges that Mr. Veenstra left Calvary Chapel, where he was an Elder, because of Kestler's "issues with women" and after he left, his mailbox was tampered with and a dead bird left inside it. Affidavit of Frank "Butch" Veenstra, II, "Veenstra Aff." Kestler argues that these allegations are irrelevant to the issues raised by this partial summary judgment motion. Additionally, Kestler maintains that if the Court finds the Veenstra Affidavit to be relevant, it is inadmissible under Fed.R.Evid. 404(b) which prohibits evidence of prior bad acts to prove the character of a person in order to show that the person acted in conformity therewith. Kestler also submits that the Veenstra Affidavit is vague and ambiguous as to identity, time and circumstance because no specific facts about Kestler's "issues with women" are given nor is there any evidence of who tampered with Veenstra's mailbox. Additionally, as to the statement attributed to Kestler that he could only be pushed so far before he will explode and get even, Kestler argues that there is no context as to the circumstances or nature of the conversation and there is no indication when the statement was made. Both Defendants also maintain that the Veenstra Affidavit contains conclusory statements.

***8** Plaintiffs argue that the Veenstra Affidavit contains relevant information on the issues of "motive, ... intent, ... plan, identity and absence of mistake or accident" as permitted under Fed.R.Evid. 404(b). Plaintiffs also maintain that Veenstra's statement that he was leaving Calvary Chapel because Kestler had issues with women is not offered to show that Kestler did in fact have "issues with women," but rather to show that Veenstra told Kestler this and later experienced retaliation. Additionally, Plaintiffs urge that the Veenstra Affidavit is not vague and ambiguous, does not contain conclusory statements and that Defendants supply no authority in support of this argument.

Defendant Kestler also urges that Paragraph 17 of Mrs. Pollitt's affidavit should be stricken because it is inadmissible hearsay. This paragraph contains an assertion that Calvary Chapel's Interim Pastor, Kelly Hassani, told Mrs. Pollitt that both her and Mr. Pruitt and her residence were being watched. Defendant CSN moves to strike Paragraph 17 and also Paragraphs 9, 10, 11, 12, 14 and 15 because they are generalized, conclusory statements.

Plaintiffs argue that the reference to Kelly Hassani's statement in Mrs. Pollitt's Affidavit is a party opponent admission and admissible under Fed.R.Evid. 801(d)(2)(A), (D) because Mr. Hassani was Calvary Chapel's Interim Pastor at the time his statement was made and Calvary Chapel is a party opponent in this case and in these motions for partial summary judgment. Additionally, Plaintiffs point out that even if Paragraph 17 of Mrs. Pollitt's

Affidavit is stricken, the same evidence is contained in the Jeff Pruitt's deposition which Defendants have not moved to strike. As to Defendant CSN's objections to Paragraphs 9-12 and 14-15 of Mrs. Pollitt's Affidavit, Plaintiffs submit that her statements are not generalized and conclusory but rather contain specific statements regarding specific events that Mrs. Pollitt directly perceived.

A. Discussion

Federal Rule of Civil Procedure 56(e) states, in pertinent part, that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiff is entitled to submit affidavits on his behalf in an attempt to defeat a motion for summary judgment; in fact, he is compelled to do so by Fed.R.Civ.P. 56(e) in order to be successful. *See Celotex Corp. v. Citrate,* 477 U.S. 317 (1986), and *British Motor Car Distributors, Ltd. v. San Francisco Automotive Industries Welfare Fund,* 882 F.2d 371 (9th Cir.1989).

Rule 56(e) requires that affidavits filed in connection with motions for summary judgment be made on personal knowledge. *DePinto v. Provident Security Life Ins. Co.,* 374 F.3d 50, 55 (9th Cir.1967). As such, hearsay testimony and opinion testimony that would not be admissible if testified to at trial would not be properly set forth in such an affidavit. *Id.* Facts alleged on understanding, such on belief or on information and belief, are not sufficient to create a genuine issue of fact. *Cermetek, Inc. v. Butler Avpak, Inc.,* 573 F.2d 1370, 1377 (9th Cir.1978). A motion for summary judgment will not be defeated by mere conclusory allegations unsupported by factual data. *Seattle-First Nat'l Bank v. United States,* 653 F.2d 1293, 1299 (9th Cir.1981).

*9 Both Plaintiffs and Defendants rely on Fed.R.Evid. 404(b) which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident ...

Party-opponent admissions are governed by Fed.R.Evid. 801(d)(2) which states a statement is not hearsay if: "The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or ... (D) a statement by the party's agent concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

As to Defendants' "prior bad acts" argument, the affidavit does not actually state that it was Kestler who tampered with Veenstra's mailbox after he left Calvary Chapel, although that is what is implied by the statements. Additionally, even if these statements did constitute evidence of Kestler's prior bad acts, they could come be admissible to show motive or identity under Fed.R.Evid. 404(b). However, even with consideration of the Veenstra Affidavit, the evidence was not strong enough to survive summary judgment on six of the seven claims that Defendants sought summary judgment on. Also, this evidence is not relevant to the invasion of privacy claim that did survive summary judgment.

As to Mrs. Pollitt's Affidavit, Paragraphs 9-12 and 14-15 are admissible. In these paragraphs, she recounts events that happened to her while she worked at CSN. She does not draw any conclusions as Defendants argue. As to Paragraph 17, this is a hearsay statement that does not fall within the party-opponent exception despite the fact that Mr. Hassani worked for Calvary Chapel at the time he made the statement, as it does not seem to concern matters with the scope of his employment. This statement will be stricken.

ORDER

Based on the foregoing, the Court being otherwise fully advised in the premises, **IT IS HEREBY ORDERED that:**

1) Defendant Kestler's Motion for Partial Summary

Judgment (Docket No. 43), filed August 25, 2006 be granted in part and denied in part.

2) Defendant CSN International's Motion for Partial Summary Judgment (Docket No. 54), filed November 9, 2006 be granted in part and denied in part.

3) Defendant Kestler's Motion to Strike Affidavit of Frank "Butch" Veenstra, II (Docket No. 73), filed January 3, 2007 be granted in part and denied in part.

4) Defendant CSN International's Motion to Strike Affidavit of Frank "Butch" Veenstra, II (Docket No. 79), filed January 5, 2007 be granted in part and denied in part.

Slip Copy, 2007 WL 294249 (D.Idaho)

END OF DOCUMENT

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

I. INTRODUCTION AND BACKGROUND

This memorandum responds to the Defendant's Motion for Partial Dismissal of the Complaint filed by Plaintiff's herein. The facts pertinent to this motion are as follows. Mr. Bratton owns a parcel of land in Canyon County near Middleton, which was purchased in 1973. At the time of the purchase he also purchased a right of way on the adjacent property to provide for a ditch to carry irrigation water to his parcel of land. The easement also allowed access,

maintenance, and servicing of the ditch and the surrounding land adjacent to the ditch. The width of the easement was immediately widened by implication or use to a width of 5 feet.

Mr. Bratton had enjoyed this easement without interruption for over thirty-three years, until John and Jackie Scott moved to the parcel of land on which the easement lies. When spring came this year, Mr. Bratton accessed his easement as he had always done. This access occurred in April of 2007 to ready the ditch for irrigation for the 2007 irrigation season. Mr. Bratton accessed the easement with intent to remove and burn the weeds within and adjacent to the ditch, to service the ditch, and to check for any leaks or problems with the ditch, culverts or headgate.

Mr. Bratton had been out on the easement for only a short time, before Mr. John Scott came out of his house which is located on the parcel of land on which the easement is located. He approached Mr. Bratton aggressively shouting at him to get off his land. Mr. Bratton tried to inform Mr. Scott that this was his easement (Mr. Bratton's) and that he was not on Mr. Scott's land. Mr. Scott would not listen and began threatening Mr. Bratton that if he did not get off his property that Mr. Scott would cause him harm. Although Mr. Bratton is a long time professional man and at one time had been very physically strong, however, because of his advanced age he was frightened by the conduct of Mr. Scott and instead of defending himself and his rights, he retreated off his easement to avoid bodily harm. At the time of this altercation by Mr. Scott, Mr. Bratton was conducting a lawful weed burning and maintenance of the irrigation ditch located on his easement.

As stated above, to avoid bodily harm, since Mr. Bratton is in his 70's and Mr. Scott looks to be in his 30's and is stout, large, and muscular, Mr. Bratton removed himself from the easement. The very next time Mr. Bratton approached the easement to see if he could access the easement, there was a NO TRESPASSING sign located at the location which Mr. Bratton crosses

the fence to enter his easement. He also saw that Mr. Scott had plowed the ditch over to the point that the ditch no longer existed. Further, the cement culverts that were located in the ditch had been removed and were dumped in a pile on Mr. Bratton's land. Mr. Bratton observed a groove that had been dug immediately adjacent to the fence in a location that would not accommodate a ditch. He also observed rope and small metal poles that had been inserted into the easement roping off the area.

Mr. Bratton entered the easement to assess the damage and immediately saw that Mr. Scott had come out of his house and was hiding behind objects stalking Mr. Bratton. Upon information and belief, Mr. Scott at times carries a firearm and has killed at least one neighbor's pet and has threatened others with physical harm. Therefore, Mr. Bratton, left his easement and has not entered on the easement except with the company of the sheriffs department or his attorney.

II. ARGUMENT

A. Legal Standard for Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) for failure to state a claim, must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for "a short and plain statement of the claim showing that the pleader is entitled to relief," along with a demand for relief. I.R.C.P. 8(a)(1), (2).

As with a motion under Rule 8(a), every reasonable intendment will be made to sustain a complaint against a Rule 12(b)(6) motion to dismiss. *Idaho Comm'n on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973). A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to

relief." *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 787 (1960); *Ernst v. Hemenway and Moser, Co.*, 120 Idaho 941, 946, 921 P.2d 996, 1001 (Ct. App. 1991).

It need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. Wright & Miller, Federal Practice and Procedure §1357, at 339 (1990). Whether the pleadings meet this liberal standard presents a question of law, over which we exercise free review. *Ernst*, 120 Idaho at 945, 821 P.2d at 1000. We observe that, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief. Wright & Miller, *supra*, §1357, at 344-45

B. Tortious Interference with Right of Privacy/Tortious Stalking

Defendants' set forth Idaho law regarding private causes of action for tortious stalking. However, in doing so, Defendants have addressed a non-issue and somehow managed to miss the premise under which this specific complaint was pled. In *Pollitt v. CSN International*, 2007 WL 294249, the court suggests that, "the invasion of privacy claim might be broad enough to encompass...allegations in support of...tortious stalking claim." Plaintiffs agree with *Pollitt* and their pleading offers a short and plain statement of their claim which shows that the Plaintiffs are entitled to relief from Defendant's stalking under the tort of invasion of right of privacy.

There should be no doubt that Plaintiffs' complaint is one that arises because the Defendants' conduct violate's the Plaintiffs' constitutional rights. Indeed, under Idaho law, invasion of privacy occurs when "one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private concerns or affairs." *O'Neil v. Schuckardt* 112

Idaho 472, 477, 733 P.2d 693, 698 (1987); see also, *Pollitt v. CSN International,* 2007 WL 294249. Such intrusion must be highly offensive to a reasonable person. *Id.* There does not need to be a physical invasion but there must be something in the nature of a prying or intrusion. *Id.* Additionally, this cause of action does not depend upon publicity given to the person whose interests or affairs are invaded. *Uranga v. Federated Publications, Inc.*, 138 Idaho 550, 553 67 P.3d 29, 32 (2003); see also, *Pollitt v. CSN International,* 2007 WL 294249.

Here, a controversy exists between Plaintiffs and Defendants with respect to Plaintiff's rights to access and utilize a longstanding irrigation ditch easement and Defendant's conduct in preventing the access to the property owned by Plaintiff. Defendants' have engaged in highly offensive and threatening conduct towards' Plaintiffs.

In April 2007, Defendants threatened Plaintiff, Charles Bratton, with physical harm while he was attempting to access his easement by running toward Plaintiff shouting "get off my property," along with the treats to do Plaintiff harm if he did not remove himself from the easement. Shortly thereafter, the Defendants not only posted a "No Trespassing" sign in the precise location where the Plaintiffs customarily accessed the easement, but they also vandalized the Bratton ditch by removing it and rendering it useless. Any effort on the part of the Plaintiff to access or monitor his ditch was met with extreme hostility. Whenever Mr. Bratton tries to access his easement, Defendant, John Scott comes out of his house running at the Plaintiff while yelling in a verbally and physically threatening manner or stalks Mr. Bratton by coming out of the house and hides behind objects.

Defendant's actions would be considered highly offense and threatening to anyone trying to access their rights to an easement. Plaintiff is a retired teacher in his 70's. Defendant is a large stout man much younger than Plaintiff. Defendants' have intentionally, knowingly and

maliciously intruded upon Plaintiffs' right to access their easement in ways that seriously alarm, annoy and harass Plaintiffs, causing them serious emotional distress.

III. CONCLUSION

Plaintiffs' pleading contains a claim of Tortious Interference with Right of Privacy/Tortious Stalking. Defendants' have attacked Plaintiffs' claim on the basis that Idaho has not yet recognized a private cause of action for tortious stalking. Although Defendants' argument may technically be true, there has been a ruling by the Federal Court of this jurisdiction that Plaintiff's can seek relief for tortious stalking by the use of a claim for violation of their right of privacy.

Plaintiffs' pleading offers a short and plain statement of their claim which shows that the Plaintiffs are entitled to relief under the tort of invasion of right of privacy. Further, it appears that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. Wright & Miller, Federal Practice and Procedure §1357, at 339 (1990). Defendant's conduct satisfies all of the elements of the tort of invasion of privacy. Therefore, it cannot be said beyond a doubt that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 787 (1960); *Ernst v. Hemenway and Moser, Co.*, 120 Idaho 941, 946, 921 P.2d 996, 1001 (Ct. App. 1991).

For the reasons stated, Plaintiff respectfully asserts that Defendants' Motion For Partial Dismissal pursuant to I.R.C.P. 12(b)(6), should be denied and requests that this Court so rule.

DATED this 10th day of August, 2007.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2007, I served a true and correct copy of the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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AUG 30 2007

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL DISMISSAL PURSUANT TO I.R.C.P. 12(b)(6)

Defendants John R. Scott and Jackie G. Scott ("the Scotts"), by and through their attorney of record Perkins Coie LLP, hereby submit the following reply memorandum in support of their Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6). This reply is supported by Defendants' Memorandum in Support of Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6) filed previously herewith.

I. INTRODUCTION

On July 20, 2007, the Scotts filed a motion to dismiss Plaintiffs Charles and Marjorie Bratton's ("the Brattons") claim for tortious stalking. The Brattons have no legal basis for

their tortious stalking claim, and therefore, it must be dismissed pursuant to Idaho Rule of Civil Procedure 12(b)(6). It is clear that Idaho courts have never recognized a private right of action nor did the legislature intend to create a private right of action for stalking. Because the Brattons have failed to state a claim upon which relief can be granted, the claim must be dismissed.

II. ARGUMENT

Under Idaho Rule of Civil Procedure 12(b)(6), the court must determine whether "[a]fter viewing all facts and inferences from the record in favor of the non-moving party . . . a claim for relief has been stated." *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 106 P.3d 449, 453 (2005) (citations omitted). "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.'" *Id.*

The Brattons concede that no Idaho courts have found that a private right of action for tortious stalking exists nor did the Idaho Legislature intend to create a private cause of action. (Plaintiffs' Response, pg. 6.) Instead, they argue that they have purportedly stated a proper claim for interference with the right of privacy. *See id.* However, a review of what is actually alleged in the Complaint reveals that the Brattons' claim is indeed a claim for tortious stalking based upon Idaho's criminal statute. Idaho Code § 18-7906(1) provides:

> A person commits the crime of stalking in the second degree if the person knowingly and maliciously: (a) Engages in a course of conduct that seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress; or (b) Engages in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.

Likewise, the Brattons' claim for tortious stalking is as follows:

> 40. Defendants knowingly and maliciously engaged in a course of stalking conduct that seriously alarmed, annoyed and harassed Plaintiffs, causing them substantial emotional distress and caused the Plaintiffs not to be able to access their easement.
>
> 41. Defendants conduct caused Plaintiffs to be in reasonable fear of death or physical injury to Plaintiffs or their family members.
>
> 42. Defendants' actions caused damages to Plaintiffs.

(Complaint and Demand for Jury Trial, pg. 7.) Despite the Brattons' assertions to the contrary, they are clearly attempting to state a private right of action for tortious stalking based on I.C. § 18-7906(1), which is contrary to case authority and legislative intent. Any purported claim for invasion of privacy is in title alone.

Even if we assume that the Brattons intended to allege a claim for invasion of privacy, that claim has not been properly stated. The Brattons' Complaint and Demand for Jury Trial is devoid of any such allegations pertaining to a claim for invasion of privacy by intrusion into the solitude or seclusion. To properly establish a claim for intrusion into solitude or seclusion, the areas intruded upon must be, and be entitled to be, private. *Hoskins v. Howard*, 132 Idaho 311, 317, 971 P.2d 1135, 1141 (1998) (citing *O'Neil v. Schuckardt*, 112 Idaho 472, 477, 733 P.2d 693, 698 (1986)). No such claim has been made in the present matter.

The Brattons' claim for tortious stalking is without basis in law. Furthermore, the Brattons have failed to state a proper claim for invasion of privacy. Because the Brattons have failed to state a claim upon which relief may be granted, the Scotts' motion for partial dismissal should be granted.

III. CONCLUSION

For the above-stated reasons, the Scotts respectfully request that the above claim be

dismissed pursuant to Idaho Rule of Civil Procedure 12(b)(6).

DATED: August 29, 2007.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August ~~29~~ 30, 2007, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

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CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW, Plaintiffs Charles and Marjorie Bratton, by and through their counsel of record, Brassey, Wetherell, Crawford & Garrett, and hereby move the Court to grant Plaintiffs' Motion for Partial Summary Judgment against Defendants. Specifically, the Court should hold as a matter of law that Plaintiffs have an express easement, a 34 year old irrigation ditch, a location established for the 34 year old ditch, a 34 year old ditch that is three feet in width, as well as an implied easement by use for a 12-foot-wide easement area relating to their irrigation ditch on Defendants' property. Further, the Court should hold that Defendants are liable for the damages, including destruction and leveling of the 34 year old original irrigation ditch.

This Motion is brought pursuant to the Idaho Rules of Civil Procedure, including Rule 56. Further, this Motion is supported by a corresponding Memorandum, the Affidavit of Charles Bratton, the Affidavit of Harold Ford, and the Affidavit of Counsel, filed contemporaneously herewith, as well as the documents, files and pleadings of record.

Plaintiffs will call up the Court for a hearing regarding this matter.

DATED this 7th day of January, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2008, I served a true and correct copy of the foregoing PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

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CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

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JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

For more than 34 years, Plaintiffs Charles and Marjorie Bratton used their easement rights to a vital three feet wide irrigation ditch for the pasturing of their race horses. This was initially conveyed pursuant to an express easement, but immediately took the form of a 12-foot-wide easement area which included a three foot wide ditch and was recognized by both Plaintiffs and all prior owners of Defendants' property. In 2005, Defendants obtained possession of the subject land encumbered by said easement and by early spring of 2007, Defendants began threatening the

Brattons. At that time, Defendants also denied all access to the subject easement, destruction of the 34 year old irrigation ditch and barring Plaintiffs' access to their water rights for irrigation. The Brattons now bring the instant Motion for Partial Summary Judgment to affirmatively establish their easement rights prior to the 2008 spring's irrigation season. In sum, this Motion seeks to establish liability against Defendants and to establish, in this matter, the Plaintiffs' ownership rights, leaving only the determination of damages for trial.

As shown below, the Court should grant Plaintiffs' Motion for Partial Summary Judgment and hold as a matter of law that the Brattons have both express and implied easements on Defendants' property. The Court also should hold that Defendants are liable for their infringement upon Plaintiffs' easement rights, including the destruction of the original 34 year old irrigation ditch, and all damage to the lack of irrigation and the personal damage due to the Brattons.

