2-10-2010

Bratton v. Scott Appellant's Brief Dckt. 36275

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.

Supreme Court No. 36275

PLAINTIFFS/APPELLANTS' BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho in and for the County of Canyon

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the February 2, 2009, trial court's order denying the Appellants' (Brattons) Motion for New Trial. The trial commenced on September 3, 2008, and the final verdict was in favor of the Brattons and was rendered on September 16, 2008. Thereafter, Brattons moved for costs as a matter of right. The Scotts moved for JNOV, which, on November 17, 2008, was granted. The Brattons subsequently moved for a new trial, which motion was denied. The Scotts then moved for costs as a matter of right, discretionary costs, and attorney fees, which all were granted in substantial part.

The underlying claim in this matter dealt with the destruction of Brattons' 34-year-old irrigation ditch created by an express irrigation easement. Along with acreage, an easement/right-of-way was conveyed to the Brattons by Harold and Janet Ford (Ford) in the early spring of 1973, and because of the muddy condition of the servient property, the ditch could not be dug until after the conveyance. As soon as the ground conditions permitted, Ford dug a three-foot-wide irrigation ditch and verbally allowed for a permanent 12-foot easement/right-of-way. Brattons added a culvert at either end, as well as cement and galvanized pipe to the ditch to preclude erosion. The Brattons used and maintained the ditch and right-of-way continually from 1973 to April of 2007.

In April 2007, the new owners of the servient estate, John and Jackie Scott (Scotts), began interfering with the Brattons' use of their irrigation ditch. The Scotts were hostile to Mr. Bratton, told him not to spray or burn the easement, not to come onto their property to access

the easement or ditch, also placed no trespassing signs around the easement and ditch/canal headgate, placed a perimeter rope fence containing "No Trespassing" signs, and destroyed the ditch and piping.

The Brattons tried to negotiate with the Scotts and their attorney to have the Scotts stop their interference and replace the ditch. Unfortunately, those negotiations were unsuccessful.

B. Course of Proceedings.

On June 28, 2007, the Brattons filed a complaint for equitable and civil relief to have the ditch replaced. R. Vol. I, pp. 1-17. The Brattons' equitable relief claim was never heard due to the trial court's scheduling issues. The Brattons lost the irrigation season of 2007, and on January 14, 2008, filed an Amended Complaint. R. Vol. I, pp. 94-110. The trial date was set, but vacated on two difference occasions at the request of the Scotts. Tr. Vol. I, p. 102, L. 20 – p. 103, L. 20. A partial summary judgment was granted to the Brattons that provided a judgment affirming the Brattons' express irrigation easement. Tr. Vol. I, p. 61, LL. 11-15. The trial finally commenced on September 3, 2008. Tr. Vol. II, p. 292, LL. 1-10. At the time of the trial, upon motion of the Brattons, the trial court took judicial notice of Idaho Code Sections 42-1101, *et seq.* and 42-1201, *et seq.* Tr. Vol. II, p. 311, L. 2 – p. 312, L. 18.

On the eve of trial and over the Brattons' objection, the trial court ordered that the trial be trifurcated. Tr. Vol. I, p. 200, L. 14 – p. 202, L. 1. The first segment would deal with the scope/width of the irrigation easement/right-of-way; the second segment would decide liability; and the third segment would address damages. *Id.* The jury would be impaneled for all three segments, but would be advisory only as to the first segment. *Id.*, p. 249, L. 24 – p. 250, L. 3;

p. 252, LL. 8-11. The trial court emphasized more than once that if the jury did not find for the Brattons on liability, then the damage segment would not be necessary. *Id.*, p. 200, L. 14 – p. 202, L. 1. The jury would render three separate and distinct verdicts following each of the three segments. *Id.*

In the first segment, the trial court, over objections and argument of the Brattons, instructed the jury strictly according to the three elements of implied easement as set out in *Thomas v. Madsen*, 142 Idaho 635, 638, 432 P.3d 392, 395 (2006). Tr. Vol. II, p. 311, L. 2 – P. 312, L. 18. The Brattons argued that the jury should be instructed pursuant to Idaho Code Section 42-1102. Based on the *Madsen* instruction regarding implied easement, the jury found there was no "*Madsen* defined" implied easement. R. Vol. III, pp. 355-56.

The second segment of the trial addressed liability. The jury unanimously found, in pertinent part, that: the Scotts interfered with the Brattons' easement; the Scotts' interference was a proximate cause of harm; the Scotts had changed the Brattons' ditch; and the Scotts did not have written permission to change the ditch. R. Vol. III, pp. 387-91; Tr. Vol. IV, p. 1416, LL. 7-12; p. 1420, LL. 3-17.

The third segment addressed damages. Immediately prior to the third segment, the trial court ruled that the Brattons could not address damage evidence including crop loss and the consequences thereof because the jury had found there was no diminished flow. Tr. Vol. IV, p. 1419, L. 4 – p. 1420, L. 17. The Brattons' damage case had been prepared based upon Idaho Code Sections 42-1102 and 42-1207 in that the destruction of the ditch and interference of the

Scotts had caused injury to the Brattons' property activities conducted thereon. *Id.*, p. 1412, L. 23 – p. 1415, L. 21; p. 1420, LL. 3-17.

The Brattons claimed the cost of constructing an underground irrigation system that would essentially replace their 34-year-old system and allow avoidance of the ongoing interference by the Scotts. Tr. Vol. III, p. 608, L. 20 – p. 609, L. 5. The jury had found interference and that interference had caused harm to the Brattons. *Id.*, p. 1396, LL. 1-18. The trial court excluded evidence of a piped ditch, as well as the crop loss and consequences thereto based on Idaho Code Section 42-1207. Tr. Vol. IV, p. 1412, L. 23 – p. 1415, L. 21; p. 1419, L. 4 – p. 1420, L. 17.

The trial court allowed the Brattons' irrigation expert to explain and illustrate replacement of a fully aboveground ditch. Tr. Vol. IV, p. 1453, L. 12 – p. 1454, L. 12. That was all the damage evidence allowed. *Id.* The jury verdict in the third segment was in favor of the Brattons in the amount of $6,500.00. R. Vol. III, pp. 451-53. Following the third verdict, the Brattons filed a Motion for Costs, which was never heard. R. Vol. IV, pp. 563-67. The Scotts then moved for a JNOV, which was granted. R. Vol. III, pp. 454-55. The Brattons subsequently moved for a new trial, which was denied. R. Vol. IV, pp. 598-600; pp. 651-52. The Scotts filed a motion for costs as a matter of right, discretionary costs, and attorney fees, which was granted in substantial part. R. Vol. III, pp. 498-506; pp. 649-50. A Judgment was entered in favor of the Scotts. R. Vol. IV, pp. 551-53. The Brattons filed this timely appeal. R. Vol. IV, pp. 655-59.