II.
PERTINENT FACTS AND PROCEDURAL HISTORY

It is undisputed that Plaintiffs Charles and Marjorie Bratton own and maintain an easement on Defendants' property. The record shows that in 1973, Harold and Janet Ford owned and subsequently divided property, which became the Fruitdale Farm Subdivision in Canyon County, Idaho. ***See*** ¶ 2 of the Affidavit of Harold Ford in support of Plaintiffs' Motion for Partial Summary Judgment, filed contemporaneously herewith. In doing so, Mr. Ford created two adjoining lots, lots 32 and 40. On April 19, 1973, Mr. Ford conveyed lot 32 to the Brattons by way of an executed Warranty Deed. ***See*** Exhibit "A" of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment, filed contemporaneously herewith. Specifically, the Warranty Deed conveyed 3.83 acres of land to the Brattons. ***See*** Exhibit "A" of the Affidavit of Charles Bratton. The Brattons, however, did not reside on this land, but used it for commercial

purposes in the care, feeding and stalling of their race horses and other livestock. ***See*** ¶ 4 of the Affidavit of Charles Bratton.

The Warranty Deed from the Fords to the Brattons provided water rights, including a one-half share of water stock held in Canyon Hill Ditch Company and another one-half share of stock in Middleton Mill Ditch Company. ***See*** Exhibit "A" of the Affidavit of Charles Bratton. In addition, the Warranty Deed gave an express easement for the construction and maintenance of an irrigation ditch, with rights of ingress and egress, as follows:

> [A]n easement along the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

See Exhibit "A" of the Affidavit of Charles Bratton.

As a result, in 1973, Mr. Ford installed a three feet wide irrigation ditch for the Brattons that traversed lot 40. ***See*** ¶ 5 of the Affidavit of Charles Bratton and ¶ __ of the Affidavit of Harold Ford. In addition, the Brattons placed sections of concrete pipe intermittently in the ditch to keep its walls from eroding and to control the volume of water. ***See*** ¶ 5 of the Affidavit of Charles Bratton.

In the Spring of 1973, the Brattons began their use and maintenance of the ditch on lot 40 to irrigate their pasture property located in lot 32. ***See*** ¶ 6 of the Affidavit of Charles Bratton. Since 1973, the Brattons continually utilized and maintained the structure of the ditch as well as the area adjacent to the ditch. ***See*** ¶ 7 of the Affidavit of Charles Bratton. The Brattons' use and maintenance of the ditch involved utilizing a tractor to till the ground on both sides of the ditch, creating a total easement width area of 12 feet. ***See*** ¶ 7 of the Affidavit of Charles Bratton. The Brattons also regularly sprayed and burned this 12-foot-wide area every spring, and regularly burned

and cleaned the inside of the ditch itself. ***See*** ¶ 7 of the Affidavit of Charles Bratton. Significantly, Mr. Ford always allowed the Brattons to access their 12-foot-wide easement on lot 40 with tractors and other equipment needed to maintain the ditch. ***See*** ¶ 9 of the Affidavit of Charles Bratton; ¶ 6 of the Affidavit of Harold Ford. In fact, Mr. Ford knew of, and agreed with, the Brattons' use of the 12-foot-wide easement area, which use he intended to be permanent. ***See*** ¶ 8 of the Affidavit of Harold Ford.

On January 2, 1996, Mr. Ford signed a Quit Claim Deed on lot 40 to Lois Rawlinson. ***See*** ¶ 11 and Exhibit "A" of the Affidavit of Harold Ford. After the time of this 1996 Quit Claim Deed, the Brattons continued to utilize their easement consistent with the manner set forth above. ***See*** ¶ 9 of the Affidavit of Charles Bratton.

On September 13, 2005, Ms. Genice Rawlinson, heir to Lois Rawlinson, gift deeded lot 40 to Defendants. ***See*** Exhibit "A" and ¶ 2 of the Affidavit of Counsel in Support of Plaintiffs' Motion for Partial Summary Judgment, filed contemporaneously herewith. This gift deed specifically states that the Defendants took their property "subject to any encumbrances or easements as appear of record or by use upon such property." ***See*** Exhibit "A" and ¶ 5 of the Affidavit of Counsel (emphasis added).

In April of 2007, Mr. Bratton accessed his easement and began to burn the 12-foot-wide easement area. ***See*** ¶ 11 of the Affidavit of Charles Bratton. Again, this was regularly done by the Brattons for 34 years. ***See*** ¶ 11 of the Affidavit of Charles Bratton. Mr. Bratton specifically burned the weeds in the ditch and adjacent area in preparation to receive water. ***See*** ¶ 7 of the Affidavit of Charles Bratton. While Bratton was burning the area, Defendant John Scott approached Mr. Bratton and verbally threatened him, demanding that Mr. Bratton leave the property. ***See*** ¶ 11 of the Affidavit of Charles Bratton. Defendant John Scott is much younger and larger than Mr. Bratton.

See ¶ 7 of the Affidavit of Counsel. Defendants also told Mr. Bratton that he could not burn or spray the irrigation ditch or its surrounding area. ***See*** ¶ 11 of the Affidavit of Charles Bratton.

Subsequently, Defendants would not allow Mr. Bratton to freely access his easement. ***See*** ¶ 11 and 17 of the Affidavit of Charles Bratton. In doing so, the Defendants placed a "No Trespassing" sign on the boundary line where Mr. Bratton accessed lot 40 for his easement. ***See*** ¶ 12-13 and Exhibit "B" of the Affidavit of Charles Bratton. The Defendants would come out of their house at any time Mr. Bratton would approach the area in the fence where he would access the easement and Mr. Scott would stalk Mr. Bratton until Mr. Bratton would move away from the fence and/or leave the area completely.

Additionally, unbeknownst to Plaintiffs, on or around April 15, 2007, Plaintiff Mr. Bratton discovered that Defendants removed the concrete pipe culverts utilized in the irrigation ditch. ***See*** ¶ 14 and Exhibit "D" of the Affidavit of Charles Bratton. Defendants also completely leveled the ditch, and attempted to create a new, smaller ditch-like culvert located adjacent to the fence which is on the property line. ***See*** ¶ 14 and Exhibit "C" of the Affidavit of Charles Bratton.

Since April 15, 2007, Mr. Bratton attempted again to access his easement, but was unable to do so because of Defendants' continued verbal threatenings and stalking behavior. ***See*** ¶ 17 of the Affidavit of Charles Bratton. Accordingly, the Brattons have not accessed their easement and have been unable to irrigate their property since April of 2007. ***See*** ¶ 17 of the Affidavit of Charles Bratton.

On June 26, 2007, the Brattons filed their Complaint and Demand for Jury Trial. The Brattons now file the instant Motion for Partial Summary Judgment as to liability and the recognition in this matter of their easement rights.

III.
ARGUMENT

In Idaho, an easement may be created by express agreement, or may be implied by subsequent use or conduct. ***Shultz v. Atkins***, 97 Idaho 770, 773, 554 P.2d 948, 951 (1976) (citation omitted). As shown below, the Brattons have an express easement and an implied easement based upon their use for 34 years. In addition, the Court should hold that Defendants are liable for their infringement upon Plaintiffs' easement rights, including the destruction of the original irrigation ditch and subsequent damages to be determined at trial.

A. Based Upon their Warranty Deed from Mr. Ford, the Brattons Have an Express Easement on Defendants' Property.

It is undisputed that the Brattons have an express easement on Defendants' property. As set forth above, an easement may be created by express agreement. ***Shultz***, 97 Idaho at 773, 554 P.2d at 951. As such, the owner of an easement is entitled to full enjoyment of his or her easement. ***McKay v. Boise Project Board of Control***, 141 Idaho 463, 471, 111 P.3d 148, 156 (2005) (citing ***Carson v. Elliott***, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct. App. 1986)). In fact, an easement owner's rights are paramount to those of the servient owner. The servient owner is the owner of the property on which the easement is located. ***See id.*** (citing ***Boidstun Beach Assoc. v. Allen***, 111 Idaho 370, 376-77, 723 P.2d 914, 920-21 (Ct. App. 1986).

In the instant matter, the Brattons have an express easement through the 1973 Warranty Deed they received from the Fords. The express language of the easement provides for the construction and maintenance of the irrigation ditch as follows:

> [A]n easement along the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of

an irrigation ditch and for ingress and egress along said ditch boundary line. (emphasis added).

See Exhibit "A" of the Affidavit of Charles Bratton.

In addition, Defendants have admitted that the Brattons have an express easement for an irrigation ditch, and for ingress and egress rights. ***See*** ¶ 6 of the Affidavit of Counsel. As such, the Brattons are entitled to the use and full enjoyment of their easement. ***See McKay***, 141 Idaho at 471, 111 P.3d at 156. This includes the right to enter and to leave Defendants' property, known as "ingress and egress," as well as the right to maintain the ditch. ***See*** Exhibit "A" of the Affidavit of Charles Bratton. In fact, the Brattons' rights are paramount to the rights of the Defendants, as servient owners. ***See McKay***, 141 Idaho at 471, 111 P.3d at 156. Accordingly, the Court should rule as a matter of law that the Brattons have an express easement on Defendants' property for an irrigation ditch, including their rights to construction and maintenance as well as ingress and egress.

B. For 34 Years, the Brattons' Conduct Has Established an Implied Easement by Use.

The Court should rule as a matter of law that the Brattons are entitled to an implied easement based upon use. It is well established in Idaho that an easement may be implied by prior use or conduct. ***See Thomas v. Madsen***, 142 Idaho 635, 638, 132 P.3d 392, 395 (2006); ***Davis v. Peacock***, 133 Idaho 637, 642, 991 P.2d 362, 367 (1999); ***Bear Island Water Association, Inc. v. Brown***, 125 Idaho 717, 725, 874 P.2d 528, 536 (1994). The party seeking to establish an implied easement from prior use must show: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before conveyance 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. ***Id.*** (citations omitted).

Additionally, an implied easement by prior use passes with subsequent conveyances of either the dominant or servient estates. ***Davis***, 133 Idaho at 643, 991 P.2d at 368 (citing ***Hughes v. State***, 80 Idaho 286, 328 P.2d 397 (1958)).

As shown below, the Brattons meet the requirements of unity of ownership, continuous use, and reasonable necessity. Thus, the Brattons have established an implied easement for a 12-foot-wide easement area in this action.

(I.) Unity of Ownership.

The Brattons have established the first requirement for an implied easement, namely unity of ownership and subsequent separation by the original dominant estate. ***See Thomas***, 142 Idaho at 638, 132 P.3d at 395. The facts of record show that the Fords owned both the Brattons' and Defendants' property at one time, and subsequently conveyed lot 32 to the Brattons while keeping lot 40 for themselves. ***See*** ¶ 2-4 of the Affidavit of Harold Ford. Therefore, the first requirement is met because there was unity of ownership in the Fords, and a subsequent separation of the Fords' dominant estate. ***See Thomas***, 142 Idaho at 638, 132 P.3d at 395.

(ii.) Continuous Use.

The continuous use of the 12-foot-wide easement area establishes that it was intended for permanent use by the Brattons. ***See Thomas***, 142 Idaho at 638, 132 P.3d at 395. The evidence shows that the Brattons continuously used and maintained their easement since the spring of 1973. ***See*** ¶ 9 of the Affidavit of Charles Bratton. In addition, the Brattons regularly tilled the ground on both sides of the ditch with a tractor, creating a total easement width of 12 feet. ***See*** ¶ 7 of the Affidavit of Charles Bratton. The Brattons also sprayed and burned the 12-foot-wide easement area each spring. ***See*** ¶ 7 and 10 of the Affidavit of Charles Bratton. Notably, Mr. Ford allowed the Brattons to access their easement on lot 40 with their tractors and other equipment. ***See*** ¶ 9 of the

Affidavit of Charles Bratton; ¶ 6 of the Affidavit of Harold Ford. In fact, Mr. Ford knew of, and agreed with, the Brattons' use of the 12-foot-wide easement area for more than 22 years before conveying lot 40 to another person. ***See*** ¶ 8 of the Affidavit of Harold Ford. As such, it is Mr. Ford's own testimony that he intended for the Brattons permanently to use the 12-foot-wide easement area. ***See*** ¶ 8 of the Affidavit of Harold Ford.

The facts also show that the Brattons used the 12-foot-wide easement area until April of 2007, when Defendants threatened Mr. Bratton, told him to leave their property, and placed a "No Trespassing" sign at Mr. Bratton's area of ingress. ***See*** ¶ 10 and 11 of the Affidavit of Charles Bratton. Also, at that time, Defendants denied Mr. Bratton access to maintain his ditch by threatening him if Mr. Bratton tried to burn or spray the easement of the adjacent ditch or the areas. ***See*** ¶ 11 of the Affidavit of Charles Bratton. Further, Defendants would not allow Mr. Bratton to access his easement at any time at a later date. ***See*** ¶ 17 of the Affidavit of Charles Bratton. Accordingly, it is clear that the Brattons have continuously used the 12-foot-wide easement area until wrongfully barred by Defendants and that Plaintiffs' use was intended to be permanent. ***See Thomas***, 142 Idaho at 638, 132 P.3d at 395.

(iii.) Reasonable Necessity.

The facts also shown that the 12-foot-wide easement area is reasonably necessary to the Brattons' proper enjoyment of the dominant estate, now assumably being Defendants' property. ***See Thomas***, 142 Idaho at 638, 132 P.3d at 395. In Idaho, a showing of strict necessity is not required to establish an implied easement. ***Id.*** Rather, all that is required is a reasonable necessity based upon the circumstances that existed at the time of the conveyance. ***Id.***

The express language of the easement in this matter implicitly acknowledges the need for maintenance of the ditch. ***See*** Exhibit "A" of the Affidavit of Charles Bratton. Further, the use of

tractor tilling, and spraying and burning for approximately 4.5 feet on each side of an irrigation ditch is practical, customary, and reasonably necessary for the use of irrigation ditch easements. ***See*** ¶ 8 of the Affidavit of Charles Bratton; ¶ 10 of the Affidavit of Harold Ford. As such, the Brattons' use of the 12-foot-wide easement area in this matter was reasonably necessary. ***See Thomas,*** 142 Idaho at 638, 132 P.3d at 395.

Of significance also is the fact that Defendants' own Warranty Deed expressly states that the Defendants took their property subject to any easements "as appear of record or by use upon such property." ***See*** ¶ 5 and Exhibit "A" of the Affidavit of Counsel (emphasis added). As such, the Defendants received their property subject to the easement established by the Brattons' prior use. ***See Davis***, 133 Idaho at 643, 991 Pl2d at 368 (stating that implied easements by prior use pass with subsequent conveyances).

Accordingly, the Brattons have established an implied easement by use for the 12-foot-wide easement area. As a result, the Court should hold as a matter of law that the Brattons are entitled both to access rights, and to utilize this 12-foot-wide easement area.

C. Defendants Are Liable as a Matter of Law for Their Infringement Upon the Brattons' Easement Rights.

Defendants are liable for the damages associated with the Brattons' easement. Under Idaho law, a party is entitled to damages where access to an easement is denied. ***See Hardwood v. Talbert,*** 136 Idaho 672, 679, 39 P.3d 612, 619 (2001). Further, a servient estate cannot materially interfere with the dominant owner's use of its easement. ***See Nampa & Meridian Irr. Dist. v. Mussell***, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003) (citing ***Nampa & Meridian Irr. Dist. v. Washington Fed. Savings***, 135 Idaho 518, 20 P.3d 702 (2001)). Where such an interference occurs, an easement owner is entitled to damages. ***See Id.***

Here, the Brattons have a right to enter and to leave Defendants' property, known as "ingress and egress," as well as the right to use and maintain the irrigation ditch. ***See*** Exhibit "A" of the Affidavit of Charles Bratton. Nevertheless, Defendant John Scott threatened Mr. Bratton, and demanded that Mr. Bratton leave the easement property. ***See*** ¶ 11 of the Affidavit of Charles Bratton. Defendants also warned Mr. Bratton that he could not burn or spray the irrigation ditch without fear of harm by Mr. Scott. ***See*** ¶ 11 of the Affidavit of Charles Bratton. Moreover, Defendants placed an official "No Trespassing" sign on the boundary line exactly where Mr. Bratton had accessed his easement for 34 years. ***See*** ¶ 12 and Exhibit "B" of the Affidavit of Charles Bratton.

Further, on or around April 15, 2007, as set forth above, Defendants removed the concrete pipe culverts utilized in the irrigation ditch. ***See*** ¶ 14 and Exhibit "D" of the Affidavit of Charles Bratton. Defendants also completely leveled the ditch, and attempted to move the ditch by creation of a new, culvert-type ditch placed immediately adjacent to the fence line. ***See*** ¶ 14 and Exhibit "C" of the Affidavit of Charles Bratton. Since April 15, 2007, Mr. Bratton attempted again to access his easement, but was unable to do so because of Defendants' continued threats and stalking. ***See*** ¶ 17 of the Affidavit of Charles Bratton. Accordingly, the Brattons have not accessed their easement and have been unable to irrigate their property since that time. ***See*** ¶ 17 of the Affidavit of Charles Bratton.

As the servient estate, Defendants materially interfered with the Brattons' use of their easement. Accordingly, the Court should rule as a matter of law that the Defendants are liable for the resultant damages to be proven at trial. ***See Nampa & Meridian Irr. Dist.***, 139 Idaho at 33, 72 P.3d at 873.

IV.
CONCLUSION

Based upon the foregoing, the Court should grant Plaintiffs' Motion for Partial Summary Judgment.

DATED this 9th day of January, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2008, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
PERKINS COIE
251 East Front Street, Suite 400
P.O. Box 737
Boise, Idaho 83701-0737

✓ U.S. Mail, postage prepaid
___ Hand-Delivered
___ Overnight Mail
___ Facsimile

_____
Nancy Jo Garrett

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
P.O. Box 1009
Boise, Idaho 83701-1009
Telephone: (208) 344-7300
Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF CHARLES BRATTON IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of _____)

Charles Bratton, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 21 and am competent to make this Affidavit, and do so based upon my own personal and direct knowledge.

2. I received a Warranty Deed from Harold and Janet Ford executed April 19, 1973, for lot 32 of the Fruitdale Farm Subdivision, in Canyon County, Idaho. This lot as originally conveyed

to me contained 3.83 acres. A true and correct copy of the Warranty Deed from the Fords to me is attached hereto as Exhibit "A".

3. The Warranty Deed, Exhibit "A", grants water rights and an easement on adjoining property for an irrigation ditch. The Warranty Deed expressly grants to me:

> [A]n easement along the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

4. I have never resided on lot 32, but have used it principally for the care, feeding and stalling of my racing horses and other livestock.

5. In 1973, pursuant to the easement in the Warranty Deed, Mr. Ford installed a three-foot-wide irrigation ditch on lot 40 of the Fruitdale Farm Subdivision, in Canyon County, Idaho, for my use and I intermittently laid sections of concrete pipe in the irrigation ditch to keep its walls from eroding and to control the volume of water.

6. I began my use and maintenance of the ditch on lot 40 in the spring of 1973 to irrigate my property located on lot 32.

7. From 1973 forward, my use and maintenance of this ditch included regularly using a tractor to till the ground on both sides of the ditch, creating at least a 12-foot total easement area. I also routinely sprayed and burned this area every spring to keep the easement area in good condition, and in preparation to receive water. Likewise, I regularly burned and cleaned the inside of the ditch itself.

8. Based upon my own experience and learning, these methods of tilling, spraying and burning are practical and customary in the local area for maintaining irrigation ditches, are conducted at least annually, and are reasonably necessary for their use. As such, it was reasonably necessary for me to use these methods in maintaining my irrigation rights.

9. Since the spring of 1973, Mr. Ford continuously allowed me to access at least a 12-foot-wide easement on lot 40 with tractors and other equipment used to maintain the irrigation ditch.

10. After Mr. Ford conveyed lot 40 to another person, I continued to utilize and maintain my easement consistent with the manner set forth above, up until my altercation with the Defendants in the spring of 2007.

11. Specifically, I accessed my easement in the spring of 2007 and began to burn the 12-foot-wide easement area, which I had done for the previous 34 years. Defendant John Scott, however, came onto lot 40 and threatened me, screaming that I must leave his property, and that I must not return. Defendant Scott also stated at that time that I could not burn or spray the ditch, or any area surrounding it.

12. After the above altercation, I noticed that Defendant John Scott placed a "No Trespassing" sign on the boundary line where I accessed lot 40 for my water easement.

13. Attached hereto as Exhibit "B" are true and correct copies of pictures taken of the "No Trespassing" sign, which pictures accurately depict, explain, and reflect the location of the sign and its appearance in the spring of 2007.

14. On or around April 15, 2007, Defendants removed part or all of the concrete pipe culverts from my irrigation ditch. Defendants also completely leveled and destroyed the ditch on lot 40, and attempted to create a new, smaller ditch outside of their property line.

15. Attached hereto as Exhibit "C" are true and correct copies of pictures taken of the leveled irrigation ditch and another much smaller culvert-type ditch. These pictures accurately depict, explain, and reflect the status and location of the original irrigation ditch and the leveling and damage thereto in the spring of 2007.

16. Attached hereto as Exhibit "D" are true and correct copies of pictures taken of the removal of the concrete culvert piping by Defendants. These pictures accurately depict, explain, and reflect the appearance of the concrete portions of the irrigation ditch in the spring of 2007.

17. Since April 15, 2007, I again attempted to access my easement but could not do so because of Defendant John Scott's threatenings. As of the date of this Affidavit, I have been unable to access the irrigation ditch on lot 40 and have been unable to irrigate any property.

FURTHER YOUR AFFIANT SAITH NOT.

DATED this 8th day of January, 2008.

Charles Bratton

CHARLES BRATTON

SUBSCRIBED AND SWORN to before me this 8th day of January, 2008.

Notary Public for Idaho
Residing at Caldwell, Idaho
Commission expires: 4/28/2011

STACY A. WOODS NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
PERKINS COIE
251 East Front Street, Suite 400
P.O. Box 737
Boise, Idaho 83701-0737

✓ U.S. Mail, postage prepaid
___ Hand-Delivered
___ Overnight Mail
___ Facsimile

Nancy Jo Garrett

WARRANTY DEED

For Value Received HAROLD E. FORD and JANET B. FORD, husband and wife,

the grantors, do hereby grant, bargain, sell and convey unto CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife,

the grantee s the following described premises, to-wit: Canyon **County Idaho, to wit:**

PARCEL II:

A parcel of land in the FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being Lot 32 of said subdivision, consisting of 3.83 acres, more particularly described as follows:

BEGINNING at the quarter corner between Sections 3 and 10, Township 4 North, Range 3 West, Boise Meridian; thence North 0° 48' 00" East on the mid-section line 1326.5 feet to a point being the corner common Lots 32, 40, 33 and 41 of said subdivision and the real point of beginning; thence South 89° 06' 30" West along the line between Lots 33 and 32, 634.0 feet to a point; thence North 0° 45' 00" East along the West line of Lot 32, 331.8 feet to a point; thence North 89° 07' 40" East along the lot line between Lots 31 and 32, 634.3 feet to a point; thence South 0° 48' 00" West along the lot line between Lots 32 and 40, 331.6 feet to the real point of beginning; said Lot containing 4.83 acres more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including all water and ditch rights and rights of way for water and ditches.

Together with one-half share of water stock held in CANYON HILL DITCH COMPANY and one-half share of stock held in MIDDLETON MILL DITCH COMPANY.

Together with an easement along the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises; that said premises are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: April 19, 1973

EXHIBIT tabbies A

Harold E. Ford

Janet B. Ford

000065

Shows Scott field and No Trespass sign

EXHIBIT

tabbies

B

Picture is looking away from Bratton property showing no trespass sign on Scott property

Shows Scott property and Bratton fence with No Trespass sign placed by Scott after ditch plowed over

CLERKS MISTAKE
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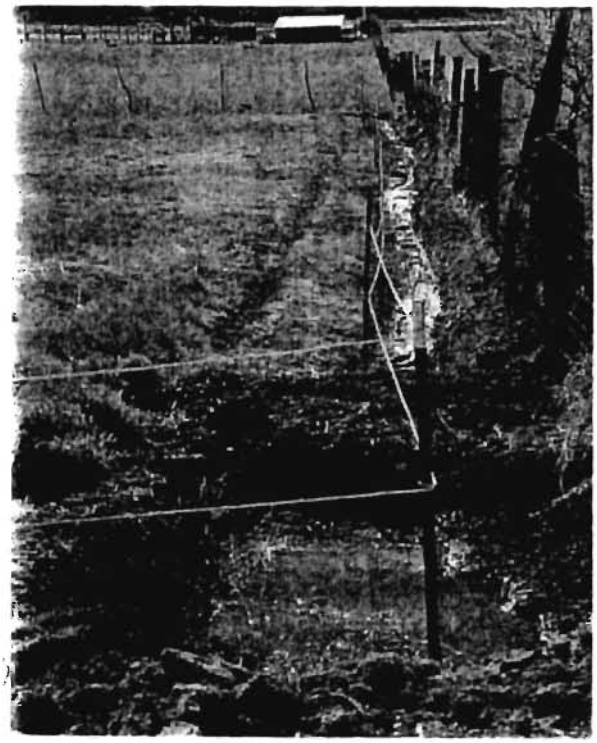
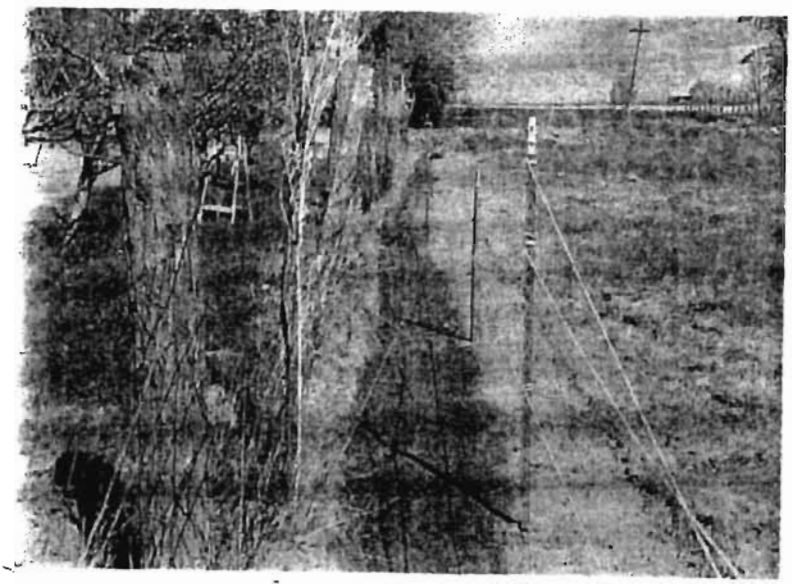
Shows plowed over Bratton ditch on April 15, 2007

EXHIBIT

C



Looking toward Bratton property, head gate and small amount of water in groove, original site of ditch is shown by freshly plowed mound of dirt to left of roped fence



Picture is looking away from Bratton property showing fence line with rope fence placed by Scott

Shows Bratton's field where Scott placed cement culvert that he removed from Bratton's ditch that was on Scott's property

Culvert - 10" diameter

Scott entered onto Bratton property to place the cement culvert

EXHIBIT

tabbies

D

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
P.O. Box 1009
Boise, Idaho 83701-1009
Telephone: (208) 344-7300
Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF HAROLD FORD IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Canyon)

Harold Ford, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 21 and am competent to make this Affidavit, and do so based upon my own personal and direct knowledge.

2. In 1973, I owned land in Canyon County, Idaho, which relates to the subject matter of this lawsuit. Specifically, I divided land creating individual lots, including two adjoining pieces of property, namely lots 32 and 40 of the Fruitdale Farm Subdivision in Canyon County, Idaho.

3. On April 19, 1973, I conveyed lot 32 in the Fruitdale Farm Subdivision to Charles and Marjorie Bratton.

4. I retained ownership of lot 40.

5. My conveyance of lot 32 in 1973 to the Brattons, included an easement for water rights and access to an irrigation ditch on lot 40 of the Fruitdale Farm Subdivision.

6. After conveying lot 32 to the Brattons, I initially and continually, without interruption, allowed them to and they did access their easement on lot 40 with tractors and other equipment needed to maintain the irrigation ditch.

7. The irrigation ditch was dug to a three foot width and ran parallel to the property line on lot 40, with the edge of the ditch closest to the property line, at least six feet in from said property line.

8. I knew of, and agree with, the Brattons' use of the irrigation ditch on lot 40. In fact, I intended that the Brattons permanently the use the irrigation ditch at its 1973 location with the closest edge to the property line at least six feet away from said property line.

9. I intended for the Brattons to maintain and they did maintain a total easement width of at least 12 feet, including the actual size of the ditch. This width area allowed a tractor to be driven over the ditch area for its maintenance and enough room to turn a tractor around within the easement area.

10. The use of a tractor for tilling both outer sides of an irrigation ditch, and the spraying and burning on each side of an irrigation ditch was conducted at least on an annual basis and are customary, and reasonably necessary for the use and maintenance of irrigation ditch rights.

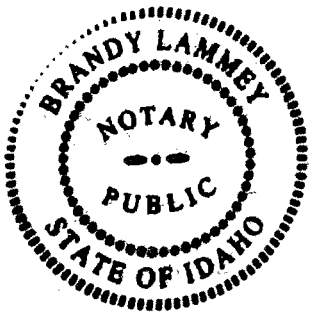
11. In 1996, I executed a Quitclaim Deed for lot 40 of the Fruitdale Farm Subdivision to Lois Rawlinson. Attached hereto as Exhibit "A" is a true and correct copy of the executed Quitclaim Deed dated January 2, 1996 (Instrument No. 9600007).

FURTHER YOUR AFFIANT SAITH NOT.

DATED this 8 day of Jan, 2008.

Harold Ford
HAROLD FORD

SUBSCRIBED AND SWORN to before me this 8 day of January, 2008.



Brandy Lammey
Notary Public for Idaho
Residing at Caldwell, Idaho
Commission expires: 11-3-12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
PERKINS COIE
251 East Front Street, Suite 400
P.O. Box 737
Boise, Idaho 83701-0737

✓ U.S. Mail, postage prepaid
___ Hand-Delivered
___ Overnight Mail
___ Facsimile

Nancy Jo Garrett

INSTRUMENT NO. 9600007

QUITCLAIM DEED

For Value Received, HAROLD E. FORD, a single man dealing with his sole and separate property, hereinafter called the First Party, does by these presents remise, release and forever QUITCLAIM, unto LOIS RAWLINSON as her sole and separate property, of 23231 Freezeout Road, Caldwell, Idaho, hereinafter called the Second Party, and to Second Partys heirs and assigns, all title which first party now has or may hereafter acquire, in the following described real property, situated in Canyon County, State of Idaho, to-wit:

See exhibit "A" attached hereto and incorporated herein by this reference as though set forth in full.

Together with all water and ditch rights and rights of way for water and ditches appurtenant thereto.

First Party does hereby convey any and all right, title and interest, either contingent or vested and however arising, in and to the above-described real property that First Party may now have or may hereafter acquire.

TO HAVE AND TO HOLD, ALL and singular the said premises, together with any appurtenances thereto, unto the Second Party, and to Second Party's heirs and assigns forever.

IN WITNESS WHEREOF, The said First Party has hereunto set First Party's hand and seal this 2nd day of ~~December~~ January, ~~1995~~ 1996.

Harold E. Ford

Harold E. Ford.

STATE OF IDAHO, COUNTY OF CANYON} ss.

On this 2nd day of ~~December~~ January, ~~1995~~ 1996, before me, a notary public in and for said State, personally appeared HAROLD E. FORD, known to me to be the person whose name is subscribed in the within instrument, and acknowledged to me that he executed the same.

Robi Starr

NOTARY PUBLIC FOR IDAHO
Residing at Caldwell
My Commission Expires: 3/10/2000

(Seal) ROBI STARR NOTARY PUBLIC STATE OF IDAHO

EXHIBIT A

tabbies

A parcel of land in the Fruitdale Farm Subdivision, Section 3, Township 4 North, Range 3 West of the Boise Meridian, Canyon County, Idaho, being Lot 40 of said Subdivision more particularly described as follows:

Beginning at the Quarter corner between Sections 3 and 10, Township 4 North, Range 3 West, Boise Meridian; thence North 0°48'00" East on the mid-section line 1326.5 feet to a point being the corner common to Lots 32, 40, 33 and 41 of said Subdivision and the real point of beginning; thence North 89°01'10" East along the line between Lots 40 and 41, 638.2 feet to a point; thence North 0°46'40" East along the East line of Lot 40, 331.5 feet to a point; thence South 89°01'40" West along the lot line between Lots 39 and 40, 638.0 feet to a point; thence South 0°48'00" West along the lot line between Lots 32 and 40, 331.6 feet to the real point of beginning.

96000007

RECORDED

'96 JAN 2 - AM 9 45

NED ... ER
CANYON CNTY RECORDER
BY ... Laughlin dep

REQUEST Harold Ford
TYPE Deed FEE 6.00

EXHIBIT "A"

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
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Telephone: (208) 344-7300
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Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF IDAHO)
) ss.
County of Ada)

Nancy Jo Garrett, being first duly sworn upon oath, deposes and states as follows:

1. I am one of Plaintiffs' attorneys of record, and make this Affidavit based upon my own personal and direct knowledge.

2. Attached hereto as Exhibit "A" is a true and correct copy of the Gift Deed from Genice Rawlinson regarding lot 40 of the Fruitdale Farm Subdivision, in Canyon County, Idaho, to Defendants Jackie and John Scott (Instrument No. 200524649).

3. Attached hereto as Exhibit "B" is a true and correct copy of Defendants' Responses to Plaintiffs' First Set of Requests for Admissions received by Plaintiffs on December 3, 2007.

4. Defendants' Response to Request for Admission No. 1 admits that Genice Rawlinson executed a gift deed of lot 40 to the Defendants.

5. Defendants' Response to Request for Admission No. 2 admits that Defendants received lot 40 "subject to any encumbrances or easements as appear of record or by use upon such property."

6. Defendants' Response to Request for Admission No. 6 admits that the Warranty Deed for lot 32 expressly provides an easement for an irrigation ditch and for the right of access, or ingress or egress.

7. Mr. John Scott, one of the Defendants in this matter is much younger, more muscular, and of a larger stature than Mr. Bratton.

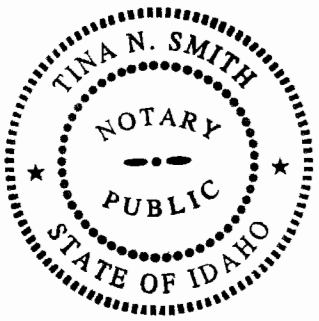
8. Mr. Bratton is a retired school teacher and is 76 years of age.

FURTHER YOUR AFFIANT SAITH NOT.

DATED this 9th day of January, 2008.

NANCY JO GARRETT

SUBSCRIBED AND SWORN to before me this 9th day of January, 2008.



Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 5/10/08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
PERKINS COIE
251 East Front Street, Suite 400
P.O. Box 737
Boise, Idaho 83701-0737

✓ U.S. Mail, postage prepaid
___ Hand-Delivered
___ Overnight Mail
___ Facsimile

Nancy Jo Garnett

INSTRUMENT NO. 200524649

GIFT DEED

For Value Received Love and Affection
GENICE RAWLINSON, a single person, do hereby convey, release, remise and forever gift unto
JACKIE G. SCOTT and JOHN R. SCOTT whose current address is: P. O. Box 577, Middleton, Idaho 83644
the following described premises, to-wit:

A parcel of land in the FRUITLAND FARMS SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being lot 40 as the same is shown on the official plat of said Subdivision on file in the office of the County Recorder of Canyon County, Idaho, more particularly described as follows:

BEGINNING at the Quarter corner between Sections 3 and 10, Township 4 North, Range 3 West of the Boise Meridian, thence
North 0°48'00" East on the mid-section line a distance of 1,326.5 feet to a point being the corner common to Lots 32, 40, 33, and 41 of said Subdivision and the REAL POINT OF BEGINNING; thence
North 89°01'10" East along the line between Lots 40 and 41, a distance of 638.2 feet to a point; thence
North 0°46'40" East along the East line of Lot 40 a distance of 331.5 feet to a point; thence
South 89°01'40" West along the Lot line between Lots 39 and 40 a distance of 638 feet to a point; thence
South 0°48'00" West along the Lot line between Lots 32 and 40 a distance of 331.6 feet to the REAL POINT OF BEGINNING.

More commonly known as 23231 Freezeout Road.

together with all tenements, hereditaments, water, water rights, ditches, ditch rights, easements and appurtenances thereunto belonging or in anywise appertaining, and subject to any encumbrances or easements as appear of record or by use upon such property.

Dated May 6, 2005

Genice Rawlinson

Genice Rawlinson, a single person

STATE OF IDAHO, COUNTY OF Washington

On this 6th day of May 2005, before me, a notary public in and for the said State, personally appeared GENICE RAWLINSON known to me to be the persons whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Glennis K. Bonner
Notary Public
Residing at Midvale, Idaho
Commission Expires 4/6/06

GLENNIS K. BONNER
Notary Public
State of Idaho

RECORDED
2005 MAY 6 PM 12:00
G NOEL HALES
CANYON CNTY RECORDER
REQUEST Jackie Scott
TYPE Deed 39

200524649

000086

EXHIBIT
tabbies
A

ORIGINAL

RECEIVED

DEC 03 2007

Shelly H. Cozakos, Bar No. 5374
SCozakos@perkinscoie.com
PERKINS COIE LLP
251 East Front Street, Suite 400
Boise, ID 83702-7310
Telephone: 208.343.3434
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

Defendants John R. Scott and Jackie G. Scott ("Defendants"), by and through their counsel of record, Perkins Coie LLP, hereby respond to Plaintiffs' First Set of Requests for Admissions to Defendants as follows:

REQUEST FOR ADMISSION NO. 1: Please admit that on September 13, 2005, Genice Rawlinson gifted Lot 40 of the Fruitdale Farm Subdivision, Middleton, Idaho to one or both of the Defendants.

RESPONSE TO REQUEST FOR ADMISSION NO. 1: Defendants admit these allegations, with the exception of the property location, which is in Caldwell, Idaho.

EXHIBIT
tabbies
B

REQUEST FOR ADMISSION NO. 2: Please admit that Genice Rawlinson's gift of Lot 40 to one or both of Defendants was "subject to any encumbrances or easements as appear of record or by use upon such property."

RESPONSE TO REQUEST FOR ADMISSION NO. 2: Admit, with the same exception as noted in Response to Request for Admission No. 1.

REQUEST FOR ADMISSION NO. 3: Please admit that to your knowledge and belief, Plaintiffs own Lot 32 of the Fruitdale Farm Subdivision, in Middleton, Idaho.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admit, with the same exception as noted in Response to Request for Admission No. 1.

REQUEST FOR ADMISSION NO. 4: Please admit that Plaintiffs have a recorded and expressed easement relating to Lot 32 of Fruitdale Farm Subdivision.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Defendants admit that Plaintiffs have an express easement for an irrigation ditch as stated in Exhibit A to the Complaint. Defendants have insufficient information or knowledge to admit or deny the remaining allegations and therefore deny the same.

REQUEST FOR ADMISSION NO. 5: Please admit that Plaintiffs' recorded and expressed easement is contained in the Warranty Deed for Lot 32 of the Fruitdale Farm Subdivision, in Middleton, Idaho.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: Defendants admit that Plaintiffs' express easement is contained in the Warranty Deed set forth in Exhibit A to the Complaint. Defendants have insufficient information or knowledge to admit or deny the remaining allegations and therefore deny the same.

REQUEST FOR ADMISSION NO. 6: Please admit that the Warranty Deed for Lot 32 of the Fruitdale Farm Subdivision, in Middleton, Idaho, expressly provides an easement for construction and maintenance of an irrigation ditch and for ingress and egress along the boundary lines of Lots 39 and 40 of Fruitdale Farm Subdivision, Middleton, Idaho.

RESPONSE TO REQUEST FOR ADMISSION NO. 6: Admit.

REQUEST FOR ADMISSION NO. 7: Please admit that in 1973 an irrigation ditch was established by Plaintiff on Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: Defendants admit that Plaintiffs have an express easement for an irrigation ditch as stated in Exhibit A to the Complaint. Defendants have insufficient information or knowledge to admit or deny the remaining allegations and therefore deny the same.

REQUEST FOR ADMISSION NO. 8: Please admit that since 1973 the Plaintiffs have used the ditch identified in the easement provided for in the Warranty Deed for Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: Defendants have insufficient information or knowledge to admit or deny this request and therefore deny the same.

REQUEST FOR ADMISSION NO. 9: Please admit that since 1973 the Plaintiffs have used the ditch identified in the easement provided for in Warranty Deed for Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: Defendants have insufficient information or knowledge to admit or deny this request and therefore deny the same.

REQUEST FOR ADMISSION NO. 10: Please admit that since 1973, Plaintiffs have regularly maintained the ditch identified on the Warranty Deed for Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 10: Deny.

REQUEST FOR ADMISSION NO. 11: Please admit that since 1973, the easement as identified on Lot 32, included a ditch and maintenance area.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Admit.