C. Statement of Facts.

In 1973, Ford owned and subsequently divided a tract of land that became the Canyon County Fruitdale Farm Subdivision. Def. Tr. Ex. A; Tr. Vol. II, p. 414, L. 9 – p. 426, L. 8. In doing so, among other divisions, Ford created two adjoining lots, lots number 32 and 40. *Id.* On April 19, 1973, Ford conveyed 32 to the Brattons by way of a Warranty Deed (dominant estate). *Id.*

The Warranty Deed from Ford to the Brattons included a one-half share of water stock held in the Canyon Hill Ditch Company and another one-half share of stock held in Middleton Mill Ditch Company. *Id.* In addition, the Warranty Deed gave an express easement for the construction of a three-foot-wide irrigation ditch, maintenance, as well as rights of ingress and egress onto lot 40 (servient estate). *Id.* The ditch was constructed by Ford as soon as the spring-time ground condition allowed use of a tractor and "V" ditcher. Tr. Vol. II, p. 427, LL. 2-15; p. 441, L. 20 – p. 447 L. 7. The deed reads in pertinent part:

> [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.

Def. Tr. Ex. A; Tr. Vol. II, p. 425, L. 12 – p. 426, L. 2.

In addition to the express deed, Ford orally and by conduct permanently enlarged the easement to 12 feet, which in 2008, Ford testified had been in place since 1973. Tr. Vol. II, p. 425, L. 12 – p. 427, L. 15; p. 459, L. 18 - p. 460, L. 24.

The three-foot-wide irrigation ditch traversed lot 40 and was specifically located far enough away from the fence constructed between lots 39 and 40. This placement of the ditch was to protect the integrity of the fence and to allow for installation and maintenance of the ditch. Tr. Vol. II, p. 427, LL. 2-15; p. 453, LL. 16-22. The easement allowed irrigation to the dominant estate, lot 32, which without the ditch would have been landlocked. *Id.*, p. 456, L. 21 – p. 457, L. 23. Because the servient property had a downward drop and westerly slope, the Brattons tiled sections of the irrigation ditch in concrete and galvanized pipe in order to prevent erosion and to also control water flow and volume. *Id.*, p. 444, LL. 18-25; p. 445, L. 13 – p. 447, L. 16.

After the ditch was constructed, the Brattons began their irrigation and corresponding ditch maintenance. *Id.*, p. 441, LL. 13-23; p. 454, LL. 19-23; p. 456, LL. 21- 24. Ford, upon agreement with the Brattons, also used the Brattons' ditch for irrigation of a portion of lot 40, the servient estate. *Id.*, p. 422, LL. 11-19; p. 442, LL. 9-14. Since 1973 and up to 2007, the Brattons enjoyed the use of their ditch and maintained the ditch, depositing dredged spoils adjacent to the ditch. *Id.*, p. 470, LL. 1-5; p. 478, L. 22 – p. 479, L. 15. The Brattons' use and maintenance of the ditch and corresponding ditch easement involved use of a tractor with a "V" ditcher to clean the ditch and to deposit spoils along the ditch banks, the spraying and burning of weeds, and for ingress and egress for irrigation and ditch equipment. *Id.*, p. 470, LL. 1-10. The maintenance, ingress, and egress required a 12-foot easement. *Id.*, p. 425, L. 12 – p. 426, L. 8.

On January 2, 1996, Ford signed a Quitclaim Deed for lot 40 (servient estate) to Lois Rawlinson (Rawlinson). After the 1996 Quitclaim Deed, the Brattons continued the use,

enjoyment, and maintenance of their irrigation ditch and its underlying easement. On September 13, 2005, Rawlinson gift-deeded lot 40 (servient easement) to the Scotts. Pl. Trial Ex. 9; *id.*, p. 462, L. 20 – p. 464, L. 1. This gift deed specifically stated, in pertinent part, that the Scotts take the property:

> 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***.

Id. (emphasis added).

In April 2007, Mr. Bratton followed his normal routine to prepare to receive water for the upcoming irrigation season, by spraying the ditch and easement for weeds. Tr. Vol. II, p. 455, LL. 9-18; Tr. Vol. III, p. 939, L. 17 – p. 940, L. 10. Once the weeds died, as was also his routine, Mr. Bratton accessed his easement and began to burn the dried weeds. *Id.*, Tr. Vol. II, p. 455, L. 19 – p. 456, L. 11; Tr. Vol. III, *id.* During the burning process, the Scotts approached Mr. Bratton in a hostile manner and demanded that he stop burning, that he never again spray or burn the easement, and that he leave the servient property. Tr. Vol. III, p. 941, L. 8 – p. 942, L. 17; *id.*, p. 943, LL. 12-21. During the trial, the Scotts agreed that they approached Mr. Bratton and told him not to burn or spray the irrigation ditch or the area adjacent thereto. *Id.*, p. 863, L. 23 – p. 864, L. 11.

Within days of the above encounter, the Scotts placed "No Trespassing" signs on the boundary line between lots 32 (dominant estate) and 40 (servient estate) at the point of the Brattons' ingress. Tr. Vol. III, p. 966, LL. 1-23. The Scotts also placed "No Trespassing" signs

near Brattons' canal headgate. *Id.* On a second encounter, the Scotts acted in a hostile manner to prevent Mr. Bratton from ingress of his easement. *Id.*, p. 951, L. 16 – p. 952, L. 12. Mr. Bratton was just beginning to go onto his easement when Mr. Scott came running after him and shouting at Bratton. *Id.*, p. 941, L. 11 – p. 942, L. 11. Mr. Bratton backed away from the easement and did not access water. *Id.*, p. 943, LL. 12-21; p. 951, L. 16 – p. 952, L. 12. Soon thereafter, when Mr. Bratton was away from his property, and without permission from the Brattons, the Scotts leveled the 34-year-old ditch, destroyed the galvanized pipe, and removed the cement piping. *Id.*, p. 883, LL. 18-23; p. 953, L. 5 – p. 954, L. 1. After the ditch was destroyed, Mr. Bratton called the police and unsuccessfully attempted, via negotiations, to require the Scotts to replace the 34-year-old ditch, piping, and to stop interfering with the easement. *Id.*, p. 947, LL. 5-7; p. 954, LL. 5-13. The Brattons also tried, without success, to mediate the issue through counsel. *Id.*, p. 956, L. 17 – p. 957, L. 12.

The Brattons were without irrigation water during the 2007 and 2008 irrigation seasons because of the destruction of their ditch and because of repeated interference by the Scotts. *Id.*, p. 996, LL. 9-24.

II. ARGUMENT

A. Standard of Review.

This appeal addresses the trial court's grant of Scotts' motion for judgment n.o.v., as well as the trial court's denial of the Brattons' Motion for New Trial. On appeal of a motion for judgment n.o.v. and a motion for new trial, the appellate court applies distinct standards for each.

The standard of review for a judgment n.o.v. is a question of law and has been articulated by this Court:

> In determining whether a directed verdict or judgment n.o.v. should have been granted, the appellate court applies the same standard as does the trial court which passed on the motion originally.

Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986).

In contrast, the appellate standard of review for new trial addresses the question of whether the trial court abused its discretion in denying the motion. This Court has set forth the review standard as follows:

> On appeal, we [the Supreme Court] will not reverse a trial court's order granting or denying a motion for new trial "unless the court has manifestly abused the wide discretion vested in it." [Citation omitted.] "While we [the Supreme Court] must review the evidence, we are not in a position to 'weigh' it as the trial court."

Jones v. Panhandle Distribs., Inc., 117 Idaho 750, 792 P.2d 315 (1990).

B. The Trial Court Abused Its Discretion in Ruling in Favor of the Scotts' Motion for Judgment Not Withstanding the Verdict as to the Verdict for Damages.

The Scotts' motion for judgment n.o.v. involved only the verdict in the third segment, damages. As stated, *supra,* the function of I.R.C.P. 50(b) is "to give the trial court the last opportunity to order the judgment that the law requires." *Quick v. Crane*, 111 Idaho 759, 764, 727 P.2d 1187, 1192 (1986). In determining whether a judgment not withstanding the verdict should have been granted, the Idaho Appellate Court applies "the same standard as does the trial court . . . ." *Quick*, 111 Idaho at 763, 727 P.2d at 1191. The question of whether a verdict should have been directed "is purely a question of law," and in such matters, the "parties are entitled to a full review by the appellate court without special deference to the views of the trial

court." *Id.* at 764. This court is obligated to review the record of the trial below and determine if there was "substantial evidence to justify submitting the case to the jury." *Id.* The question is "not whether there is literally no evidence supporting the party against whom the motion is made, but whether there is substantial evidence upon which the jury could properly find a verdict for that party." *Quick*, 111 Idaho at 773, citation omitted.

1. Damage verdict.

In moving for judgment not withstanding the verdict, the movant admits the truth of the adversary's evidence and every legitimate inference that could be drawn therefrom in the light most favorable to the non-moving party. *See, e.g., id.*, *Quick* at 763, and *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 391 (1961). Therefore, the trial judge is **not permitted** to weigh the evidence or pass on the credibility of the witnesses and make his or her own separate findings of fact for comparison with those of the jury. *Id.*, *Quick* at 763 (citation omitted, emphasis added). Moreover, the trial court should not take a case from the jury unless, as a matter of law, no recovery could be had upon any view which properly could be taken of the evidence. *Smith*, 83 Idaho at 391, citing *Stearns v. Graves*, 62 Idaho 312 (1941). **This is particularly true of motions implicating findings of proximate cause.** *Fouche v. Chrysler Motors Corp.*, 107 Idaho 701, 704 (1984) (citation omitted, emphasis added). As is of record, the second verdict on proximate cause was a unanimous verdict, which allowed the trial to commence to the third segment on damages. The Brattons prevailed as to the verdict on damages.

2. Jury's common knowledge.

In this matter, the jury was well versed in irrigation ditches and the costs associated. As the Idaho Supreme Court and the Idaho Court of Appeals have both confirmed, it is the very nature of the jury process for jurors to bring with them into the jury room their general life experiences, and a sense of what is and is not reasonable in light of those experiences and in light of the facts before them. *See Quick*, 111 Idaho at 765; *see also Smith v. Praegitzer*, 113 Idaho 887, 890 (Ct. App. 1988). Consequently, when considering trial evidence and reaching a verdict, jurors are permitted and expected to take into account matters of common knowledge and experience. *State v. Espinoza*, 133 Idaho 618, 622 (Ct. App. 1999). In other words, in this matter, the members of this jury, when reaching a verdict, are permitted to apply their own experience and their own common knowledge.

Damage awards, particularly damage awards in tort actions, are primarily a question for the jury. *See Gonzales v. Hodson*, 91 Idaho 330, 334 (1966); *see also Bentzinger v. McMurtrey*, 100 Idaho 273, 274 (1979).

This is because "[d]amages are susceptible to proof ***only with an approximation of certainty*** . . . ." *See Shrum v. Wakimoto*, 70 Idaho 252, 256 (1950) (citation omitted, emphasis added); *see also Gonzales and Bentzinger, supra.* As a result, it is solely for the jury to estimate damages as best they can by reasonable probabilities, and based upon their sound judgment as to what would be just and proper under all of the circumstances. *Shrum*, 70 Idaho at 256, quoting *Gorton v. Doty*, 57 Idaho 792 (1937). Jury verdicts are **not to be disturbed** absent a showing of bias or prejudice. *Id.* (emphasis added).

In this matter, during voir dire, the trial court learned that the jury was very versed in water rights, ditches, pastures, hay, etc. Juror Number 540 had experience driving large equipment, digging ditches, and laying pipe; Juror Number 542 had experience with irrigation, driving large equipment, digging ditches, and laying pipe, experience with plants and weeds in Idaho, owned rural property, and owned horses; Juror Number 544 had experience driving large equipment and owned rural property; Juror Number 548 had experience driving large equipment and had owned horses; Juror Number 549 had experience with irrigation, pastures, and hay, owning acreage, driving large equipment, digging ditches and laying pipe, and owned horses and livestock; Juror Number 557 owned rural property; Juror Number 559 had experience driving large equipment and owned rural property; Juror Number 572 had experience driving large equipment, digging ditches, laying pipe, and owned rural property; and Juror Number 586 had experience driving large equipment, had been involved in property disputes, and owned rural acreage and horses. Based on the collective common experience of the jury, even though the trial court excluded the cost of the ditch and pipe replacement, this jury used that collection of common experience to arrive at a reasonable verdict based on what evidence the trial court did allow.

3. The district court erred by not following law of the state of Idaho as set forth by Idaho Code Sections 42-1101, *et seq.* and 42-1201, *et seq.*

a. Notice pleading.