REQUEST FOR ADMISSION NO. 12: Please admit that since 1973, Plaintiffs regularly utilized a tractor to dig the ditch identified on the Warranty Deed for Lot 32 and to maintain both sides of the ditch.

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Deny.

REQUEST FOR ADMISSION NO. 13: Please admit that since 1973, the easement as identified on Lot 32, encompassed/included an area adjacent to the ditch.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Defendants object to this Request on the basis that the term "encompassed/included" is ambiguous. Subject to this objection, Defendants deny the remaining allegations.

REQUEST FOR ADMISSION NO. 14: Please admit that since 1973, the easement as identified on Lot 32 encompassed an area 12 feet in width, which included and ran adjacent to the irrigation ditch.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Deny.

REQUEST FOR ADMISSION NO. 15: Please admit that since 1973, during the spring of every year, Plaintiffs regularly maintained the 12 foot area adjacent to the irrigation ditch as identified in the easement located on Lot 32, by spraying or burning.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Deny.

REQUEST FOR ADMISSION NO. 16: Please admit that since 1973, Plaintiffs have been allowed to access and exit upon Defendant's [sic] property on the area adjacent to

the irrigation ditch as identified in the easement located on Lot 32 with tractors and other equipment needed to maintain the ditch.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Defendants have insufficient information or knowledge to admit or deny this request and therefore deny the same.

REQUEST FOR ADMISSION NO. 17: Please admit that Plaintiffs have an easement by implication from prior use, for the twelve feet in width to include and adjacent to the irrigation ditch as identified on the easement for Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 17: Deny.

REQUEST FOR ADMISSION NO. 18: Please admit that at or near April 2007, Defendant, John R. Scott, verbally and physically threatened Plaintiff Charles Bratton.

RESPONSE TO REQUEST FOR ADMISSION NO. 18: Deny.

REQUEST FOR ADMISSION NO. 19: Please admit that in or around April 2007, Defendants impeded Plaintiffs' access to the irrigation ditch easement as identified on Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 19: Deny.

REQUEST FOR ADMISSION NO. 20: Please admit that at or near April 2007, Defendants posted a "no trespassing" sign on Defendants' property at or near the area where Plaintiffs customarily accessed their easement as identified on Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 20: Defendants object to this Request on the basis that the phrase "at or near the area" is ambiguous. Subject to this objection, Defendants admit these allegations.

REQUEST FOR ADMISSION NO. 21: Please admit that on or about April 15, 2007, Defendant, John R. Scott, again verbally and physically threatened Plaintiff, Charles Bratton.

RESPONSE TO REQUEST FOR ADMISSION NO. 21: Deny.

REQUEST FOR ADMISSION NO. 22: Please admit that on or about April 15, 2007, Defendant, John R. Scott, removed all of the concrete pipe culverts in Plaintiffs' irrigation ditch of the easement as identified on Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 22: Defendants admit that John Scott removed certain concrete pipe culverts from the irrigation ditch. Defendants deny all remaining allegations.

REQUEST FOR ADMISSION NO. 23: Please admit that Defendants took and retain custody of the Plaintiffs' concrete pipe culverts.

RESPONSE TO REQUEST FOR ADMISSION NO. 23: Defendants admit that the concrete pipe culverts are currently located on Defendants' property at the request of Plaintiffs. Defendants deny all remaining allegations.

REQUEST FOR ADMISSION NO. 24: Please admit that on or around April 15, 2007, Defendant, John R. Scott, leveled Plaintiffs' irrigation ditch.

RESPONSE TO REQUEST FOR ADMISSION NO. 24: Deny.

REQUEST FOR ADMISSION NO. 25: Please admit that since April 2007, Defendant, John R. Scott, has verbally threatened or "stalked" Plaintiff, Charles Bratton, each time Charles Bratton has attempted to access the irrigation ditch which is identified on Lot 32.

RESPONSE TO REQUEST FOR ADMISSION NO. 25: Deny.

DATED: December 3, 2007.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 3, 2007, I caused the original of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett
Bradley S. Richardson
BRASSEY, WETHERELL, CRAWFORD & GARRETT, LLP
203 W. Main St.
P.O. Box 1009
Boise, ID 83701-1009
FAX: 344-7077

Hand Delivery	X
U.S. Mail	
Facsimile	
Overnight Mail	

_____
Shelly H. Cozakos

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT, LLP
203 W. Main Street
P.O. Box 1009
Boise, Idaho 83701-1009
Telephone: (208) 344-7300
Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, the above-referenced Plaintiffs, by and through their counsel of record, Brassey, Wetherell, Crawford & Garrett, and for a cause of action against Defendants, complains and alleges as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs Brattons are residents of Canyon County, Idaho.

2. Defendants Scotts are residents of Canyon County, Idaho.

3. The property in question is located in Canyon County, Idaho.

4. The Court has jurisdiction pursuant to Idaho Code § 1-705.

5. Damages meet the jurisdictional requirements and exceed $10,000.

5. Venue is proper in Canyon County, Idaho, pursuant to Idaho Code § 5-401.

II. ALLEGATIONS

6. The Brattons received an executed Warranty Deed for their current property in Middleton, Idaho, from Harold E. Ford and Janet B. Ford, husband and wife. The Warranty Deed is dated April 19, 1973, a true and correct copy of which is attached as Exhibit "A". Specifically, in part, the Warranty Deed conveyed 3.83 acres of land to Plaintiffs as known as Lot 32 of the Fruitdale Farm Subdivision, in Middleton, Idaho. Plaintiffs have subsequently used this land in connection with agricultural use for the care, feeding and stalling of their horses or livestock.

7. The Warranty Deed from the Fords to Plaintiffs also included a one-half share of water stock held in Canyon Hill Ditch Company and a one-half share of stock in Middleton Mill Ditch Company (See Exhibit "A").

8. The Warranty Deed also provides an easement for construction and maintenance of an irrigation ditch and for ingress and egress as follows:

> [A]long the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section e, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

9. Pursuant to this easement, Harold Ford installed a 3-foot wide ditch for Plaintiffs that traversed Lot 40. At that time, sections of concrete pipe were laid intermittently in the ditch to keep its walls from eroding and to control the volume of water.

10. Subsequently, Harold Ford, deeded the Plaintiffs an additional 1 acre.

11. Since 1973, Plaintiffs, pursuant to the easement, have used the ditch for agricultural irrigation and have maintained the ditch, in which Plaintiffs regularly and continuously used a tractor to till the ground on both sides of the ditch, creating a total easement width area of 12 feet. In addition, Plaintiffs regularly sprayed or burned this 12 foot area every spring to keep the adjacent easement area in good condition, and also regularly burned and cleaned out the ditch itself. Further, Plaintiff was allowed to access and exit the area adjacent to the ditch with tractors and other equipment needed to maintain said ditch.

12. Harold Ford subsequently executed a Quit Claim Deed to Lot 40 at the Fruitdale Farm Subdivision to Lois Rawlinson. This deed is dated January 2, 1996, and contains the Instrument Number 9600007, a true and correct copy of which is attached hereto as Exhibit "B".

13. After the January 1996 conveyance, Plaintiffs continued to utilize and exercise their easement as set forth above in the same manner as they had previously since 1973.

14. Genice Rawlinson, heir to Lois Rawlinson, later gift deeded Lot 40 of the Fruitdale Farm Subdivision to Defendants. A true and correct copy of this gift deed, Instrument Number 200557645, dated September 13, 2005, is attached as Exhibit "C". This gift deed specifically states that the property described therein is "subject to any incumbrance or easements as appear of record or by use upon such property." (emphasis added).

15. At or near the beginning of April of 2007, Plaintiff Charles Bratton accessed his easement and proceeded to perform the usual maintenance to include burning the ditch as well as burning the areas adjacent to the ditch within the 12 foot easement. The maintenance was performed to clean out the ditch and adjacent area in preparation to receive water. This was done in accordance with Plaintiffs' customary practice.

16. At or near this time, Defendants John and Jackie Scott verbally threatened Plaintiff Charles Bratton, and shouted at him to get off "their" property or they would harm him. They also told him that he could not burn or spray anywhere on the easement, or otherwise access the property or utilize his easement rights. In connection with this action, Defendant Scott placed a "No Trespassing" sign on said property in the precise location where Plaintiff customarily accessed the easement.

17. On or around April 15, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton, the Defendants then removed all or part of the concrete pipe culverts utilized by Plaintiffs in the ditch portion of the easement.

18. Based upon information received from the Defendants, Defendants have retained custody of the Plaintiffs' concrete pipe culverts.

19. On or about April 15, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton, the Defendants destroyed the Bratton ditch by filling the ditch in and leveling the area.

20. On or about April 15, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton, the Defendants attempted to create a new, smaller culvert type ditch, immediately adjacent to and which incorporates the fence line between Lot 40 and that of another landowner.

21. Since April 15, 2007, whenever Plaintiff, Charles Bratton, has tried to access his easement, Defendant John Scott comes out of his house and yells at him, runs toward him, runs up and down the adjoining fence line, and does so in a verbally and physically threatening manner.

22. Upon information and belief, Defendant has verbally and physically threatened the other neighbors who also have irrigation ditch easements.

23. Upon information and belief, Defendant has utilized a firearm to shoot a neighborhood pet that inadvertently crossed over onto his property.

24. Defendants' actions violated Plaintiff's easement rights, caused damages to Plaintiffs, violated the Plaintiff's right of privacy, prevented Plaintiffs from accessing their easement, prevented Plaintiffs from irrigating their property and general use of easement, and blocked Plaintiff's access to their easement and to obtain water for their agricultural property and commercial livestock. Among other things, Plaintiffs' pasture has died, Plaintiffs have been forced to take remedial steps to feed, care for, and water their livestock. Further, Defendant has cause Plaintiffs to fear for their safety and suffer severe emotional distress.

III. DECLARATORY RELIEF

25. Plaintiffs incorporate and reallege all preceding paragraphs as if set forth herein.

26. An actual case and controversy exists between Plaintiffs and Defendants with respect to Plaintiffs' rights to access and utilize the12-foot irrigation ditch easement, and the maintenance thereto.

27. Based upon information and belief, Defendants have taken the position that the 34 year old, 3 foot wide ditch was rightfully removed by Defendant Scott from its long-term location; and that the easement is only three feet in total width, running adjacent to and incorporates the fence which is located on the property line between Lot 40 and another neighbor.

28. Plaintiffs have a recorded and express easement as granted by Harold E. Ford and Jeannette B. Ford. Plaintiffs also have an easement by implication from prior use, for the remaining nine feet in width on the easement, as there was unity of title, subsequent separation, continuous and regular use, and such use was reasonably necessary to the proper enjoyment of the easement by

Plaintiffs. Further, Plaintiffs have a right of access to, maintenance and enjoyment of the easement by express terms and by implication.

IV. INJUNCTION

29. The Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

30. As a direct and proximate result of Defendants' action, Plaintiffs have suffered and will continue to suffer immediate and irreparable harm, injury, loss, and damage, including, but not limited to, the foreclosure of access to the easement and water rights, and the wrongful interference with their right to exclusive use, enjoyment, and possession of their 12 foot easement on Lot 40 of the Fruitdale Farm Subdivision.

31. As a result, Defendants should be precluded from verbally and physically threatening Plaintiffs or otherwise interfering with Plaintiffs' access and use of their easement on Lot 40 of the Fruitdale Farm Subdivision.

32. Given Defendants' dangerous propensity, hostility, use of a firearm on the property, as well as verbal and physical threats, Defendant should be precluded from entering the 12-foot easement area or from coming within 600 feet from Plaintiffs when Plaintiffs are on the easement, without prior court approval.

33. In addition, the Court should take all steps necessary to restore Plaintiffs to full possession of their easement rights, pursuant to Rule 65 of the Idaho Rules of Civil Procedure. Because of the Defendants conduct and actions, Plaintiffs are fearful of contact with the Defendants. Contact will be decreased by placement of a covered pipe or culvert ditch, as this type of ditch requires minimal maintenance. Therefore, Plaintiffs request that the Court grant injunctive relief that

would allow the placement of a covered pipe or culvert system across the easement area with all costs thereto paid by the Defendants.

34. In the alternative, the Court should require Defendants to return the easement to its prior status.

V. NEGLIGENCE AND/OR WILLFUL, WANTON, AND/OR INTENTIONAL CONDUCT

35. The Plaintiffs incorporate and reallege all preceding paragraphs as set forth herein.

36. Defendants owed a duty to Plaintiffs.

37. Defendants breached that duty, whether negligently, willfully, or intentionally, to Plaintiffs by the removal of Plaintiffs' concrete culverts, the filling in and changing Plaintiffs' ditch location, and by making verbal and physical bodily threats to Plaintiffs.

38. Defendants' conduct caused direct and proximate damage to Plaintiffs.

VI. TORTUOUS INTERFERENCE WITH RIGHT OF PRIVACY

39. The Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

40. Defendants knowingly, intentionally and maliciously engaged in a course of harassment that seriously alarmed, annoyed and frightened Plaintiffs, causing them substantial emotional distress and caused the Plaintiffs not to be able to access their easement and invaded the Plaintiffs' right of privacy.

41. Defendants intentionally intruded physically and verbally upon the solitude and seclusion of Plaintiffs' private concerns, as well as by physical destruction of Plaintiffs' real property, which is utilized for private and commercial concerns.

42. Defendants conduct caused Plaintiffs to be in reasonable fear of death or physical injury to Plaintiffs or their family member.

43. Defendants' conduct caused physical harm to Plaintiffs' real property.

44. Defendants' actions caused damages to Plaintiffs.

VII. ATTORNEYS FEES AND COSTS

45. As a result of Defendants' actions and conduct, Plaintiffs have been required to retain the law firm of Brassey, Wetherell, Crawford and Garrett, in the instant matter and Plaintiffs therefore are entitled to recover their attorneys fees and costs for said representation pursuant to Idaho Code §§12-120 and 12-121 and I.R.C.P. 54.

46. Plaintiff reserves the right to amend this complaint to include a claim for Punitive Damages

47. WHEREFORE, Plaintiffs pray for relief as follows:

A. For a judgment against Defendants for any and all general and special damages in an amount to be proven at trial.

B. For declaratory relief in a judgment against Defendants setting forth that Plaintiffs have an express easement for 3 feet as set in its' original location by Mr. Ford, that Plaintiffs have a 12-foot wide easement by implication and use, and that Plaintiffs possess legal rights to access and utilize their 12-foot easement on Lot 40, and take all reasonable steps for the maintenance thereof.

C. For injunctive relief precluding Defendants from verbally or physically threatening Plaintiffs or otherwise interfering with Plaintiffs' access and use of their 12-foot easement on Lot 40; that Defendants be denied access to the Plaintiffs' easement unless they obtain prior Court approval; that Defendant be required to stay at a distance from Plaintiff of at least 600

feet; that Defendant be ordered to not carry a firearm when Plaintiff is on or near the easement; that Defendants be stopped from making/voicing verbal or physical threats against Plaintiffs; that Defendants be required to pay all costs for a covered pipe or culvert system to be placed the length of Plaintiffs' easement ditch; damage to the Plaintiffs' pasture; cost of hay and feed for livestock; rental cost to pasture the Plaintiffs livestock while the pasture is reseeded and re-established; and any and all other damages proven at trial.

D. For attorneys fees and costs pursuant to Idaho Code §§ 12-120 and 12-121, and I.R.C.P. 54.

E. For such and other relief as the Court deems proper and equitable.

PLAINTIFFS DEMAND A TRIAL BY JURY PURSUANT TO RULE 48 OF THE IRCP

DATED this 10th day of January, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2008, I served a true and correct copy of the foregoing AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
PERKINS COIE
251 East Front Street, Suite 400
P.O. Box 737
Boise, Idaho 83701-0737

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
__✓__ Facsimile

Nancy Jo Garrett

EXHIBIT A

000104

WARRANTY DEED

For Value Received HAROLD E. FORD and JANET B. FORD, husband and wife,

the grantors, do hereby grant, bargain, sell and convey unto CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife,

the grantee s the following described premises, to-wit: Canyon **County Idaho, to wit:**

PARCEL II:

A parcel of land in the FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being Lot 32 of said subdivision, consisting of 3.83 acres, more particularly described as follows:

BEGINNING at the quarter corner between Sections 3 and 10, Township 4 North, Range 3 West, Boise Meridian; thence North 0° 48' 00" East on the mid-section line 1326.5 feet to a point being the corner common Lots 32, 40, 33 and 41 of said subdivision and the real point of beginning; thence South 89° 06' 30" West along the line between Lots 33 and 32, 634.0 feet to a point; thence North 0° 45' 00" East along the West line of Lot 32, 331.8 feet to a point; thence North 89° 07' 40" East along the lot line between Lots 31 and 32, 634.3 feet to a point; thence South 0° 48' 00" West along the lot line between Lots 32 and 40, 331.6 feet to the real point of beginning; said Lot containing 4.83 acres more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including all water and ditch rights and rights of way for water and ditches.

Together with one-half share of water stock held in CANYON HILL DITCH COMPANY and one-half share of stock held in MIDDLETON MILL DITCH COMPANY.

Together with an easement along the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises; that said premises are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: April 19, 1973

Harold E. Ford

Janet B. Ford

EXHIBIT B

000106

INSTRUMENT NO. 9600007

QUITCLAIM DEED

For Value Received, HAROLD E. FORD, a single man dealing with his sole and separate property, hereinafter called the First Party, does by these presents remise, release and forever QUITCLAIM, unto LOIS RAWLINSON as her sole and separate property, of 23231 Freezeout Road, Caldwell, Idaho, hereinafter called the Second Party, and to Second Partys heirs and assigns, all title which first party now has or may hereafter acquire, in the following described real property, situated in Canyon County, State of Idaho, to-wit:

See exhibit "A" attached hereto and incorporated herein by this reference as though set forth in full.

Together with all water and ditch rights and rights of way for water and ditches appurtenant thereto.

First Party does hereby convey any and all right, title and interest, either contingent or vested and however arising, in and to the above-described real property that First Party may now have or may hereafter acquire.

TO HAVE AND TO HOLD, ALL and singular the said premises, together with any appurtenances thereto, unto the Second Party, and to Second Party's heirs and assigns forever.

IN WITNESS WHEREOF, The said First Party has hereunto set First Party's hand and seal this 2nd day of ~~December~~ January, ~~1995~~ 1996.

Harold E. Ford.

STATE OF IDAHO, COUNTY OF CANYON) ss.

On this 2nd day of ~~December~~ January, ~~1995~~ 1996, before me, a notary public in and for said State, personally appeared HAROLD E. FORD, known to me to be the person whose name is subscribed in the within instrument, and acknowledged to me that he executed the same.

(Seal) STARR NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at Caldwell
My Commission Expires: 3/10/2000

A parcel of land in the Fruitdale Farm Subdivision, Section 3, Township 4 North, Range 3 West of the Boise Meridian, Canyon County, Idaho, being Lot 40 of said Subdivision more particularly described as follows:

Beginning at the Quarter corner between Sections 3 and 10, Township 4 North, Range 3 West, Boise Meridian; thence North 0°48'00" East on the mid-section line 1326.5 feet to a point being the corner common to lots 32, 40, 33 and 41 of said Subdivision and the real point of beginning; thence North 89°01'10" East along the line between Lots 40 and 41, 638.2 feet to a point; thence North 0°46'40" East along the East line of Lot 40, 331.5 feet to a point; thence South 89°01'40" West along the lot line between Lots 39 and 40, 638.0 feet to a point; thence South 0°48'00" West along the lot line between Lots 32 and 40, 331.6 feet to the real point of beginning.

RECORDED

'96 JAN 2 - AM 9 45

CANYON CNTY RECORDER

REQUEST Harold Ford

TYPE Deed FEE 6.00

9600007

EXHIBIT "A"

EXHIBIT C

000109

GIFT DEED

For Value Received Love and [illegible]
GENICE RAWLINSON, a single person, do hereby convey, release, remise and forever gift unto JACKIE G. SCOTT and JOHN R. SCOTT whose current address is: P. O. Box 577, Middleton, Idaho 83644 the following described premises, to-wit:

A parcel of land in the FRUITDALE FARMS SUBDIVISION, Section 3, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being lot 40 as the same is shown on the official plat of said Subdivision on file in the office of the County Recorder of Canyon County, Idaho, more particularly described as follows:

BEGINNING at the Quarter corner between Sections 3 and 10, Township 4 North, Range 3 West of the Boise Meridian; thence

North 0° 48'00" East on the mid-section line a distance of 1,326.5 feet to a point being the corner common to Lots 32, 40, 33, and 41 of said Subdivision and the REAL POINT OF BEGINNING; thence

North 89° 01'10" East along the line between Lots 40 and 41, a distance of 638.2 feet to a point; thence

North 0° 46'40" East along the East line of Lot 40 a distance of 331.5 feet to a point; thence

South 89° 01'40" West along the Lot line between Lots 39 and 40 a distance of 638 feet to a point; thence

South 0° 48'00" West along the Lot line between Lots 32 and 40 a distance of 331.6 feet to the REAL POINT OF BEGINNING.