Importantly, the Idaho Rules of Civil Procedure establish a system of notice pleading. Under this system of pleading, a plaintiff does not need to include a great deal of particularity in a complaint. Rather, a plaintiff only needs to allege facts and claims sufficient for a defendant to

understand the claim that has been alleged against them. *See Cook v. Skyline Corp.*, 135 Idaho 26, 34, 13 P.3d 857, 865 (2000). Discussing Idaho's notice pleading requirements, the court in *Cook, supra,* stated, "[n]otice pleading frees the parties from pleading particular issues or theories, and allows parties to get through the courthouse door by merely stating claims upon which relief can be granted." *Id.*

More recently, this Court in *Vendelin v. Costco Wholesale Corp.*, 104 Idaho 416, 427, 95 P.3d 34, 45 (2004), stated: "With the advent of notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings. Rather, a complaint need only state claims upon which relief may be granted. . . . The emphasis . . . is to insure that a just result is accomplished, rather than ***requiring strict adherence to rigid forms of pleading***." (Emphasis added.)

In this case, the Complaint and Amended Complaint set forth the facts that: (1) the Brattons' ditch had been a long-standing irrigation ditch that was open and obvious; (2) that the Scotts knew of the ditch; (3) that the ditch was unilaterally obliterated by the Scotts; (4) that the corresponding irrigation easement and right-of-way measured 12 feet wide; (5) that the Scotts were put on notice of the Brattons' ditch by their Gift Deed; (6) that the Scotts had observed Mr. Bratton using the ditch; and (7) that the Scotts repeatedly interfered with the Brattons' use of the ditch and its corresponding easement, which interference and ditch obliteration damaged the Brattons. Therefore, the Brattons satisfied the requirements of notice pleading. The Scotts and the trial court were well apprised of the claims to insure that a just result could be accomplished. Further, each of the enumerated facts were proven at trial during the first trial segment.

b. Idaho Code Title 42.

In recognizing the importance that water and irrigation play in Idaho, the legislature has enacted specific legislation regarding irrigation and water rights. Various statutes set forth the applicable law in both the scope and governance of such rights.

The Idaho Legislature recognized that a ditch owner must be permitted to clean, maintain, and repair a ditch or canal.[1] Idaho Code Section 42-1102 expressly grants to an irrigation easement a right-of-way so that irrigation ditch owners can "***properly do the work of cleaning, maintaining and repairing the ditch***, canal or conduit with ***personnel and with such equipment*** as is commonly used, or reasonably adapted, to that work." *Id.* (emphasis added). Recognizing the importance of cleaning and maintaining a ditch, Idaho Code Section 42-1102 further states that a ditch owner is permitted sufficient width to properly effect the necessary cleaning, maintenance, or repairs. This section is set forth:

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[1] Idaho law does not expressly define the term "ditch owner." However, Idaho case law implies that a ditch owner is an individual or entity with an interest in the water of a particular ditch or canal. *Camp v. E. Fork Ditch Co.*, 137 Idaho 850, 857, 55 P.3d 304, 311 (2002) (citing *Reynolds Irrigation Dist. v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1948)). As a ditch owner, an individual or entity is entitled to an easement across the land of others to transport its irrigation water. *Ramseyer v. Jamerson*, 78 Idaho 504, 511, 305 P.2d 1088, 1093 (1957). The Supreme Court of Idaho has provided that "[i]t is well established in this jurisdiction that an easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 549-50, 808 P.2d 1289, 1294-95 (1991) (citing *Sinnett v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961)). A ditch owner also has a "secondary easement with rights of ingress and egress for the purpose of maintenance . . . and the regulation of his water." *Ramseyer*, 78 Idaho at 511, 305 P.2d at 1093. The "cleaning, maintaining, and repairing" of a canal or ditch to ensure the proper transportation of water is considered within the scope of a maintenance easement. *Nampa & Meridian Irrigation Dist. v. Wash. Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001); *see also* IDAHO CODE § 42-1102.

> The right of way shall include . . . the right to . . . occupy such width of the load along the banks of the ditch . . . as is necessary . . . .

IDAHO CODE § 42-1102.

The statutory irrigation easement and right-of-way granted by Idaho Code Section 42-1102 is crucial (or, in the parlance of the statute itself, is "***essential***") to water users given the express duties and liabilities that Idaho Code Title 42, Chapter 12 imposes upon those who own, construct, and/or control irrigation works. For example, Idaho Code Sections 42-1202 and 42-1203 mandate maintenance of a ditch and ditch embankments for the delivery of water, particularly to prevent the "useless discharge and running away of water." *See* IDAHO CODE § 42-1203. Moreover, Idaho Code Section 42-1204 obligates ditch owners and constructors to operate and maintain their irrigation works in such a manner so as not to damage or injure the property or premises of others; the failure to properly do so resulting in liability for the ditch owner for the damage/harm caused to others. *Id. See also* IDAHO CODE § 42-1102. These statutorily imposed duties and liabilities are why the mere existence of a ditch gives rise to the equally necessary corresponding irrigation easement and right-of-way. *See* IDAHO CODE § 42-1102 ("The existence of a visible ditch ... . shall constitute notice to the . . . servient estate, that the owner of the ditch . . . has the right-of-way . . . granted by this section."). Without such a corresponding irrigation easement or right-of-way, ditch owners would have no way of meeting the obligations or mitigating the liabilities imposed by Idaho Code Sections 42-1201 through 42-1204.

Pursuant to Idaho Code Section 42-1102, an easement for an irrigation ditch allows for enough room on each side of the ditch to maintain the ditch, and allows for the ingress and egress of machinery or equipment customarily used or adapted for that maintenance. The evidence at trial proved that while the Brattons' ditch was itself was only three feet in width, the historic, usual, and customary maintenance of the ditch (via the use of a tractor and a ditcher) required at least 12 feet in total width from the bank of the ditch, so as not to harm a third party's boundary fence. The Brattons further proved that the servient estate owner at the time the ditch was constructed (Ford in 1973) granted the Brattons a 12-foot irrigation easement recognizing these maintenance needs.

c. The trial court erroneously barred Idaho Code Section 42-1102.

The trial court erroneously ruled that Idaho Code Section 42-1102 granted an irrigation easement or right-of-way only to those water users whose property was riparian (*i.e.*, possessing frontage on a natural stream). However, the plain and unambiguous language of Idaho Code Section 42-1102 makes clear that the statute provides a private right of eminent domain for irrigation purposes beyond those factual scenarios involving only ***riparian parcels abutting natural*** streams. Idaho Code Section 42-1102 provides, in pertinent part:

> When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch . . . on their own premises for the proper irrigation thereof, ***or where the land proposed to be irrigated is back from the banks of such stream***, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation.

See IDAHO CODE § 42-1102 (emphasis added). Thus, Idaho Code Section 42-1102 applies to at least ***TWO*** different scenarios, as illustrated by the statute's use of the disjunctive term "or." The statute applies when: (1) riparian property owners lack sufficient stream frontage to afford the requisite fall for a ditch; **OR** (2) when the land proposed to be irrigated ***is back from the banks of such stream***. The Brattons irrigate lands that are set back from the nearest natural stream serving as the source of their water rights (the Boise River in this instance). Consequently, the Brattons' parcel is not riparian. However, Idaho Code Section 42-1102 still grants the Brattons an irrigation easement and right-of-way as the owners of land susceptible to irrigation, even though that land is "back from the banks" of the Boise River.

Put bluntly, the trial court's holding that Idaho Code Section 42-1102 grants irrigation easements and rights-of-way only to riparian landowners is proven wrong by two simple observations: (1) Idaho common law abolished the riparian rights doctrine over a century ago (*see, e.g., Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 491 (1909)); and (2) hundreds of thousands of acres of ground in Idaho are irrigated within the boundaries of irrigation districts and canal companies whose lands are not riparian to the source (river) of water supplying the water rights used; a system of irrigation that would not exist if Idaho Code Section 42-1102 did not grant easement and right-of-ways for landlocked parcels of property.

Moreover, and despite the trial court's ruling, the Brattons' interpretation of Idaho Code Section 42-1102, and its application to the factual scenario presented in their Complaint, directly squares with Idaho Supreme Court authority interpreting the statute in the very same manner. *See, e.g., Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607 (1980) ("In

order to assist owners of water rights ***whose lands are remote from the water source***, the state has partially delegated its powers of eminent domain to private individuals . . . [IDAHO CODE §§ 42-1102 and 42-1106] permit landlocked individuals to condemn a right-of-way through the lands of others for purposes of irrigation."). *Id.* (emphasis added).[2]

d. Case law does not bar Idaho Code Section 42-1102.

The trial court cited *Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518 (2001), as dispositive in this matter because it involved the interpretation and the application of an express written easement and its juxtaposition and competition with the provisions of Idaho Code Section 42-1102. However, this Court's decision in *Washington Federal Savings* was not predicated upon a general finding that a written express easement trumps the application of Idaho Code Section 42-1102. Instead, this Court declined to apply the statute in the overly-expansive manner as argued by the Nampa and Meridian Irrigation District.

In *Washington Federal Savings*, the Nampa and Meridian Irrigation District attempted to prohibit Washington Federal Bank's construction of a fence and a sidewalk within the easement

[2] In a perplexing turn of events later in the proceedings, the trial court subsequently decided that the Brattons' parcel *was riparian* due to its relationship with the artificial, man-made irrigation ditch serving the property. Therefore, and according to the trial court, the Brattons' parcel was not "landlocked," and for that reason the Brattons could not avail themselves of the irrigation easement/right-of-way rights granted by Idaho Code Section 42-1102, and as confirmed in *Canyon View Irrigation Co., supra*. Needless to say, the Brattons' parcel is not riparian to the source of their water rights (the Boise River), or any other natural stream for that matter. Artificial irrigation works do not create riparian land. Instead, the mere existence of the Brattons' ditch, and the existence of the larger system of interconnected canals and ditches that deliver the Brattons' irrigation water to their ditch, demonstrates that the Brattons' parcel is not riparian. Said delivery canals and ditches are necessary for water delivery to the Brattons' parcel because the parcel is landlocked and not susceptible to irrigation by any other means.

and right-of-way for the Finch Lateral. Nampa and Meridian Irrigation District argued, in part, that Idaho Code Section 42-1102 granted the district an exclusive irrigation easement from which it could exclude others, including underlying fee title land owners. *Id.* at 521. Rather than holding that the express channel change easement agreement at issue trumped the application of Idaho Code Section 42-1102 for purposes of defining the scope of the Finch Lateral easement, this Court read the express easement agreement ***in harmony*** with Idaho Code Section 42-1102, holding that both the irrigation district and the bank possessed rights under the statute. *Id.* This Court held that Idaho Code Section 42-1102 granted the Nampa and Meridian Irrigation District a non-exclusive irrigation easement for the Finch Lateral, and that the bank was correspondingly entitled to use its property in any manner that did not interfere with the purposes and scope of the subject irrigation easement. *Id.*

In sum, this Court held that the irrigation district attempted to use Idaho Code Section 42-1102 in an impermissibly expansive manner, a manner that would have required the Court to find that the district's irrigation easement and right-of-way was exclusive, and that the statute operated to bar Washington Federal's fence and sidewalk for public safety reasons. Understandably, this Court was not willing to reach that result because the plain language of Idaho Code Section 42-1102 does not give rise to an "exclusive" irrigation easement or right-of-way, nor does the statute expressly contemplate the prohibition of encroachments for "public safety" reasons. *Id.* at 523-24. Of importance to this case, however, is the fact that this Court did not hold, as did the trial court, that an express easement trumps, and therefore bars, the consideration and application of Idaho Code Section 42-1102.

In the case at bar, the Brattons are seeking nothing more than the irrigation easement and right-of-way that was granted to them by the servient estate and further granted ***and*** confirmed by Idaho Code Section 42-1102. The Brattons are not claiming that their irrigation easement and right-of-way is exclusive, and they are not trying to expand the purposes for which the easement exists. Instead, the Brattons are merely seeking the same 12-foot irrigation easement and right-of-way they have always had, which allows them to operate and maintain the ditch in the same reasonable and customary manner that they have done for over the last 34 years (namely, with a tractor and a V ditcher—equipment commonly used and reasonably adapted for those operation and maintenance purposes).

The bottom line for consideration in this matter is that the Brattons' irrigation easement and right-of-way preexisted the Scotts' ownership of their property. The Scotts took ownership of the servient property subject to that preexisting irrigation easement and right-of-way. While the Scotts are free to use their property in any manner that does not interfere with the purposes and scope for which the Brattons' irrigation easement and right-of-way was created, the Scotts absolutely may not interfere with the right, destroy the existing ditch, or otherwise act to rescind the dominant irrigation easement.