More commonly known as 23231 Freezeout Road.

together with all tenements, hereditaments, water. water rights, ditches, ditch rights, easements and appurtenances thereunto belonging or in anywise appertaining, and subject to any encumbrances or easements as appear of record or by use upon such property.

Dated September 13 2005

Genice Rawlinson
Genice Rawlinson, a single person

STATE OF IDAHO, COUNTY OF Washington

On this 13th day of September 2005, before me, a notary public in and for the said State, personally appeared GENICE RAWLINSON known to me to be the persons whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Patricia Darratt
Notary Public
Residing at [illegible], Idaho
Commission Expires 7-07

PATRICIA DARRATT
NOTARY PUBLIC
STATE OF IDAHO

RECORDED
2005 SEP 14 AM 11 17
CANYON CNTY RECORDER
G NOEL HALES
D.
Jackie Scott
FEE 30

2005578645

Shelly H. Cozakos, Bar No. 5374
SCozakos@perkinscoie.com
PERKINS COIE LLP
251 East Front Street, Suite 400
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

ORDER RE: PARTIAL DISMISSAL

This matter came before the Court on September 5, 2007 on Defendants' Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6). The Court, having reviewed the briefing submitted by the parties and considered oral argument and being fully advised in the premises, hereby ORDERS and this does ORDER:

1. The Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6) is GRANTED for the reasons set forth by the Court at the Status Conference on January 9, 2008; and

2. Count VI of Plaintiffs' Complaint is hereby dismissed. Plaintiffs are allowed to file an Amended Complaint.

JAN 22 2008

DATED: _____, 2008.

Renae Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

I, the undersigned, certify that on 1-23, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett
Bradley S. Richardson
BRASSEY, WETHERELL, CRAWFORD & GARRETT, LLP
203 W. Main St.
P.O. Box 1009
Boise, ID 83701-1009
FAX: 344-7077

Hand Delivery ____
U.S. Mail ✓
Facsimile ____
Overnight Mail ____

Shelly H. Cozakos
PERKINS COIE LLP
251 E. Front St., Ste. 400
P.O. Box 737
Boise, ID 83701-0737
FAX: 343-3232

Hand Delivery ____
U.S. Mail ✓
Facsimile ____
Overnight Mail ____

S Vasco
Deputy Clerk

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
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Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES

COME NOW, Plaintiffs Charles and Marjorie Bratton, by and through their counsel of record, Brassey, Wetherell, Crawford & Garrett, and hereby move the Court to grant its Motion to Amend the Complaint to Add Punitive Damages. The Court should grant should grant the instant Motion because there is a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. This Motion is brought pursuant to the Idaho Rules of Civil Procedure, including Rule 15(a) and Idaho Code § 6-1604. Further, this Motion is supported by the information contained in Plaintiffs' supporting Memorandum, the Affidavit of Charles Bratton in Support of the Motion to Amend the Complaint to Add Punitive Damages, and the files and pleadings of record.

Plaintiffs will call up the Court to request a hearing regarding this matter.

DATED this 6th day of February, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2008, I served a true and correct copy of the foregoing PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
PERKINS COIE
251 East Front Street, Suite 400
P.O. Box 737
Boise, Idaho 83701-0737

___ U.S. Mail, postage prepaid
___ Hand-Delivered
___ Overnight Mail
✓ Facsimile

_____
Nancy Jo Garrett

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
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Boise, Idaho 83701-1009
Telephone: (208) 344-7300
Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF CHARLES BRATTON IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES

STATE OF IDAHO)
) ss.
County of Ada)

Charles Bratton, being first duly sworn upon oath, deposes and states as follows:

1. I previously filed an Affidavit in Support of my Motion for Partial Summary Judgment in this matter, and again reassert the allegations contained therein in support of the instant Motion.

2. Defendants' threatening made me fear for my life and has caused me to worry greatly about the use of my water rights.

3. Defendants' conduct endangered the safety of my commercial livestock, as he initially placed pieces of concrete piping on my property, which could have caused any of my horses to break a leg.

4. Mr. and Mrs. Scott have had numerous altercations with the neighbors.

5. Upon information and belief, Mr. and/or Mrs. Scott shot a neighbors' pet cat that came onto their land.

6. Most of the neighbors and adjoining property owners have expressed to me that the Scotts are not to be trusted and have caused many problems around the neighborhood.

FURTHER YOUR AFFIANT SAITH NOT.

DATED this 6 day of February, 2008.

CHARLES BRATTON

SUBSCRIBED AND SWORN to before me this 6th day of February, 2008.

TINA N. SMITH NOTARY PUBLIC STATE OF IDAHO

~~Notary~~ Public for Idaho
Residing at Boise, Idaho
Commission expires: 5/10/08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos PERKINS COIE 251 East Front Street, Suite 400 P.O. Box 737 Boise, Idaho 83701-0737	___ U.S. Mail, postage prepaid ___ Hand-Delivered ___ Overnight Mail _/_ Facsimile

Nancy Jo Garrett

2/21- H

ORIGINAL

Nancy Jo Garrett (ISB No. 4026)
Bradley S. Richardson (ISB No. 7008)
BRASSEY, WETHERELL, CRAWFORD & GARRETT
203 W. Main Street
P.O. Box 1009
Boise, Idaho 83701-1009
Telephone: (208) 344-7300
Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton
and Marjorie I. Bratton

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON AND MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES

I.
INTRODUCTION

At a very minimum, there is a reasonable likelihood that Plaintiffs can prove facts sufficient to support an award of punitive damages at trial. In fact, Defendants' conduct is outrageous and an extreme deviation from reasonable standards. The record shows that Defendant threatened Plaintiff and did not allow him to use his long standing, 35 year old easement and legal water rights. Further, Defendant removed concrete piping and completely leveled and destroyed the subject 35 year old

irrigation ditch. These actions, among others, by Defendants show the unreasonableness of their conduct.

Please see affidavits filed in support of Plaintiffs' Motion for Partial Summary Judgment in which Defendant incorporates said affidavits herein, as well as the Affidavit of Charles Bratton filed contemporaneously herewith. Accordingly, the Court should allow Plaintiffs to amend their Complaint to add punitive damages so that these issues may be addressed at trial.

II.
ARGUMENT

The Court should grant Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages because Defendants acted in extreme deviation from reasonable standards of conduct, and with a disregard for the resultant consequences.

A. Legal Standards.

Pursuant to Idaho Rules of Civil Procedure 15(a), great liberty should be allowed in amending a party's pleading. Rule 15 states in pertinent part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleadings is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after its is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires, and the court may make such order for the payment of costs as it deems proper. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

I.R.C.P. 15(a) (emphasis added).

Although a claim for punitive damages cannot be included in the Complaint, a plaintiff may file a pretrial motion to amend the complaint, which shall be allowed where the moving party establishes a "reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." ***See*** I.C. § 6-1604(2).

The seminal decision on punitive damages in Idaho was announced by the Idaho Supreme Court in ***Cheney v. Polos Verdes Investment Corp.***, 104 Idaho 897, 664 P.2d 661 (1983). In ***Cheney***, the Idaho Supreme Court stated that an award of punitive damages would be sustained where the defendant acted in extreme deviation from reasonable standards of conduct, and where the act was performed with "an understanding of or disregard for its likely consequences." ***Id.*** at 905, 665 P.2d at 669. Often, an award of punitive damages is granted where there is a "bad act and a bad state of mind," which are shown where the defendant acts to violate another's legal right in a deliberate or grossly negligent manner. ***See Linscott v. Rainier National Life Insurance Co.***, 100 Idaho 854, 858, 606 P.2d 958, 962 (1980).

The case of ***Weaver v. Stafford***, 134 Idaho 691, 8 P.3d 1234 (2000), involved a situation analogous to the case at bar. In ***Weaver***, a land owner brought action against a neighbor for negligent interferences with water rights, to which the neighbor countered that he had acquired a prescriptive easement by implication. The trial court ultimately awarded punitive damages against the neighbor.

On appeal, the Idaho Supreme Court upheld the trial court's decision, holding there was competent evidence showing extremely unreasonable and malicious conduct by the neighbor. ***Id.*** at 700-01, 8 P.3d at 1243-44. In doing so, the Court recognized that the neighbor had "removed the original fence and filled in the original dirt ditch located between the cement irrigation ditch" and a surveyed boundary line. ***Id.*** Further, the Court stated that the neighbor had made "no measurements or any documentary record regarding the location of the original fence and dirt ditch."

Id. Finally, the Court emphasized that the neighbor had admitted at trial that the new dirt ditch was located on the property without the land owner's permission. *Id.* As a result, the Court upheld the trial court's decision for punitive damages. *Id.* at 700-01, 8 P.3d at 1243-44.

b. <u>The Court Should Grant the Instant Motion Because There is a Reasonable Likelihood of Proving Facts at Trial to Support an Award of Punitive Damages.</u>

At a minimum, there is at least a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Here, the record shows that Defendant Scott threatened Plaintiff, screaming that Plaintiff must leave the property and not return. *See* ¶ 11 of Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment, as previously filed with the Court. Similar to the situation in *Weaver*, Defendants removed part or all of the concrete pipe culverts from Plaintiffs' irrigation ditch. *See* ¶ 14 of Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment. Further, Defendants completely leveled and destroyed the subject irrigation ditch, and even attempted to create a new, smaller ditch outside the respective properly line. *Id.* This unreasonable and outrageous conduct by Defendant is well documented. *See* ¶ ¶ 15-16 of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment. Moreover, there is no evidence that Defendant made any measurements or a documented record regarding a location of the original irrigation ditch. *See Weaver*, 134 Idaho at 700, 8 P.3d at 1243. In addition, Defendants' conduct made Plaintiff fear for his life, and posed a danger to the livelihood and safety of his livestock. *See* ¶ 2 of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages.

Accordingly, there is more than sufficient evidence to support an award of damages. *See Weaver*, 134 Idaho at 700-01, 8 P.3d at 1243-44. As such, there is at a minimum a reasonable likelihood of proving these facts at trial to support an award of punitive damages. *See* I.C. § 6-1604.

Therefore, the Court should allow Plaintiffs to amend the Complaint to add a claim for punitive damages.

III.
CONCLUSION

Based upon the foregoing, Plaintiffs respectfully ask the Court to grant the instant Motion.

DATED this 6th day of February, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By _____
Nancy Jo Garrett, Of the Firm
Attorneys for Plaintiffs Charles E. Bratton and Marjorie I. Bratton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of ~~January~~ February, 2008, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos
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_____
Nancy Jo Garrett

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Telephone: 208.343.3434
Facsimile: 208.343.3232

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants John R. Scott and Jackie G. Scott ("the Scotts"), by and through their attorney of record Perkins Coie LLP, submit the following memorandum in opposition to Plaintiff's Motion for Partial Summary Judgment. This Memorandum is supported by the Affidavits of John Scott and Shelly H. Cozakos filed herewith.

I. INTRODUCTION

Plaintiffs Charles and Marjorie Bratton's ("the Brattons") are moving the Court for partial summary judgment on claims contained in their Amended Complaint. Plaintiffs are asking the Court to grant judgment as follows: (1) that Plaintiffs have an express easement

on Defendants' Property; (2) that Plaintiffs' have an implied easement by use on Defendants' Property; and (3) that Defendants' have infringed upon Plaintiffs' easement rights. This motion is premature and unsupported by the law and the Plaintiff's own testimony.

Plaintiffs' motion is premature with respect to its claim for an express easement. As contained in the Scotts' answer to the Amended Complaint, the Scotts do not dispute that there is an express easement of record on their property as set forth in a Warranty Deed attached as Exhibit A to the Amended Complaint. The easement, however, is limited to the scope set forth in the Warranty Deed. The undisputed facts do not support an expansion of this express easement by use or implication. Finally, many factual disputes exist precluding summary judgment on the issue of whether Defendants' have infringed upon Plaintiffs' easement rights.

II. FACTUAL BACKGROUND

1. Plaintiffs John and Jackie Scott, became owners of the property at 23231 Freezeout Road, Caldwell, Idaho on September 13, 2005. At the time they became owners of the property, they were unaware that it was encumbered by an express easement. (Scott Aff., ¶2.) This express easement is set forth in the Warranty Deed attached as Exhibit A to the Amended Complaint, and provides an easement for ingress and egress and maintenance of an irrigation ditch so that the Brattons' can have access to irrigation water on their property. The easement of record is three feet in width and 20 yards in length.

2. In the summer of 2006, shortly after the Scotts moved into the property, Mr Scott was using a tractor to mow down the weeds in a field on his property and accidentally ran into what appeared to be an irrigation ditch. The ditch was covered in very tall weeds and therefore was not visible. (Scott Aff., ¶3.)

3. That fall, in approximately October of 2006, Mr. Scott noticed a gentleman wandering on his property, who he later discovered to be Mr. Charles Bratton. Mr. Scott discussed at that time with Mr. Bratton that Mr. Bratton believed he had an easement along the fenceline for a ditch to allow irrigation water to reach his pasture which adjoins my field. Mr. Bratton indicated that he had been spraying and burning over the years to keep the weeds down. (Scott Aff., ¶4.) Because the Scotts did not want Mr. Bratton spraying or burning on my property, Mr. Scott offered to fix and maintain the ditch and keep the weeds mowed. Mr. Bratton agreed. (Scott Aff., ¶5.)

4. On approximately April 7 2007, Mr. Scott was outside working in his yard and noticed that Mr. Bratton had set fire to his property along the ditchline. The flames were extending well beyond the boundaries of the easement and onto the Scotts' property. The Scotts were unhappy that Mr. Bratton was burning our property and made clear to him that they no longer wanted him to do this. At no time did they ever threaten Mr. Bratton or do anything to threaten him. (Scott Aff., ¶6.)

5. This exchange on April 7, 2007 was not hostile. Mr. Scott offered to fix the ditch given that from his perspective it was in a state of disarray and had not been kept up. In addition, the ditch had been torn up in some parts when Mr. Scott accidentally ran his tractor wheels into it. Mr. Bratton agreed to this. (Scott Aff., ¶7.)

6. Mr. Scott had also noticed that Mr. Bratton was not accessing the easement in the area that he was supposed to according to the Warranty Deed. He therefore placed a no trespassing sign on his property well away from the boundaries of the easement in order to keep Mr. Bratton from accessing his property in any area he was not supposed to and for any purpose other than the purpose allowed for in the easement, which is to maintain the

irrigation ditch. The sign was removed several weeks later. (Scott Aff., ¶8.)

7. On approximately April 9, 2007, Mr. Scott fixed the ditch by removing old and torn up concrete culvert pipes that were lying randomly in the ditch and then used a tractor to clean up the ditch and make it straighter. Mr. Scott did not destroy the ditch or alter it in any manner so that Mr. Bratton was unable to get his irrigation water. From Mr. Scott's perspective, the ditch looked much better after he fixed it than before. (Scott Aff., ¶9.)

8. After Mr. Scott fixed the irrigation ditch, it worked fine. When turned on, water ran through the ditch and on to Mr. Bratton's property. The irrigation ditch that exists now works properly and delivers sufficient water to Mr. Bratton's property (Scott Aff., ¶10.)

9. At no time did Mr. Scott tell Mr. Bratton that he could not access the easement to turn the water on. In fact, he made clear through his attorney that he was free to do so. The Scotts even offered to turn the water on for him, but he declined. (Scott Aff., ¶11; Cozakos Aff., Exhibit B.)

III. LEGAL STANDARD

In ruling on a motion for summary judgment made pursuant to Rule 56 of the Idaho Rules of Civil Procedure, the Court must review the pleadings, depositions, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). The moving party bears the burden of proving the absence of material facts. *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). When considering a Rule 56 motion for summary judgment, the Court must liberally construe the facts in the existing record in favor of the nonmoving party and draw all reasonable inferences from the record in

favor of the nonmoving party. *State v. Rubbermaid, Inc.*, 129 Idaho 353, 356, 924 P.2d 615, 618 (1996). If there are conflicting inferences contained in the record, or if reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

IV. ARGUMENT

Plaintiffs are moving for summary judgment as follows: (A) that Plaintiffs have an express easement on Defendants' Property; (B) that Plaintiffs' have an implied easement by use on Defendants' Property; and (C) that Defendants' have infringed upon Plaintiffs' easement rights. Defendants will address these issues in the same order as set forth in Plaintiffs' Memorandum.

A. There Is No Dispute That An Express Easement Exists In Favor of Plaintiffs As A Matter of Record.

When the Brattons' purchased their property from Mr. Ford in 1973, a Warranty Deed was executed containing an express easement. (See, Exhibit A to Amended Complaint, hereinafter referred to as the "Express Easement"). The Scotts do not dispute the existence of the Express Easement. The Scotts do not dispute that the Brattons' easement rights are set forth in the Express Easement. The Scotts have never disputed this right. It is not necessary for the Court to enter judgment in favor of Plaintiffs on this issue. Plaintiffs' rights are clearly set forth in the Warranty Deed and a judgment is therefore not warranted or necessary.

B. Plaintiffs Cannot Satisfy All Required Elements For An Implied Easement By Prior Use.

Plaintiffs next argue that they are entitled to an implied easement based upon use. Plaintiffs claim that the implied easement is twelve foot wide, as opposed to the three-foot

wide easement set forth in the Warranty Deed. Plaintiffs allege that they have been using the additional nine feet with the permission of the former owner, Harold Ford, and the additional nine feet was used for burning and spraying and occasional tractor use. Plaintiffs argue they meet the elements for such an easement as set forth in *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.2d 392, 395 (2006). Yet based upon the testimony of Mr. Bratton himself, Plaintiffs cannot establish the second required element to establish such an easement and their claim should be denied as a matter of law.

Plaintiffs correctly cite the elements they must prove as follows: (1) unity of title of ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough **before conveyance 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. *Id.* (emphasis added.) The Scotts do not dispute that Plaintiffs meet the first required element; yet as a matter of law Plaintiffs do not meet the second element, and the third element contains issue of fact precluding summary judgment.

1. Plaintiffs' Apparent Continuous Use Arose After Conveyance of the Dominant Estate.

In order to satisfy the second element of an implied easement by prior use, Plaintiffs must show that the use occurred *prior to separation* of the dominant and servient estate, for a duration long enough before separation to show that the use was intended to be permanent. *Thomas*, 142 Idaho at 638. *See also, Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999). In other words, an easement by implied reservation "must arise at a time when there is unity of title." 25 AmJur.2d, Easements and Licenses, § 25. This element appears to be standard among jurisdictions and is explained further follows:

> In order to establish an implied easement by prior use, the

> property must have been openly used in a manner constituting a quasi-easement while it was in a single ownership. Upon severance, the common grantor should manifest an intent that the quasi-easement continue as a true easement.

Id., *see also, Davis v. Peacock*, 133 Idaho 637, 642, 991 P.2d 362, 367 (in order to establish an implied easement by prior use, there must be "apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent . . .")

For example, in *Davis, supra*, the Court held that the second element for establishing an implied easement by prior use was satisfied because at the time of the severance of the servient and dominant estate, the use had existed. Specifically, the Court found that an implied easement by use had arisen for the use of a road over the servient estate. In finding the first two required elements had been met, the Court noted that "both parties agree the road was in existence at the time of the severance and that the [previous owners] had made apparent and continuous use of the road sufficient to show that the use was intended to be permanent." *Id.*, 133 Idaho at 642. The Court also explained that the present day test for an implied easement is whether the "grantee had notice of the preexisting use and the use was necessary to the full enjoyment of the dominant estate." *Id.*, 133 Idaho at 641.

Plaintiffs cannot establish the second element because the irrigation ditch easement was not created until after the Bratton's purchased the property. During his deposition, Mr. Bratton testified as follows:

> Q. So how did the easement come about. In other words did you request it from Mr. Ford?
>
> A. I told him I wouldn't buy the property unless I had my own ditch and I wanted to have the easement cuz I didn't want to have a water problem. He wanted me to take the water through Mr. Memmelaar's place and I said no that won't work I want my own ditch and my own easement [sic] my own headgate

. . .