The Brattons rightfully possess those rights expressly granted to them in 1973 by the servient property owner (Ford), and those concurrent rights and obligations granted and prescribed by Idaho Code Title 42, Chapters 11 and 12. Idaho Code Section 42-1102 expressly grants the Brattons a reasonable width of land for the continued operation and maintenance of the irrigation ditch that the parties all agree: (1) belonged to the Brattons; and (2) was

constructed to serve the Brattons' parcel. The Brattons are not seeking to increase any burden upon the servient estate. The Scotts' property has been "burdened" by the use of a 12-foot irrigation easement and right-of-way since 1973. That "burden" was accepted and acknowledged by the Scotts' predecessors-in-interest, including the unified parcel owner, Mr. Ford, who conveyed the easement to the Brattons in 1973. The Brattons are simply seeking to maintain the status quo, a status quo that the Scotts had no right to obliterate. *See* IDAHO CODE § 42-1102; *Nampa & Meridian Irrigation Dist. v. Wash. Fed. Sav.*, 135 Idaho 518 (2001); IDAHO CODE § 42-1207; and Amended Complaint and Demand for Jury Trial at Ex. C (wherein the Gift Deed that conveyed the subject property to the Scotts expressly provided that the Scotts were taking ownership of the property "subject to any encumbrances or easements as appear of record ***or by use upon such property***." (emphasis added)).

e. New title re: common law implied easement.

Even if the trial court required that the Brattons prove common law implied easement, inclement weather delayed placement of the ditch until after the conveyance of the dominant property. There is ample authority in Idaho to allow that under that set of facts, the easement was implied by prior use. *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 711 (Ct. App. 1992), states that apparent continuous use is not required prior to the separation of the estates. *See also Davis v. Gowen*, 83 Idaho 204, 210, 360 P.2d 403, 407 (1961).

Again, even if the trial court disregarded the evidence that a 12-foot easement was conveyed in 1973, the Brattons proved that the easement was "intended to be permanent." *Thomas v. Madsen*, 142 Idaho 635, 658, 132 P.3d 392, 395 (2006). Accordingly, the creation of

an implied easement may be inferred "through the presumed intent of the parties based upon the circumstances of separation of land formerly under one ownership . . . or inferred often fictitiously through long continued use of the easement." *Schultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948, 952 (1976) (citing THOMPSON ON REAL PROPERTY § 351 (1961)).

Necessity is also an element of an implied easement by prior use. However, the necessity is "reasonable necessity" rather than "great present necessity." *Id. at* 773. Therefore, the Brattons need only show that the easement by prior use was reasonably necessary ***at the time of severance***. *Davis v. Peacock*, 133 Idaho 637, 643, 991 P.2d 362 (1999) (emphasis added).

Even the location of an express easement depends upon the intention of the parties and the circumstances at the time the easement was given, and then carried out. *Bedke v. Pickett Ranch & Sheep Co.*, 143 Idaho 36, 39, 137 P.3d 423, 426 (2006). When the parties take affirmative steps to place appurtenances on the easement at the time it is granted or reserved, their actions in so doing constitute an expression of their intent with respect to the scope and location of that easement. *See Bedke*, 143 Idaho at 39; *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006). Here, Ford testified that he granted a permanent 12-foot easement. The trial evidence showed that the full 12-foot easement was continuously used for a period of no less than thirty-four (34) years, that use of the full 12 feet was reasonably necessary in order to allow use and maintenance of the irrigation ditch easement, and that appurtenances were placed (galvanized and cement pipe).

f. Excluding Idaho Code Section 42-1102 was error.

The trial court omitted Idaho Code Section 42-1102 from the jury instructions on the grounds that Idaho Code Section 42-1207 contained the necessary rule of law. Not all of the germane concepts set forth within Idaho Code Section 42-1102 are incorporated into Idaho Code Section 42-1207. While both Idaho Code Sections 42-1102 and 42-1207 address the rights and obligations of ditch owners and servient landowners, only Idaho Code Section 42-1102 specifically addresses the creation, nature, and scope of the irrigation easements and rights-of-way underlying irrigation ditches.

The statutes found within Chapters 11 and 12 of Title 42, Idaho Code, are not mutually exclusive. Instead, the statutes build upon one another. The fact that statutes are to be read *in pari materia* is a well-settled canon of statutory construction. *See, e.g., State v. Yager*, 139 Idaho 680, 690 (2004). Unfortunately, the trial court ignored this fundamental concept by impermissibly reading these statutes in a vacuum. Consequently, the trial court's barring of the application of Idaho Code Section 42-1102 to the consideration of this matter unfairly prejudiced the Brattons. It is a fundamental principle of statutory construction that statutes that are *in pari materia* are to be construed together, to the end that the legislative intent will be given effect.

For example, Idaho Code Sections 42-1204 and 42-1207 speak only in terms of the existing irrigation easement or right-of way, the protection of that easement and right-of-way, and the corresponding facility which the underlying easement and right-of way serves. Those statutes do not speak in terms of the initial creation and necessity of the underlying irrigation easement and right-of-way. Idaho Code Section 42-1102 not only contemplates the operation

and maintenance needs for an irrigation easement and right-of-way, but also sets out the reasons for which the easement and right-of-way were created; *i.e.*, the requisite irrigation easement and right-of way is created in order to assist those landowners in conveying their water rights to their landlocked properties. This is a factual element which was central to the consideration of this case. Idaho Code Section 42-1102 sets forth the reason why the Brattons need an irrigation easement and right-of-way, and said statute (in conjunction with Idaho Code Section 42-1207) sets forth what rights the Brattons possess in relation to any servient landowners (the Scotts, in this case).

Additionally, another key component to this case, and a concept that is only provided for in Idaho Code Section 42-1102, is the "notice concept"—the fact that the mere existence of an open and visible ditch and/or corresponding irrigation infrastructure located on the surface of the ground put the Scotts on notice that the ditch possesses a corresponding irrigation easement and right-of-way across the Scotts' property. Idaho Code Section 42-1102's visibility component sets forth the notice that there is an "essential" right of the dominant estate to operate and maintain the irrigation ditch, and that the Scotts were not permitted to interfere with the use and enjoyment of that dominant estate irrigation easement and right-of-way. *See* IDAHO CODE §§ 42-1102 and 42-1207. In this matter, the Scotts admitted that before they interfered with the easement and destroyed the ditch, they affirmatively knew that the irrigation ditch existed, and that the ditch was maintained and used by the Brattons to irrigate their property. Thus, the Scotts' actions in interfering with the Brattons' use of their irrigation easement, and the Scotts' obliteration of the Brattons' irrigation ditch absent the Brattons' prior written permission,

violated the plain and unambiguous terms of Idaho Code Sections 42-1102 and 42-1207, among others. As discussed herein, the trial court inexplicably erred in excluding the proper consideration of ***both*** statutes in this matter.

g. Implied easement by operation of law.