Q. When you and Mr. Ford first made the ditch that had been sitting there since 1973 when was that ditch dig and constructed?

A. Right after I bought the property.

(Bratton Deposition, pp. 13,113, Exhibit A to Cozakos Aff.)

Thus, it is undisputed that the irrigation ditch was not created until after the Bratton's purchased the property from Mr. Ford. Because the use occurred after separation of the dominant and servient estate, as a matter of law Plaintiffs cannot establish the second element of an implied easement by prior use.

2. Issues of Fact Exist With Respect To The Element of Reasonable Necessity.

Even assuming Plaintiffs can somehow prove the second requirement element, under the third element of an implied easement from prior use, Plaintiffs must show that the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Davis*, 133 Idaho at 642. The use of the suggested implied easement in this case is for the Brattons' to have access to irrigation water for their pasture. Plaintiffs have not established as a matter of law that the Express Easement does not provide them with this need. Mr. Bratton has testified that for many years he burned and sprayed the weeds along the ditch and used a tractor within a twelve-foot wide area. Even if this were true, this does not establish as a matter of law that the ditch cannot be reasonably maintained within the three-foot wide boundary of the Express Easement. There also is no evidence to suggest that burning the Scotts' property within a twelve-foot wide area is the only reasonably necessary way to maintain the irrigation ditch.

In contrast, Mr. Scott has testified that the ditch works fine now, and delivers

sufficient water to Mr. Bratton's property. (Scott Aff., § 10.) Too many factual disputes exist for the Court to enter judgment as a matter of law on the third required element for an implied easement by prior use.

C. Plaintiffs Should Not Be Allowed to Contradict The Terms of the Express Easement.

Plaintiffs are improperly asking the Court to contradict the terms of the Express Easement. Plaintiffs are arguing that they should have an implied easement that is exactly the same as the Express Easement, with the exception of expanding the width from three feet to twelve feet. Plaintiffs should not be allowed to do so, given that they fully agreed to the terms of the Warranty Deed and purchased the property in full agreement of an easement three feet in width.

D. Factual Disputes Exist Precluding Summary Judgment on the Issue of Infringement of Plaintiffs' Easement Rights.

Plaintiffs are asking the Court to issue a judgment as a matter of law that Defendants have infringed upon their easement rights. Yet the evidence on this issue is highly contested. Mr. Scott testified that he has not prevented the Brattons from ingress and egress to the easement, only from burning on his property and accessing the easement from any point that Mr. Bratton thinks is convenient to do so. Apparently Mr. Bratton has taken the position that he does not have to abide by the terms of the Express Easement, or the implied easement by prior use that he is asking the Court to determine. Indeed, at his deposition Mr. Bratton testified that he had been accessing the easement form whatever point on the Scotts' property was convenient:

> Q. Okay. Why have you no accessed it over here right along the ditch?
>
> A. Because its muddy there hard to walk in it sometimes.

> Besides over here there's a place underneath where its easier to crawl under.

(Bratton Deposition, p. 27, Exhibit A to Cozakos Aff.)

Moreover, Mr. Bratton has the attitude that he can do whatever he wants on the easement, without regard to the rights of the owner of the property:

> Q. Do you think that that's your easement [sic] you can do anything you want on it Mr. Bratton?
>
> A. To get my water yes.
>
> Q. Do you think that you have to consider [sic] accessing your water the rights of the owners of the property here as well?
>
> A. No not really.

(Bratton Deposition, p. 35, Exhibit A to Cozakos Aff.)

Given Mr. Bratton's attitude with respect to the easement, and the fact that he was burning the Scotts' property well beyond the boundaries of the easement, the Scotts were more than justified in placing a no trespassing sign on their property in a place where Mr. Bratton did not need to be to access the easement. The ditch as it exists now provides water to the Brattons' property, and so there has been no interference with Plaintiffs' easement rights by the Scotts. (See, Scott Aff., ¶ 10.) The Scotts have not precluded Plaintiffs from turning on the water, and even offered to do it for him. (Id.) Thus, judgment as a matter of law on this issue is not substantiated and should be denied.

V. CONCLUSION

For the above-stated reasons, the Scotts respectfully request that the Plaintiffs' motion for partial summary judgment be denied.

DATED: February 11, 2008.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 11, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett
Bradley S. Richardson
BRASSEY, WETHERELL, CRAWFORD & GARRETT, LLP
203 W. Main St.
P.O. Box 1009
Boise, ID 83701-1009
FAX: 344-7077

Hand Delivery	____
U.S. Mail	X
Facsimile	X
Overnight Mail	____

_____
Shelly H. Cozakos

ORIGINAL

FILED
A.M. P.M.
FEB 11 2008
CANYON COUNTY CLERK
J DRAKE, DEPUTY

Shelly H. Cozakos, Bar No. 5374
SCozakos@perkinscoie.com
PERKINS COIE LLP
251 East Front Street, Suite 400
Boise, ID 83702-7310
Telephone: 208.343.3434
Facsimile: 208.343.3232

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF SHELLY H. COZAKOS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
: ss.
County of Ada)

SHELLY H. COZAKOS, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record for the Defendants in the above matter and as such have personal knowledge of the facts stated herein.

2. Attached hereto as Exhibit A are excerpts of the Rough Draft of the Reporter's Notes for the Deposition of Charles Bratton taken on February 6, 2008. A true and correct copy of the excerpts of the February 6, 2008 Deposition of Charles Bratton will be provided upon receipt from the Court Reporter.

3. Attached hereto as Exhibit B is a true and correct copy of an email string between Plaintiffs' counsel and me dated June 6, 2007 through June 13, 2007.

SHELLY H. COZAKOS

SUBSCRIBED AND SWORN to before me this 11 day of February 2008.

Notary Public for Idaho -
Residing at Boise
My Commission Expires 9/19/2010

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 11, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett
Bradley S. Richardson
BRASSEY, WETHERELL, CRAWFORD & GARRETT, LLP
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P.O. Box 1009
Boise, ID 83701-1009
FAX: 344-7077

Hand Delivery	
U.S. Mail	X
Facsimile	X
Overnight Mail	

Shelly H. Cozakos

WARNING: This is a ROUGH DRAFT of the Reporter's notes. It is provided for your convenience and is not intended nor represented to be a final certified transcript.

DEPOSITION OF CHARLES BRATTON

TAKEN ON FEBRUARY 6, 2008

P R O C E E D I N G S

WITNESS NAME,,

first duly sworn to tell the truth relating to said cause, testified as follows:

EXAMINATION

QUESTIONS BY MS. COZAKOS:

Q. Good morning Mr. Bratton we've met I'm Shelley Cozakos one of the attorneys for Jackie and John Scott have you ever had your deposition taken before?

A. Once.

Q. How long ago was that? How long?

MS. GARRETT: He's thinking.

MS. COZAKOS: Sorry.

THE WITNESS: About 20 years.

EXHIBIT

tabbies

A

him that your lawyer wanted to talk to him is that correct?
A. Yes.
Q. What else did you two talk about?
A. Nothing. I left.
Q. Did you talk about have you talked to him about the ditch or the easement at all recently in the last say year?
A. Not particularly, no.
Q. So you haven't talked to him about that at all is that correct?
A. The only thing I asked him about it I asked him about the easement and he said well I give you three feet and then I told you you could have 12 feet because you had to have enough room to take the tractor down and turn it around. So he said you have 12 feet of easement in there and you always have had 12 feet.
Q. When did you tell you that?
A. Well he told me that when I first got the place after we were talking about it. And I said you can't turn a tractor down there he said no you've got a 12 foot easement through there to turn your tractor in there.
Q. He told you that when you first moved

in?
A. Yeah when he was first doing the ditch, yes.
Q. The ditch existed when you first moved in 1973?
A. No.
Q. Is that correct?
A. No.
Q. Just line let me finish the sentence?
A. Okay.
Q. We can't talk over one another.
So when did the ditch come into existence then?
A. When I bought the place I told him I had to have my own ditch, so he said I'll put it in.
Q. Okay. And then did he put the ditch in?
A. Yes.
Q. Or I guess he dug the ditch would be the rate way to say it is that right?
A. He put it within tractor.
Q. So Mr. Ford is the one that constructed the ditch is that right?
A. Yes.

Q. And how far away from that fence that neighbors the property that runs along the property was the ditch when Mr. Ford still when Mr. Ford initially constructed it do you know?
MS. GARRETT: I'll object to the form of the question foundation. Are you talking about the edge of the ditch middle of the ditch.
MS. COZAKOS: Well yeah.
Q. (BY MS. COZAKOS) Do you understand the question?
MS. GARRETT: If you understand how far from the fence just explain your answer.
THE WITNESS: It was probably four or five feet but I never measured it.
Q. (BY MS. COZAKOS) Okay. If you started from the fence and then measured to the outside edge of the ditch how many feet do you suppose that was when Mr. Ford first constructed it?
A. Well he had to have room to get the tractor down so I'd say probably five feet at least.
Q. So was it beyond did it extend beyond the three feet in width that set forth in this easement on Exhibit 1?
A. Yes. I'd say so.

Q. When you purchased the property from Mr. Ford there was no ditch along that fence line is that correct?
A. Yes.
Q. And so was there an easement to your knowledge that existed along that fence line?
MS. GARRETT: Object to the form of the question you can answer if you can.
THE WITNESS: Well the easement was put in when I bought the place. It wasn't there before.
MS. COZAKOS: Okay.
THE WITNESS: I bought it from him.
Q. (BY MS. COZAKOS) Gotcha and there was no easement already?
A. No.
Q. So how did the easement come about. In other words did you request it from Mr. Ford?
A. I told him I wouldn't buy the property unless I had my own ditch and I wanted to have the easement cuz I didn't want to have a water problem. He wanted me to take the water through Mr. Memmelaar's place and I said no that won't work I want my own ditch my own easement my own headgate.

either of these things fair question.
MS. GARRETT: He's been going that path for 35 years he doesn't know if he owns that as an easement or not.
MS. COZAKOS: Okay.
Q. (BY MS. COZAKOS) Do you think you may have some sort of easement in the path you've been walking over all these years Mr. Bratton?
A. Yes, I do.
Q. And is it the exact same path that you've taken all these years?
A. No.
Q. Okay. So if you think you have some sort of easement or a walking path where would it be?
A. Anywhere that I walked up there in the 35 years.
Q. All right. Aside from this walking easement that you've just told me about, you don't own the property this property right here correct and never have?
A. No.
Q. Okay. Why have you not accessed it over here right along the ditch?
A. Because it's muddy there hard to walk

in it sometimes. Besides over here there's a place underneath where it's easier to crawl under.
Q. In the fence?
A. Um-hmm.
Q. Does Mr. Ford ever say that he was going to give you an easement to walk in this area to access your ditch, the ditch rather?
A. Never talked about it.
Q. Okay. And so after the time Mr. Ford dug the ditch along this fence post, has it always stayed in the same location?
A. Yes.
Q. And what have you used the dip for over the years Mr. Bratton?
A. To irrigate my pasture.
Q. And show me where your pasture is?
A. Marking.
Q. In there? Okay. What have you been keeping on this pasture?
A. Horses.
Q. Over the years only horses?
A. Only horses.
Q. How many horses?
A. 10 to 12.

Q. How many do you have on there now?
A. There's eight on there right now. I have 10, though.
Q. And under Exhibit 1, it looks like you were deeded a one-half share of water stock held in Canyon Hill Ditch Company? Do you see that on the deed? It's on about the third paragraph down.
A. Yes and there's another half with the Middleton ditch company.
Q. Yes. And so you were deeded one-half share of water stock Canyon Hill Ditch Company and one-half share of stock and that would be water stock I'm guessing in the Middleton ditch company correct?
A. Yes.
Q. And how much water have you been using to irrigate your pasture over the years?
A. All I need. I'm at the end of the ditch, so if there's water there I can use it so I never have any problem with it.
Q. Have you been using more than your one-half shares?
A. I doubt it.
Q. What does one-half share equate to?

A. I'm not really sure.
Q. Is it one-half acre?
A. I don't think so.
Q. No? You don't know?
A. I don't know.
Q. So in order to start the water running down the ditch, you turn it on right up around here correct?
A. Yes.
Q. And how do you turn it on?
A. As a headgate.
Q. Okay. Do you lift it up or how do you do it?
A. Turn it.
Q. Oh, okay. And then how long do you let it run typically?
A. Till it goes across the pasture. That maybe a day day-and-a-half.
Q. When is the water season in other words during what months do you get water down the ditch?
A. I think it comes in about April 15th and runs to about October.
Q. And how often per week have you been turning on the water?

Q. Do you recall meeting Mr. Scott in the fall of 2006?
A. I think I may have. I think he came down and said he had a bunch of fence posts he wanted to sell me that he would taken out or something. I didn't know anything about it. He wanted six or eight dollars for them and I knew that was not reasonable, so I said no. And I think that was about the end of the conversation.
Q. Did you talk to him in the fall of '06 about burning and spraying?
A. No.
Q. Okay. Do you recall Mr. Scott asking you not to burn or spray in the fall of '06?
A. No I don't. He didn't do that till he run down there when I was burning. And that's when he said you can't burn you can't spray this is my property and I know what the law is. That's the first time I heard it.
Q. Do you recall agreeing that you would not burn or spray on the property and he would keep the weeds mowed down?
A. No I don't remember that.
Q. So first met Mr. Scott in around the fall of '06 when you were talking about the fence

posts. And then in the spring of '07 you weren't aware that he was living there is that correct?
A. No not really because I told you I didn't know what was going on up there. That wasn't my business so I never paid any attention to what was going on up there.
Q. Didn't you think you might want to talk to someone that maybe living before you started burning?
A. No because my easement my ditch and my right to a burn which I had been doing for 35 years.
Q. It wasn't your fence, though, is that correct?
A. No it wasn't my fence.
Q. Do you think that that's your easement you can do anything you want on it Mr. Bratton?
A. To get my water yes.
Q. Do you think that you have to consider accessing your water the rights of the owners of the property here as well?
A. No not really.
Q. When you were aware at some point that Mr. Scott had ran into the ditch with his tractor?

A. No.
Q. You're not aware of that?
A. No.
Q. When Mr. Scott approached you in April of '07 when you were burning there on the property, did he try and stomp out some of the flames?
A. Well he was running up and down the ditch like a mad dog yelling at me. I don't know what he was doing to be truthful with you.
Q. Did you see him try and stamp out the flames?
A. No. I didn't pay any attention to him because I figured this guy half nuts so I wanted to burn my ditch and get out of there.
Q. Okay. Did you know that he owned this property here when he approached you?
A. Not really.
Q. What do you mean not really?
A. Well I didn't even really think about it. I just knew that I was on my easement burning my ditch and that he had no right coming down there harassing me bullying me. And he was yelling and I couldn't even understand half of what he was saying he was so mad.

Q. Do you think he was mad because there were flames that were on his property?
A. No he was just mad I was there.
Q. Had nothing to do with the fire that had been set?
A. Oh, yeah he didn't want me burn. You can't burn the ditch and you can't spray weeds well I have to spray the weeds because he has morning glory on his property they come down on my property I don't know them on there so I spray them on my easement.
Q. Can you mow the weed?
A. Can I mow them.
Q. Can they be mowed?
A. It doesn't do any good to mow morning glory you've got to kill them. Mowing does no good.
Q. Mowing won't keep them with the water running down the ditch?
A. The morning glory.
Q. Right?
A. Morning glory don't keep water coming down the ditch they float down the ditch come on my property and you can't guest rid of them.
Q. If they are mowed down are they still

eat very good. I only eat about two meals a day anymore. I just don't feel like it.
Q. (BY MS. COZAKOS) Any other emotional distress that you've been caused because of the Scotts?
A. No.
Q. Do you have any problems with your memory Mr. Bratton?
A. No.
MS. COZAKOS: I don't think I have any other questions. Do you have questions Nancy.
MS. GARRETT: Yeah I may. Why don't you step out with me Charles.
(A brief recess was taken.)
EXAMINATION
QUESTIONS BY MS. GARRETT
Q. Now Mr. Bratton I have a few questions. I want to you to look at Exhibit 2 okay. And I want you to look at what I'm going to call B three of the exhibits to the summary judgment. And it's a picture of a no trespassing sign and then a picture of your fence, is it not?
A. Yes.
Q. I want you to look at your Exhibit No. 2 that you drew that you call the fine art, and I

want you to take a red pen and put an X on Exhibit 2 where that no trespassing sign exists on Scott property?
A. (Witness complied.)
Q. Make a big one?
A. (Witness complied.)
Q. Okay. Now is that X where you usually go in and out of?
A. Yes.
Q. The Scott property? Okay thank you?
A. There's a place under the fence where you can go there easy.
Q. Did you ask Mr. Waylon who is one of the Scotts neighbors for a bid on redoing the ditch in its original spot?
A. Yes.
Q. Okay. And what did he and is he a someone that is a professional ditch digger so to speak?
A. That's his business he has a backhoe and does that work.
Q. And how much did he say would cost -- now this is in May of 2007. In May of 2007 to redo your ditch above ground?
A. About $500.

Q. Okay. And did you also ask him an estimate of how much it would cost to redo the ditch if you put in underground pipe?
A. Yes did I.
Q. And how much did he say about?
A. About five thousand dollars.
Q. Is there anyone else that's one of your neighbors that has an underground pipe ditch now?
A. Yes the people to the west of me.
Q. Okay.
A. Steve put that in by the way.
Q. Did Mr. Waylon say that there were any conditions for him to do the work?
A. Said the only way he would do the work is have a deputy sheriff come out there and stay with him while he dug it up.
Q. And did you understand why wanted that?
A. I assumed that he thought that he was dangerous.
MS. COZAKOS: I'll just object speculation lack of foundation. Sorry to interrupt yo.
MS. GARRETT: I'll try to change it.
Q. (BY MS. GARRETT) Did he tell you why he wanted sheriff there?

A. Because he didn't trust him wanted sheriff there make sure safe for him to do it.
Q. Who didn't he trust?
A. Mr. Scott.
Q. Okay. When we were at the ditch in June of 2007 and Ms. Cozakos was there and clients were there how long was the water turned into that low spot?
A. Just a few minutes like five minutes or so because didn't want to wash the ditch out.
Q. Why didn't you want to wash dish out?
A. Because I didn't want to wash that stuff down in my field.
Q. When you and Mr. Ford first made the ditch that had been sitting there since 1973 when was that ditch dug and constructed?
A. Right after I bought the property.
Q. So you bought the property in April?
A. And bought the property in April and we had to have a ditch dug so he did it right away.
Q. And when was the time that he afforded you that 12 feet easement?
A. He told me have to have a tractor to clean ditch out and have to have at least 12 feet.

Cozakos, Shelly (Perkins Coie)

From: Nancy Garrett [njg@brassey.net]
Sent: Wednesday, June 13, 2007 1:09 PM
To: Cozakos, Shelly (Perkins Coie)
Subject: RE: the ditch

I will provide my client with your email. I do not share your position and there is absolutely no truth to the statement that Mr. Scotts destroyed the ditch with Mr. Bratton's approval. Nancy Jo Garrett

---

From: Cozakos, Shelly (Perkins Coie) [mailto:SCozakos@perkinscoie.com]
Sent: Tuesday, June 12, 2007 1:46 PM
To: Nancy Garrett
Subject: RE: the ditch

Nancy:
Thank you for the information. Given that our clients are neighbors, I think it would be better for them if we try and work together rather than continue the accusations which are becoming personal to Mr. Scott and not conducive to working this dispute out.

That said, I am sure you will agree that it is not illegal for the Scotts to place no trespassing signs on their property. They are not precluding Mr. Bratton from maintaining or using the ditch. My client assures me that water will flow to Mr. Bratton's property if he turns it on. If your client insists this is not the case, perhaps we should schedule a viewing of the property and demonstration of water flow so we can put this issue to rest.

As I explained in my last letter, the Scotts did not destroy the ditch. Mr. Bratton was not properly maintaining the ditch, and the concrete culverts were lying in the ditch not being used, and the Scotts made an effort to clean it up. They did so with Mr. Bratton's approval. They tried to return to him the culverts but he refused.

Your client is welcome to install an underground ditch, but asking the Scotts to pay for it is not supported by the law or the facts at this juncture.

I am available to discuss this further once you have had an opportunity to discuss the photos I sent with your client. Best regards, Shelly Cozakos.