The facts regarding the ditch and easement's prior use are not in dispute. Idaho law recognizes that implied easements may be created by prior use. *See Davis v. Peacock*, 133 Idaho 637, 643, 991 P.2d 362, 368 (1999); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 711 (Idaho Ct. App. 1992). Idaho recognizes two distinct methods for establishing an implied easement. The first is set forth in *Davis*, 133 Idaho at 643, 991 P.2d at 368, which requires:

> (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Id. at 642, 991 P.2d at 367. The second method was first promulgated in *Davis v. Gowen*, 83 Idaho 204, 360 P.2d 403 (1961), and requires:

> (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) ***apparent continuous user***; [and] (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Id. at 210, 991 P.2d at 407 (emphasis added). The *Davis v. Gowen* method was favorably cited in *Davis v. Peacock* and remains valid authority today. *See Close v. Rensink*, 95 Idaho 72, 501 P.2d 1383 (1972); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 711 (Ct. App. 1992). In fact, several courts have recognized the validity of the *Gowen* language in determining the existence of an implied easement. *Id.* In *Close*, the Idaho Supreme Court stated:

"[e]ven though the phraseology of the requirements as set out in *Davis v. Gowen*, . . . is somewhat different . . . ***the same principles are involved.***" *Close*, 95 Idaho at 76, 501 P.2d at 1387 (emphasis added). *See also Shultz v. Atkins*, 97 Idaho 770, 554 P.2d 948 (1976).

As this Court has made clear, it is the second prong of the *Davis v. Peacock* holding: i.e., ***(2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent***, that has caused the Court to question the basis of implied easement. Under the *Davis v. Gowen* method of determining an implied easement, the Brattons have continuously used the ditch and associated easement since 1973.

Further, it is important to note one difference between an implied easement for ***irrigation systems*** and those for other reasons. In *Abbott v. Nampa School District No. 131*, 119 Idaho 544, 808 P.2d 1289 (1991), the Court recognized that a ditch easement necessarily includes the applicable state law, such as the explicit requirement for a ditch owner to maintain and clean their ditch and ditch embankments. As such, when considering an irrigation easement, as here, regard for applicable statutory provisions must be given. Conversely, in *Peacock*, the case revolves around a road easement, not an irrigation system. The reason that the distinction is so important is because there are specific statutory protections for irrigation systems, which statutes do not apply to other easements. Due to the protective statutes for irrigation systems, the Brattons demonstrated a valid implied easement or right-of-way by operation of law.

h. The Scotts had written and actual notice.

Additionally, the Scotts' Gift Deed must be considered. Idaho law has created a statutory implied easement where a purchaser of land has **notice** of a ditch:

> The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

IDAHO CODE § 42-1102.

In 2005, when the Gift Deed conveyed the property to the Scotts, the facts are uncontested that the ditch was in plain sight, open, and in obvious use. In fact, prior to 2007, John Scott watched Mr. Bratton irrigate and use the ditch. In 2007 the Scotts: (1) threatened Mr. Bratton while he was cleaning and maintaining his ditch; (2) placed No Trespassing signs; (3) continued to threaten Mr. Bratton when he tried to irrigate; (4) destroyed the ditch; and then (5) placed yellow rope containing the "No Trespassing" signs. Mr. Bratton asked the Scotts to replace the ditch in its original location and configuration. The Scotts refused. Only then did the Brattons seek judicial intervention.

Pursuant to Idaho Code Section 42-1102, where a subsequent purchaser of the servient estate can visibly identify the ditch, the visible nature of the ditch is sufficient notice to inform the purchaser of the easement. In this case, prior to 2007, the Scotts admitted the ditch was visible and that the Brattons had been using the ditch for irrigation for that same period. Based on the visible nature of the ditch and their knowledge that the Brattons used the ditch for irrigation, the Scotts had been on notice of the ditch and all incidental rights associated therewith as set forth by the statutes previously discussed herein.

The Scotts' Gift Deed further confirms the existence of the implied easement. As mentioned, the deed contains the following language informing the Scotts that their property was subjected to certain encumbrances and easements:

> The following described premises, to-wit:
>
> . . . .
>
> 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.***

(Emphasis added). Pl. Trial Ex. 9. Tr. Vol. II, P. 462, L. 20 – p. 464, L. 1. The Scotts had notice of the existing ditch and easement by way of its visible nature and use, which is buttressed by the language contained within their Gift Deed.

i. The court misapplied Idaho Code Section 42-1207 in awarding a JNOV.

The trial court found that the Brattons are not entitled to any award of damages, particularly under Idaho Code Section 42-1207, unless the Brattons sufficiently proved that the Scotts' actions impeded the flow of water. The trial court's ruling is against the plain language of the state water statute, which provides in part that the impedance of flow of water in a ditch is not the only measure of damages, but that damages may also result if the tortfeaser changes the dominant estate's ditch. *See* IDAHO CODE § 42-1207.

Idaho Code Section 42-1207 acknowledges and protects separate and distinct rights: (1) the conveyance of one's own individual water rights, and (2) a separate property interest in the integrity of the irrigation facility and its overall flows beyond one's own, individual water

right (known as a "ditch right"). *See Savage Ditch Water Users v. Pulley*, 125 Idaho 237, 242-43 (1993) ("It is undeniable that water and ditch rights are tied together in that the ditch carries the water. But they are not the same."); *see also Simonson v. Moon*, 72 Idaho 39, 47 (1951) ("[I]n this state a ditch right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of water conveyed therein. Each may be owned, held and conveyed independently of the other."). Consequently, one can have an injury to his or her water rights (through impeded ditch flows), but one can also sustain a distinctly separate injury to their ditch rights as a result of a change in the ditch or irrigation facility. This is why Idaho Code Section 42-1207 contains the disjunctive "or" (" . . . as not to impede the flow of water therein ***OR*** to otherwise injure any person or persons using or interested in such ditch . . ."), and why the statute requires the prior written permission of the ditch owner before a servient landowner may alter a ditch or place the same in a pipe. The location and integrity of an irrigation ditch itself is protected by this prior written permission requirement.