Shelly H. Cozakos
Perkins Coie LLP
251 East Front Street
Ste. 400
Boise, Idaho 83702
(208) 343-3434 (phone)
(208) 343-3232 (facsimile)

From: Nancy Garrett [mailto:njg@brassey.net]
Sent: Tuesday, June 12, 2007 12:48 PM
To: Cozakos, Shelly (Perkins Coie)
Subject: RE: the ditch

EXHIBIT
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June 12, 2007

Ms. Cozakos;

I have received and reviewed your email and attachment. I will discuss your position with my client as soon as possible, but do want to inform you of some further information.

After your client demolished Mr. Bratton's ditch, he placed a "groove" adjacent to his fence line. Mr. Bratton had this groove evaluated by a person that professionally digs ditches and waterways. He informed Mr. Bratton something that Mr. Bratton already knew, in that the groove will not hold and deliver the water to Mr. Bratton's property and it will also erode into the Scott's fence line. Further, the groove is not located in the easement, but rather is on the outside border of the easement. With the position of the groove, there would not be a way to maintain the groove due to its proximity to the Scott's fence line. In summary, the groove is not a replacement of Mr. Bratton's ditch, it is not located in the easement as established by more than 30 years of use, it will not function to supply water to Mr. Bratton's property, it will erode the Scott fence line, and because of it's proximity to the Scott's fence line it can not be maintained.

I have also been informed that since we last spoke, Mr. Scott has posted at least 2 more no trespassing signs near the easement.

Further, Mr. Bratton attended the ditch association meeting this week to inquire regarding his water rights. The board informed him that they too have had difficulty with Mr. Scott and that the Board would assist Mr. Bratton in any way they could in his dispute with Mr. Scott. They told Mr. Bratton that it was their position that Mr. Scott not only would have to pay for the replacement of the ditch, but also for any costs Mr. Bratton has incurred to include the cost of purchasing hay to feed his horses in the fall as well as his legal fees. It also appears that Mr. Scott has had disputes over water and water rights with more than just Mr. Bratton and his other neighbors.

I will contact you after I have shared your email with my client, but I continue to proffer a solution of placing an in ground culvert that will not require my client to enter onto your client's property except to open and close the head gate.

Nancy Jo Garrett

From: Cozakos, Shelly (Perkins Coie) [mailto:SCozakos@perkinscoie.com]
Sent: Wednesday, June 06, 2007 1:30 PM
To: Nancy Garrett
Subject: FW: the ditch

From: Cozakos, Shelly (Perkins Coie)
Sent: Wednesday, June 06, 2007 1:13 PM
To: 'nig@brassey.net'
Subject: FW: the ditch

Nancy: I spoke to the Scotts about the issue of whether the ditch on their property has been filled with dirt. They assured me they have not done this, and sent me the attached photos showing the ditch as it is now. According to the Scotts, the reason Mr. Bratton is not getting water is because he is not turning it on. If he does so, irrigation water will flow to his property as it always has. In order to put this issue to rest, we could schedule a time for you to view the ditch on my client's property and see that it has not been filled in with dirt. My clients assure me they have not threatened Mr. Bratton in any manner. Most times when he would need to turn the water on they are no where in the vicinity. Mr. Bratton should feel free to turn the water on as he needs to so water gets to his property, which is the purpose of the easement.
I am still available to speak Monday morning. Thank you. Shelly Cozakos.

Shelly H. Cozakos
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Sent: Wednesday, June 06, 2007 1:05 PM
To: Cozakos, Shelly (Perkins Coie)
Subject: the ditch

ORIGINAL

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF JOHN R. SCOTT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
: ss.
County of Ada)

JOHN R. SCOTT, being first duly sworn upon oath, deposes and says:

1. I am one of the Defendants in the above matter and as such have personal knowledge of the facts stated herein.

2. My wife, Jackie Scott, and I became owners of the property at 23231 Freezeout Road, Caldwell, Idaho on September 13, 2005. At the time we became owners of the property, I was unaware that it was encumbered by an express easement.

3. In the summer of 2006, shortly after I moved into the property, I was using a tractor to mow down the weeds in a field on my property and accidentally ran into what appeared to be an irrigation ditch. The ditch was covered in very tall weeds and therefore was not visible.

4. That fall, in approximately October of 2006, I noticed a gentleman wandering on my property, who I later discovered to be Mr. Charles Bratton. I discussed at that time with Mr. Bratton that he believed he had an easement along the fenceline for a ditch to allow irrigation water to reach his pasture which adjoins our field. Mr. Bratton indicated at the time that he had been spraying and burning over the years to keep the weeds down.

5. Because I did not want him spraying or burning on my property, I offered to fix and maintain the ditch and keep the weeds mowed. Mr. Bratton agreed.

6. On approximately April 7 2007, I was outside working in my yard and noticed that Mr. Bratton had set fire to my property along the ditchline. The flames were extending well beyond the boundaries of the easement and onto my property. My wife and I were unhappy that Mr. Bratton was burning our property and made clear to him that we no longer wanted him to do this. At no time did we ever threaten Mr. Bratton or do anything to make him feel threatened. We simply did not want him destroying our property.

7. I did not consider our exchange on April 7, 2007, to be hostile in any manner. In fact, I offered to fix the ditch given that from my perspective it was in a state of disarray and had not been kept up. In addition, the ditch had been torn up in some parts when I accidentally ran my tractor wheels into it. Mr. Bratton agreed to this.

8. I had also noticed that Mr. Bratton was not accessing the easement in the area that he was supposed to according to the Warranty Deed. I therefore placed a no trespassing

sign on my property well away from the boundaries of the easement in order to keep him from accessing my property in any area he was not supposed to and for any purpose other than the purpose allowed for in the easement, which is to maintain the irrigation ditch. I removed the sign several weeks later.

9. On approximately April 9, 2007, I fixed the ditch by removing old and torn up concrete culvert pipes that were lying randomly in the ditch and then used a tractor to clean up the ditch and make it straighter. At no time did I destroy the ditch or alter it in any manner so that Mr. Bratton was unable to get his irrigation water. From my perspective, the ditch looked much better after I fixed it than before.

10. After I fixed the irrigation ditch, it worked fine. When turned on, water ran through the ditch and on to Mr. Bratton's property. There is no need for the three-foot wide easement to be expanded to twelve feet as suggested by Mr. Bratton. The irrigation ditch that exists now works properly and delivers sufficient water to Mr. Bratton's property

11. At no time did I ever tell Mr. Bratton that he could not access the easement to turn the water on. In fact, I made clear through my attorney that he was free to do so. I even offered to turn the water on for him, but he declined.

JOHN R. SCOTT

SUBSCRIBED AND SWORN to before me this 11 day of February 2008.

LAURIE A. LOYD NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise
My Commission Expires 9/19/2010

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 11, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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Shelly H. Cozakos

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES

Defendants John R. Scott and Jackie G. Scott ("the Scotts"), by and through their attorney of record Perkins Coie LLP, submit the following memorandum in opposition to Plaintiff's Motion to Amend the Complaint to Add Punitive Damages. This Memorandum is supported by the Affidavit of Shelly H. Cozakos filed herewith and the Affidavit of John Scott filed in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Scott Aff.").

I. INTRODUCTION

Plaintiffs are asking the Court to allow them to amend their Complaint to add a claim for punitive damages against Defendants. Plaintiffs have not come close to meeting the high

legal burden for such an amendment. Based upon Plaintiff Charles Bratton's own testimony during his deposition, he was not threatened with harm by the Defendants. There is no evidence in the record to establish that Defendants acted toward Plaintiff with the requisite intent to cause harm or with a harmful state of mind. The Scotts simply did not want Mr. Bratton burning their property, and told him so during one encounter in April, 2007. John Scott then cleaned up the ditch contained in the easement, with the approval of Mr. Bratton. The irrigation ditch works fine and delivers water to Plaintiffs' property. Allowing Plaintiffs to pursue a claim for punitive damages is completely unwarranted and their motion should be denied.

II. FACTUAL BACKGROUND

Plaintiffs John and Jackie Scott, became owners of the property at 23231 Freezeout Road, Caldwell, Idaho on September 13, 2005. At the time they became owners of the property, they were unaware that it was encumbered by an express easement. (Scott Aff., ¶2.) This express easement is set forth in the Warranty Deed attached as Exhibit A to the Amended Complaint, and provides an easement for ingress and egress and maintenance of an irrigation ditch so that the Brattons' can have access to irrigation water on their property. The easement of record is three feet in width and 20 yards in length.

In the summer of 2006, shortly after the Scotts moved into the property, Mr Scott was using a tractor to mow down the weeds in a field on his property and accidentally ran into what appeared to be an irrigation ditch. The ditch was covered in very tall weeds and therefore was not visible. (Scott Aff., ¶3.)

That fall, in approximately October of 2006, Mr. Scott noticed a gentleman wandering on his property, who he later discovered to be Mr. Charles Bratton. Mr. Scott

Revised Page 3 per 2/15/08 pleading ✓

discussed at that time with Mr. Bratton that Mr. Bratton believed he had an easement along the fenceline for a ditch to allow irrigation water to reach his pasture which adjoins his field. Mr. Bratton indicated that he had been spraying and burning over the years to keep the weeds down. (Scott Aff., ¶4.) Because the Scotts did not want Mr. Bratton spraying or burning on their property, Mr. Scott offered to fix and maintain the ditch and keep the weeds mowed. Mr. Bratton agreed. (Scott Aff., ¶5.)

On approximately April 7 2007, Mr. Scott was outside working in his yard and noticed that Mr. Bratton had set fire to his property along the ditchline. The flames were extending well beyond the boundaries of the easement and onto the Scotts' property. The Scotts were unhappy that Mr. Bratton was burning their property and made clear to him that they no longer wanted him to do this. At no time did they ever threaten Mr. Bratton or do anything to threaten him. (Scott Aff., ¶6.)

This exchange on April 7, 2007 was not hostile. Mr. Scott offered to fix the ditch given that from his perspective it was in a state of disarray and had not been kept up. In addition, the ditch had been torn up in some parts when Mr. Scott accidentally ran his tractor wheels into it. Mr. Bratton agreed to this. (Scott Aff., ¶7.) Mr. Bratton described the incident as follows:

Q When Mr. Scott approached you in April of '07 when you were burning there on the property, did he try to stomp out some of the flames?

A Well, he was running up and down the ditch like a mad dog, yelling at me. I don't know what he was doing, to be truthful with you.

Q Did you see him try and stomp out the flames?

A No. I didn't pay any attention to him because I figured, this guy is half nuts, and so I just wanted to burn my ditch and get out of there.

Q Okay, did you know that he owned this property here when he approached you?

A Not really.

Q What do you mean "not really"?

A Well, I didn't even think about it. I just knew that I was on my easement burning my ditch, and that he had not right coming down there harassing me, bullying me. And he was yelling, and I couldn't even understand half of what he was saying he was so mad.

Q Do you think he was made because there were flames that were on his property?

A No. He was just mad I was there.

Q Had nothing to do with the fire that had been set?

A Oh, yeah, he didn't want me to burn. He said: "You can't burn the ditch and you can't spray the weeds." . . .

(Bratton depo, pp. 41-42, Exhibit A to Cozakos Aff.).

While Mr. Bratton claims he felt threatened, he admitted that Mr. Scott did nothing to threaten him verbally. Instead, Mr. Scott made clear to Mr. Bratton that he did not want Mr. Bratton burning on his property:

Q Okay. In April of '07 when he approached you when you were burning along the ditch there, did he threaten you; Mr. Scott?

A I considered it a threat, yeah, the way he ran at me intentionally, yelling, getting right in my face.

Q What did he say that was threatening?

A The whole action.

Q Okay. Did he say anything that – were any of his words threatening?

A They were threatening to me. "You can't burn on my property. You can't spray on my property. You can't do this, you can't do that." Yeah, I consider that very threatening.

Q Okay.

A I'm 76 years old; he's probably 40 years old. What do you think?

Q So the words that you consider to be threatening were: "You can't burn, you can't spray, and you can't do this or that"?

A And all the other things that he said that I can't remember. He ran off the fact for 30 minutes there.

Q Did he ever say anything along the lines of: If you burn the property, I'm going to do this? Did he threaten you physically with bodily harm?

A I consider he was threatening me with bodily harm, yeah.

Q Okay. Well, did he say something those lines?

A That was a year ago and I don't remember exactly everything he said, because he was incoherent, like a mad dog running up and down that ditch yelling at me. And I was trying to get my ditch burned so I could leave.

Q Do you recall a time when Mr. Scott offered to clean up the ditch?

A No, I don't. Because I got tired of listening to him, so I just shut him out.

(Bratton depo, pp. 43-46, Exhibit A to Cozakos Aff.).

Mr. Bratton also admitted that Mr. Scott did not threaten to harm him or harm him in any way:

Q John Scott didn't tell you he was going to harm you; isn't that right?

A He did that by the way he kept running at me and shouting, looking at me in the face, bugging me.

Q But he didn't tell you that he would –

A You don't have to tell somebody that.

Q Just answer my question. He didn't tell you he was going to harm you; correct?

A No.

Q (BY MS. COZAKOS) Okay. The question was: Mr. Scott did not tell you he was going to harm you; correct?

A In so many words, no. But he threatened –

Q Meaning that is correct?

A He threatened me to make me think that.

Q I understand. But the question was, and we're working on a double negative: Did he tell you verbally he was going to harm you? Mr. Scott, that is.

A He was shouting at me so much and yelling at me and running up and down, I'm not sure exactly what all he said to me.

Q Do you remember him saying to you he was going to harm you?

A In so many words, no.

Q Okay.

A In actions, yes.

Q And those were the actions of running up and down?

A Yeah. Intimidating me, bullying me.

Q How as he bullying you? Was he running up and down?

A Yeah, running up and down. He'd run up to me and shout stuff at me. I was trying to burn my ditch up; I was trying to control the dire. And I had this idiot pouncing on me all the time. I was trying to get it burned up and get out of there.

Q How close did he get to you?

A Closer than you and I.

Q How long did he stay there?

A Oh, God, seemed like days, but it's probably 15, 20 minutes, a half hour, however long it took me to burn that ditch.

Q No. How long did he stay close to you?

A Oh, he went back and forth like he was on a yo-yo.

. . .

A The thing that really got me, though, was those trespassing signs going up right after we had that altercation. To me that was a direct threat.

Q You considered that to be a verbal threat?

A Yep. No Trespassing is pretty verbal to me.

Q A threat of what?

A I don't want you on the property. There's the sign that says No Trespassing and it was on both ends of the ditch.

(Bratton depo, pp. 102-106, Exhibit A to Cozakos Aff.).

Moreover, Mr. Bratton admitted that this was the only encounter between the Scotts and himself:

Q So you encountered him that one day when you were burning in April of '07; correct?

A The only day that I've encountered him.

Q Oh, that was the only day?

A The only day.

. . .

Q But did they do something overtly any other time but that one time on the property you told me about when you were burning the weeds?

A Face-to-face?

Q At any point, on the phone, face-to-face?

A No, I never talked to them on the phone.

Q Okay.

A I only seen them two times, the time that – no, three times. The time that you was with us and the time that they were on me about burning.

(Bratton depo, pp. 45 and 105, Exhibit A to Cozakos Aff.).

When further pushed regarding his allegations that Jackie Scott had threatened him, Mr. Bratton testified as follows:

Q (BY MS. COZAKOS) It says: "At or near this time, Defendants John and Jackie Scott verbally threatened Plaintiff Charles Bratton."

Did you see that?

A Yes.

MS. GARRETT: Let's figure out what time. April of 2007.

MS COZAKOS: Yeah.

Q (BY MS COZAKOS) Would that be the time when you were burning weeds –

A Yes.

Q -- and they came out?

A Yes. That's the only time I seen them.

Q Did Jackie Scott verbally threaten you?

A Yeah. She said: "Look at my – you're burning my pretty field. You're burning my fence posts."

And I don't know what else she said. I just shut her off then because I figured this one is off her rocker, too.

Q So her statements of: "You're burning my pretty field and you're burning my fence posts," you consider that to be a verbal threat; is that right?

A Right. You're doing damage, so I'm going to get even with you.

Q Did she say "I'm going to get even with you"?

A She didn't have to say it. You could hear it in her voice.

Q She didn't say it; is that correct?

A She didn't say those exact words, no.

Q Did she say anything along the lines of: I'm going to get even with you?

A No.

Q All you remember her saying is: "You're burning my pretty field, you're burning my fence posts"; correct?

A Yeah, and they wanted me off the property.

(Bratton depo, pp. 99-101, Exhibit A to Cozakos Aff.).

Mr. Scott had also noticed that Mr. Bratton was not accessing the easement in the area that he was supposed to according to the Warranty Deed. He therefore placed a no trespassing sign on his property well away from the boundaries of the easement in order to keep Mr. Bratton from accessing his property in any area he was not supposed to and for any purpose other than the purpose allowed for in the easement, which is to maintain the irrigation ditch. The sign was removed several weeks later. (Scott Aff., ¶8.)

On approximately April 9, 2007, Mr. Scott fixed the ditch by removing old and torn up concrete culvert pipes that were lying randomly in the ditch and then used a tractor to clean up the ditch and make it straighter. Mr. Scott did not destroy the ditch or alter it in any manner so that Mr. Bratton was unable to get his irrigation water. From Mr. Scott's perspective, the ditch looked much better after he fixed it than before. (Scott Aff., ¶9.)

After Mr. Scott fixed the irrigation ditch, it worked fine. When turned on, water ran through the ditch and on to Mr. Bratton's property. The irrigation ditch that exists now works properly and delivers sufficient water to Mr. Bratton's property (Scott Aff., ¶10.) At no time did Mr. Scott tell Mr. Bratton that he could not access the easement to turn the water on. In fact, he made clear through his attorney that he was free to do so. The Scotts even offered to turn the water on for him, but he declined. (Scott Aff., ¶11; Cozakos Aff., Exhibit B.)

III. LEGAL STANDARD

Punitive damages are only justified when a claimant seeking punitive damages proves "oppressive, fraudulent, malicious or outrageous conduct" by the opposing party. Idaho Code § 6-1604. The wrongful conduct must be shown by clear and convincing evidence. *Id.* A claimant must prove by clear and convincing evidence that the defendant "acted in a manner that was an extreme deviation from reasonable standards of conduct, ... that the act was performed ... with an understanding of or disregard for its likely consequences,[and] that the defendant acted with an extremely harmful state of mind." *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1187 (9th Cir. 2004) (quoting *Gen'l Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 979 P.2d 1207, 1210-11 (1999)). Idaho law does not favor punitive damages, which should only be awarded in the most compelling and unusual circumstances. *Strong v. Unumprovident Corp.*, 393 F.Supp.2d 1012 (D.Idaho 2005).

IV. ARGUMENT

A. The Record Does Not Establish That Defendant Scott Threatened Plaintiff.

Plaintiffs argue that they have met the high standard for adding a claim of punitive damages because the record shows that John Scott threatened Mr. Bratton "screaming that Plaintiff must leave the property and not return." (Memorandum in Support, p. 4.) Mr. Bratton himself has described this incident under oath at his deposition, and it is clear there were no threats made by either John or Jackie Scott toward him. There was only one incident on April 7, 2007, which took place on the Scotts' property. Mr. Bratton had entered the Scotts property well away from the boundaries of the easement. He was burning the ground outside the easement boundaries, and burning the fence posts. The Scotts were justifiably upset and did not want him burning their property. They asked Mr. Bratton to stop burning their property. At no time did they bar access to the easement. To the contrary, the Scotts

reaffirmed that they had no objections to Mr. Bratton accessing the easement and turning on the water. They even offered to turn it on for him.

With respect to the allegations that the Scotts destroyed the ditch, this is again over-exaggerated and a misrepresentation of the facts. Mr. Scott cleaned up the easement with the agreement of Mr. Bratton. Mr. Scott removed the concrete culverts, and returned them to Mr. Bratton. The ditch works fine now. Mr. Bratton testified that there was water running through it, although he said it was a "trickle." However, Mr. Bratton admits that he made the conscious decision not to turn on the water. Thus, because of Mr. Bratton's actions there is not way of knowing whether sufficient water would have reached his property in the irrigation season of 2007:

> Q. Do you recall a time when Mr. Scott offered to turn the water on for you?
>
> A. I think I do, but I thought that was a really dumb idea because that would have never worked.
>
> Q. Why not?
>
> A. Because you have to turn the water on when you want it and turn it off when you want it. And besides that, I would have to have contact with him, and I didn't want contact with him because I was afraid of him. He's scary.

(Bratton depo, pp. 69-70, Exhibit A to Cozakos Aff.)

In sum, there is no evidence presented by Plaintiffs that would come close to meeting the high standard for punitive damages.

B. The Caselaw Cited By Plaintiffs Does Not Support A Claim For Punitive Damages.

Plaintiffs cite to *Weaver v. Stafford*, 134 Idaho 691, 8 P.2d 1234 (2000). This case, however, lends support for the position that Plaintiffs have not presented sufficient evidence

to substantiate a claim for punitives. In Weaver, the trial court *denied* punitive damages against defendant Weaver on the claim that Weaver had "intentionally or negligently interfered with [plaintiff's] appropriative water rights. *Id.*, 134 Idaho at 699. This decision was upheld on appeal. The trial court did allow punitive damages against defendant Stafford based on *trespass* only. The appellate court upheld this decision, stating that "punitive damages are thus appropriate in a *trespass* action when the defendant acted in a manner which was outrageous, unfounded, unreasonable, and in conscious disregard of the plaintiff's property rights." *Id.*, 134 Idaho at 700 (emphasis added).

This case does not involve a claim for trespass. To the contrary, the Scotts did not leave their own property, and it was Mr. Bratton who was burning and destroying the Scotts' property outside the boundaries of the easement. Thus, the *Weaver* decision is demonstrative that his case would not warrant a claim for punitive damages.

V. CONCLUSION

For the above-stated reasons, the Scotts respectfully request that the Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages be denied.

DATED: February 14, 2008.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 14, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

AFFIDAVIT OF SHELLY H. COZAKOS IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ADD PUNITIVE DAMAGES

STATE OF IDAHO)
: ss.
County of Ada)

SHELLY H. COZAKOS, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record for the Defendants in the above matter and as such have personal knowledge of the facts stated herein.

2. Attached hereto as Exhibit A are excerpts of the the Deposition of Charles Bratton taken on February 6, 2008.

SHELLY H. COZAKOS

SUBSCRIBED AND SWORN to before me this 14 day of February 2008.

Notary Public for Idaho
Residing at Boise
My Commission Expires 9/19/2010

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 14, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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Shelly H. Cozakos

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I. BRATTON (husband and wife),	)	
Plaintiffs,	)	
vs.	)	Case No. CV 0706821C
JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife),	)	
Defendants.	)	
	)	

DEPOSITION OF CHARLES E. BRATTON

FEBRUARY 6, 2008

REPORTED BY:

TAUNA K. TONKS, CSR No. 276, RPR

Notary Public

Q. Had you ever met Ms. Rawlinson?
A. No, I didn't.
Q. To your knowledge, when did Mr. Ford move off the property?
A. I don't know that.
Q. Okay. Did you ever hear about him having to move off the property?
A. The neighbors said that he was having a problem with it, but I never asked him, never asked them, didn't know anything about it, because it really wasn't my business.
Q. Okay. And do you recall what month this was in when you were out burning and Mr. Scott approached you?
A. What month?
Q. Yes. What month and year?
A. I try to do it just before the water comes in, so it would be April, I suspect.
Q. Was that in '06 or '07?
A. That's '07.
Q. '07. Okay.
A. In '06 he was just sneaking around watching me. I mean '06, yeah.
Q. Did you burn the weeds in '06?
A. Yes. I burned them every year for 30

some years.
Q. Do you recall meeting Mr. Scott in the fall of 2006?
A. I think I may have. I think he came down and said he had a bunch of fence posts he wanted to sell me, that he had taken out or something. I didn't know anything about it. But he wanted 6 or $8 for them, and I knew that was not reasonable, so I said no. And I think that was about the end of the conversation.
Q. Did you talk to him in the fall of '06 about burning and spraying?
A. No.
Q. Okay. Do you recall Mr. Scott asking you not to burn or spray in the fall of '06?
A. No, I don't. He didn't do that till he run down there when I was burning. And that's when he said: "You can't burn, you can't spray. This is my property and I know what the law is." That's the first time I heard it.
Q. Do you recall agreeing that you would not burn or spray on the property and he would keep the weeds mowed down?
A. No, I don't remember that.
Q. Okay. So you first met Mr. Scott in

around the fall of '06 when you were talking about the fence posts. And then in the spring of '07, you weren't aware that he was living there; is that correct?
A. No, not really, because I told you that I didn't know what was going on up there. That wasn't my business, so I never paid any attention to what was going on up there.
Q. Okay. Didn't you think you might want to talk to someone that may be living there before you started burning?
A. No, because that was my easement, my ditch, and my right to burn which I had been doing for 35 years.
Q. It wasn't your fence, though; is that correct?
A. No, it wasn't my fence.
Q. Do you think that that's your easement and you can do anything you want on it, Mr. Bratton?
A. To get my water, yes.
Q. Do you think that you have to consider, in accessing your water, the rights of the owners of the property here as well?
A. No, not really.

Q. Were you aware at some point that Mr. Scott had ran into the ditch with his tractor?
A. No.
Q. You're not aware of that?
A. No.
Q. When Mr. Scott approached you in April of '07 when you were burning there on the property, did he try and stomp out some of the flames?
A. Well, he was running up and down the ditch like a mad dog, yelling at me. I don't know what he was doing, to be truthful with you.
Q. Did you see him try and stomp out the flames?
A. No. I didn't pay any attention to him because I figured, this guy is half nuts, and so I just wanted to burn my ditch and get out of there.
Q. Okay. Did you know that he owned this property here when he approached you?
A. Not really.
Q. What do you mean "not really"?
A. Well, I didn't even think about it. I just knew that I was on my easement burning my

ditch, and that he had no right coming down there harassing me, bullying me. And he was yelling, and I couldn't even understand half of what he was saying he was so mad.

Q. Do you think he was mad because there were flames that were on his property?

A. No. He was just mad I was there.

Q. Had nothing to do with the fire that had been set?

A. Oh, yeah, he didn't want me to burn. He said: "You can't burn the ditch and you can't spray the weeds." Well, I have to spray the weeds because he has morning glories on his property. And they come down on my property and I don't want them on there, so I spray them on my easement.

Q. Can you mow the weeds?

A. Can I mow them?

Q. Can they be mowed?

A. It doesn't do any good to mow morning glory; you've got to kill them. Mowing does no good.

Q. Mowing won't keep them from interfering with the water running down the ditch?

A. The morning glories?

Q. Right.

A. Morning glories don't keep the water from coming down the ditch. They just float down the ditch and get on my property, and then you can't get rid of them.

Q. If they are mowed down, are they still going to get into the ditch and onto your property?

A. Probably.

Q. And how would that be?

A. Well, they just -- they just grow and put seeds and stuff and seeds float down the water. Foxtail on your property floats down the water; pretty soon I've got foxtail on my property.

Q. Did you ever consider maybe finding out who was living in the property before you started burning in April of '07?

A. No.

Q. You didn't think you had to; is that right?

A. No. It's my easement, I've been doing it for 35 years, and it was my right.

Q. Okay. In April of '07 when he approached you when you were burning along the ditch there, did he threaten you; Mr. Scott?

A. I considered it a threat, yeah, the way he ran at me intentionally, yelling, getting right in my face.

Q. What did he say that was threatening?

A. The whole action.

Q. Okay. Did he say anything that -- were any of his words threatening?

A. They were threatening to me. "You can't burn on my property. You can't spray on my property. You can't do this, you can't do that." Yeah, I consider that very threatening.

Q. Okay.

A. I'm 76 years old; he's probably 40 years old. What do you think?

Q. So the words that you consider to be threatening were: "You can't burn, you can't spray, and you can't do this or that"?

A. And all the other things that he said that I can't remember. He ran off the face for 30 minutes there.

Q. Did he ever say anything along the lines of: If you burn the property, I'm going to do this? Did he threaten you physically with bodily harm?

A. I consider he was threatening me with bodily harm, yeah.

Q. Okay. Well, did he say something along those lines?

A. That was a year ago and I don't remember exactly everything he said, because he was incoherent, like a mad dog running up and down that ditch yelling at me. And I was trying to get my ditch burned so I could leave.

Q. Do you recall a time when Mr. Scott offered to clean up the ditch?

A. No, I don't. Because I got tired of listening to him, so I just shut him out.

Q. Well, when would you have to listen to him? I'm confused.

So you encountered him that one day when you were burning in April of '07; correct?

A. The only day that I've encountered him.

Q. Oh, that was the only day?

A. The only day.

Q. Okay. Do you recall on that day if he offered to fix or clean up the ditch?

A. No, I don't.

Q. Okay. Do you think he might have done that?

A. I don't know, because he yelled at me and said: "You can't burn and you can't do this. And this is my property and I know the Idaho law, and if you don't like it, go get a lawyer." So that's what I did.
Q. So you don't remember -- do you think it's possible that he offered to clean up and fix the ditch?
A. I don't think so.
Q. Okay. Did you see him, at some point after that, with a tractor out there along the ditch?
A. No.
Q. Have you ever seen him with a tractor along the ditch?
A. No.
Q. At some point did you notice that there had been con- -- the concrete culverts had been placed on your property that were in the ditch?
A. Yes, I did.
Q. And what did you do then?
A. I walked up there to see what happened, and that's when I first saw that he had plowed the ditch up.
Q. What do you mean when you say "plowed

it up"?
A. Taken the ditch out from the original position where it was at and made kind of a flat spot out of it.
Q. Can you tell me what you mean by that, a flat spot?
A. Ditch goes down in the ground. A flat spot runs along the ground.
Q. Did he cover up the ditch? I don't know what you mean.
A. He just took it out.
Q. He took it out. How do you mean "took it out"?
A. It disappeared.
Q. The ditch disappeared?
A. Yeah.
Q. So he had to cover it with dirt to make it disappear; right?
A. No, he didn't. He just plowed it out.
Q. Okay.
A. He took a blade and just plowed all the dirt out. Just plowed the ditch out, leveled it off.
Q. Okay.
MS. GARRETT: And I think we have given

you pictures of that, Shelly.
We've been going about an hour. Can we take a break?
MS. COZAKOS: You bet. And I actually need to take a lunch break.
MS. GARRETT: Right now? Well, it's almost noon, so...
MS. COZAKOS: Yeah, I think we probably only have an hour or so left, but I need to take a lunch break, so why don't you come back about 1 o'clock.
(The lunch recess was taken at 11:45 a.m., and the deposition was reconvened at 1:15 p.m.)
Q. (BY MS. COZAKOS) So before the break, Mr. Bratton, you said that Mr. Scott had leveled off the ditch; is that correct? After you had the encounter when you were burning the weeds, then at some point after that Mr. Scott leveled off the ditch?
A. Yes.
Q. And how long after -- well, when, approximately, was that; do you remember?
MS. GARRETT: The ditch leveling?
Q. (BY MS. COZAKOS) Yeah. When he

leveled it off, assuming that happened.
A. A day or two. I don't remember exact date, but fairly soon.
Q. And did you notice that the pieces of concrete culvert had been placed on your property?
A. That's how I noticed the ditch had been done, because I saw all those pieces of pipe laying up on my property. So I walked up there, and that's when I noticed that the other had been done.
Q. I see. Did you call the sheriff's office about the concrete pipes being left on your property?
A. No. I went to the sheriff -- after I had the encounter, I went and talked to the sheriff about what had happened up there because I was a little bit afraid of what might happen.
He was pretty scary. You know, in this crazy world, people do things, and I just didn't want to get shot over my water, so I went and talked to the sheriff about it.
Q. Okay. And did you file some sort of complaint?
A. I didn't file a complaint, no.

A. No.
Q. Okay. Do you know whether they could have just rolled it underneath the fence?
A. I don't know that.
Q. So you don't know that he entered your property to place the cement culvert there; isn't that true?
A. But I do know if he took it off, he had to enter my property to take if off of there.
Q. You told the sheriff you didn't want it there; right?
MS. GARRETT: Objection; asked and answered and misstates his testimony.
Q. (BY MS. COZAKOS) Did you tell the sheriff that?
MS. GARRETT: She asked you a question.
THE WITNESS: What did she ask me?
Q. (BY MS. COZAKOS) Did you tell the sheriff you didn't want the cement culverts right there?
A. Yeah, because I didn't want them hurting my horses.
Q. Okay. So you wanted them removed; right?
A. Yeah, I wanted them off of there.

Q. Well, how is anybody going to remove them unless they came onto your property?
A. Maybe they should have asked permission: This is what I'm going to do.
Q. Would you have denied that permission?
A. I don't know the answer to that.
(Exhibit 9 was marked.)
Q. (BY MS. COZAKOS) Would you turn to paragraph 16 of the complaint that you've just been handed that's Exhibit 9?
MS. GARRETT: Paragraph 16?
MS. COZAKOS: Yes, please.
Q. (BY MS. COZAKOS) Have you seen this complaint before, Mr. Bratton?
MS. GARRETT: Let me let you look at the front.
THE WITNESS: I've seen so many of them, I don't know for sure, but I don't think so.
Q. (BY MS. COZAKOS) Okay. Well, this is what was filed in the court by your attorney. Would you flip to paragraph 16?
MS. GARRETT: We're there.
MS. COZAKOS: Okay, thanks.
Q. (BY MS. COZAKOS) It says: "At or near

this time, Defendants John and Jackie Scott verbally threatened Plaintiff Charles Bratton."
Do you see that?
A. Yes.
MS. GARRETT: Let's figure out what time. April of 2007.
MS. COZAKOS: Yeah.
Q. (BY MS. COZAKOS) Would that be the time when you were burning weeds --
A. Yes.
Q. -- and they came out?
A. Yes. That's the only time I seen them.
Q. Did Jackie Scott verbally threaten you?
A. Yeah. She said: "Look at my -- you're burning my pretty field. You're burning my fence posts."
And I don't know what else she said. I just shut her off then because I figured this one is off her rocker, too.
Q. So her statements of: "You're burning my pretty field and you're burning my fence posts," you consider that to be a verbal threat; is that right?
A. Right. You're doing damage, so I'm going to get even with you.

Q. Did she say "I'm going to get even with you"?
A. She didn't have to say it. You could hear it in her voice.
Q. She didn't say it; is that correct?
A. She didn't say those exact words, no.
Q. Did she say anything along the lines of: I'm going to get even with you?
A. No.
Q. All you remember her saying is: "You're burning my pretty field, you're burning my fence posts"; correct?
A. Yeah, and they wanted me off the property.
Q. And they wanted you off the property.
A. Yeah. Their property, yeah.
Q. Did Jackie say: "I want you off my property"?
A. They both did. They were both yelling so much I couldn't tell what they really were saying, to be truthful with you. They were almost incoherent.
And that's true, they told me I couldn't burn or spray on the easement; in other words, having access to the property. And they

put the No Trespassing signs up.
Q. Okay. Let's back up. After that comma where I stopped reading, it says: "Jackie Scott verbally threatened Plaintiff Charles Bratton," it says: "And shouted at him to get off 'their' property or they would harm him."
Jackie Scott didn't tell you she would harm you; isn't that right?
A. She implied it.
Q. But she didn't state it, did she?
A. She didn't state it in words, but she implied it, so I knew what they meant.
Q. John Scott didn't tell you he was going to harm you; isn't that right?
A. He did that by the way he kept running at me and shouting, looking at me in the face, bugging me.
Q. But he didn't tell you that he would --
A. You don't have to tell somebody that.
Q. Just answer my question. He didn't tell you he was going to harm you; correct?
A. No.
Q. Yes, that's correct, or, no, he didn't tell you that?
MS. GARRETT: You're going to have to

ask it again because it's a double negative for him.
Q. (BY MS. COZAKOS) Okay. The question was: Mr. Scott did not tell you he was going to harm you; correct?
A. In so many words, no. But he threatened --
Q. Meaning that is correct?
A. He threatened me to make me think that.
Q. I understand. But the question was, and we're working a double negative: Did he tell you verbally he was going to harm you? Mr. Scott, that is.
A. He was shouting at me so much and yelling at me and running up and down, I'm not sure exactly what all he said to me.
Q. Do you remember him saying to you he was going to harm you?
A. In so many words, no.
Q. Okay.
A. In actions, yes.
Q. And those were the actions of running up and down?
A. Yeah. Intimidating me, bullying me.
Q. How was he bullying you? Was he

running up and down?
A. Yeah, running up and down. He'd run up to me and shout stuff at me. I was trying to burn my ditch up; I was trying to control the fire. And I had this idiot pouncing on me all the time. I was trying to get it burned up and get out of there.
Q. How close did he get to you?
A. Closer than you and I.
Q. How long did he stay there?
A. Oh, God, seemed like days, but it's probably 15, 20 minutes, a half hour, however long it took me to burn that ditch.
Q. No. How long did he stay close to you?
A. Oh, he went back and forth like he was on a yo-yo.
Q. Okay. Let's look at paragraph 17. It says: "On or around April 15th, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton." Do you see that?
A. Um-hmm.
Q. It says "continually threatened," and I want to know what you mean by that.
A. By not letting me make me think that I can't come up and turn my water on and take care

of my property.
Q. How did they make you think that?
A. By what they were yelling and saying to me when we had that confrontation on the ditch. That's the way I took that.
Q. Okay. It says "continually," so I want to -- we're still -- it's still -- there's only that one incident that we were talking about when you were burning on the property; correct?
A. Yes. Continually means that I thought about it all the time when I had stuff to do. That I couldn't do it because continually -- this had been on my mind for a whole year. I can't sleep, stomach is upset, causing me all kinds of problems.
So continually, yeah, I consider it a threat.
Q. But did they do something overtly any other time but that one time on the property you told me about when you were burning the weeds?
A. Face-to-face?
Q. At any point, on the phone, face-to-face?
A. No, I never talked to them on the phone.

Q. Okay.
A. I only seen them two times, the time that -- no, three times. The time that you was with us and the time that they were on me about burning.
The thing that really got me, though, was those trespassing signs going up right after we had that altercation. To me that was a direct threat.
Q. You considered that to be a verbal threat?
A. Yep. No Trespassing is pretty verbal to me.
Q. A threat of what?
A. I don't want you on the property. There's the sign that says No Trespassing, and it was on both ends of the ditch.
Q. They didn't want you burning on the property. You knew that; right?
A. I know they didn't want me to, but they didn't have the right to keep me from it.
Q. Okay. Let's look at paragraph 21. It says: "Since April 15th, 2007, whenever Plaintiff, Charles Bratton, has tried to access his easement..." And let's just stop right

there.
You testified you've never tried to access the easement after April 15th of '07; correct?
A. No. I just went up there and decided that, hey, this is not a good idea.
Q. Okay. When did you go up there?
MS. GARRETT: Now, say where "up there" is.
THE WITNESS: Up to where the water comes onto my property.
Q. (BY MS. COZAKOS) You went up on your own property?
A. Yeah, I stayed on my own property. I didn't want to get on his.
Q. You never tried to get on the easement after April 15th of '07; correct?
A. No.
Q. Yes, that is correct?
A. Yes, that's correct.
Q. Okay. Now, keep going. It says: "Defendant John Scott comes out of his house and yells at him, runs toward him, runs up and down the adjoining fence line, and does so in a verbally and physically threatening manner."

Do you see that?
A. Yes.
Q. Okay. Well, if you haven't gone on the property since April 15th of '07 --
A. But he --
Q. Hang on, let me finish. -- when was it that John Scott came out of his house and yelled at you?
A. But anybody goes around there, they come out and stare at them, yell at them.
Q. Okay. Did they do it to you?
MS. GARRETT: She's asking you about this situation.
THE WITNESS: Well, that was the time that I was burning the ditch.
Q. (BY MS. COZAKOS) Right. And that happened on April 15th of '07. Or, I'm sorry, it happened at or near the beginning of April of '07; correct, that you were on the ditch burning?
MS. GARRETT: Let's just take a break a minute. I think maybe Charles has been going for quite awhile and I think he's a little mixed up.
MS. COZAKOS: Okay. I want him to answer the question and then you can take a break.

MS. GARRETT: We are going to take a break anyway.
MS. COZAKOS: No, you can't take a break while there's a pending question.
MS. GARRETT: Yes, we're going to.
MS. COZAKOS: Nancy, come on. You know not to do that, not when there's a pending question. That's just wrong.
MS. GARRETT: That's just your rule. There's no rule that says --
MS. COZAKOS: No, it's not my rule. Unbelievable.
(A brief recess was taken.)
MS. COZAKOS: I want to make a record of what happened. I had a pending question with Mr. Bratton. He was trying to answer the question. His lawyer interrupted him and asked him to leave with her because she said she thought he was confused and would not allow him to finish answering the question as he was trying to do.
They since went out in the hall, she talked to him, and now she says he's ready to come in and answer the question. I object to the whole process. We can take it up with the Court.