Idaho Code Section 42-1207 operates to protect not only the conveyance of water, but also operates to protect one's property interest in the location, configuration, and integrity of the existing irrigation ditch. *See Savage Ditch Water Users* and *Simonson, supra*. This is why the *Savage* court made the observation that while specific ditch flow (*i.e.*, flow impedance) evidence would be "vital in a water rights controversy," such evidence was not the only acceptable evidence to establish a legally cognizable injury (injury to one's ditch rights) under the statute. *Id.* at 243. According to the *Savage* court, other forms of injury contemplated under the statute included increased maintenance difficulty, forced use rotation, and other "inconvenience." *Id.*

This case does not present a "water rights controversy," but does present a ditch right controversy. The Brattons were not required to present evidence of impeded water flow to prosecute their well settled ditch right. Likewise, the jury did not have to find that the Scotts' interference with the Brattons' irrigation ditch resulted in impeded water flow in order to award the Brattons damages as compensation for the Brattons' separate and distinct ditch rights. Under Idaho Code Section 42-1207, the Brattons could be harmed either by an impedance in ditch flows **OR** "otherwise injured" by the Scotts' unlawful interference with their ditch rights—rights capable of being "owned, held and conveyed independently" of their underlying water rights. *See Savage Ditch Water Users* and *Simonson, supra.*

4. Damages resulted when Scots did not obtain permission.

In addition to the fact that impedance of water flow is not the sole measure of injury or damage under Idaho Code Section 42-1207, the jury was also equally entitled to award damages against the Scotts for their failure to secure the Brattons' written permission prior to changing the Brattons' irrigation ditch. The Scotts' unilateral actions amounted to negligence per se, given the terms of Idaho Code Section 42-1207, "must be fully complied with by one seeking to exercise the right it confers." *Simonson*, 72 Idaho at 45; *see also Savage Ditch Water Users*, 125 Idaho at 242-43. As a result, the evidentiary burden under Idaho Code Section 42-1207 fell to the Scotts and not the Brattons. It was the Scotts who were required to prove that they had the Brattons' prior written permission to destroy the Brattons' irrigation ditch. Put simply, the Scotts violated the plain terms of Idaho Code Section 42-1207, and the jury found it appropriate to award general damages against the Scotts for that intentional and blatant violation.

5. The propriety of the jury verdict.

It is well established in Idaho that the trial court should not disturb a verdict unless, as a matter of law, no recovery can be made upon ***any*** view . . . . *Iverson Paints, Inc. v. Wirth Corp.*, 94 Idaho 43, 480 P.2d 889 (1971) (emphasis added). In ruling on a motion for judgment notwithstanding the verdict, the trial court may not weigh the evidence or resolve the conflict therein or determine what conclusion should have been drawn therefrom . . . . *Koser v. Hornback,* 75 Idaho 24, 27, 265 P.2d 988, 989 (1954); *Ness v. W. Coast, Inc.,* 90 Idaho 111 (1965). The jury had a first-hand opportunity to view the evidence as set forth in *Smith v. Big Lost River*:

> The members of the jury having had the opportunity to see all the witnesses, observe the manner of their testimony, note their apparent candor and knowledge of the matter concerning which they were examined, were entitled to give such weight to the evidence introduced as in their judgment was proper.

Smith at 392.

In Idaho, the jury may base its opinion on minimal evidence and matters of common experience if the evidence and experience is sufficient to allow for this verdict. *Fouche v. Chrysler Motors Corp.,* 107 Idaho 701, 692 P.2d 345 (1984). Therefore, in Idaho, jurors have the right to apply their own common experience in rendering their verdict. The Idaho Supreme Court is firmly committed to the rule that a trial court should not take a case from the jury unless, as a matter of law, no recovery can be made upon any view . . . *Iverson Paints, Inc. v. Wirth Corp.*, 94 Idaho 43, 480 P.2d 889 (1971).

Any and all damages flowing from that "harm" can reasonably be considered general damages for which there is no neat quantitative formula for the jury to apply. *See Shrum,*

Gonzales, and *Bentzinger*, *supra*. In viewing the evidence most favorable to the Brattons, the jury's award of $4,250.00 as damages for the Scotts' failure to comply with the express language of Idaho Code Section 42-1207, was reasonable based on the evidence allowed by the trial court, collective knowledge, and experience of the jury. The $2,250.00 ditch restoration-related damage award was based on the evidence allowed by the trial court well within the purview and general life experience (*i.e.*, common knowledge) of this Canyon County, Idaho, jury. *See Quick*, *Smith*, and *Espinoza*, *supra*. During voir dire, many members of the jury had actual experience with digging ditches, maintaining ditches, easements, irrigation, and the operation of large equipment.

It is common knowledge that Canyon County, Idaho, remains largely agricultural and pastoral. As a result, many of the jurors had extensive first-hand knowledge of flood irrigation practices, surface water delivery facilities, and pastures. *See Quick*, *Smith*, and *Espinoza*, *supra*. Because jurors bring with them their general life experiences, and a corresponding sense of what is and is not reasonable in light of those life experiences, they are qualified to estimate the costs of restoring an irrigation ditch.

Given the allowed evidence on damages, the damage awards were reasonable, not nominal, and were not of such amount to shock the consciousness. In fact, the jury awards in this case were conservative and well within the confines of the allowed evidence, and based on the jury's collective knowledge and experience.

C. The Trial Court Erred by Not Awarding the Brattons a New Trial.

1. Legal standard.

Idaho Rule of Civil Procedure 59(a) states:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:
>
> 1. **Irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.**
>
> * * *
>
> 7. **Error in law, occurring at the trial.**
>
> * * *

(Emphasis added.) A trial court may grant a new trial even though there is substantial evidence to support the jury's verdict. *Gillingham Constr., Inc. v. Newby-Wiggens Constr., Inc.,* 142 Idaho 15, 23, 121 P.3d 946, 954 (2005) (citing *Bott v. Idaho State Bldg. Auth.,* 122 Idaho 471, 475, 835 P.2d 1282, 1286 (1992)). As discussed more fully below, the Brattons are entitled to a new trial pursuant to 59(a)(1), "Irregularity in the proceedings of the court," and 59(a)(7) "Error in law, occurring at the trial."

2. Irregularity of the proceedings.

Rule 59(a)(1) allows in part for a new trial if it is found that there were irregularities of the proceeding of the Court, "[o]r any order of the Court or abuse of discretion by which the party was prevented from having a fair trial." This trial court conducted the trial in such a manner as to cause great hardship for the Brattons, including, but not limited to: entering burdensome evidentiary rulings; excluding substantial relevant evidence; advising the Brattons

and their counsel continually from the pretrial throughout the trial that if they did not prevail, the trial court would grant attorney fees to the Scotts; refusing to recognize and apply the applicable statutes; trifurcating the trial, which caused an enormous cost to the Brattons; making confusing and untimely rulings on the admission of evidence, which made it very difficult to put on each of the three segments' *prima facie* evidence; causing significant confusion as to the evidence allowed in each *prima facie* element; and causing confusion on the part of the jury.

When evaluating whether a trial court correctly ruled on the new trial based on irregularity in the proceedings merits, this Court reviews whether or not the district court took into consideration whether the irregularity had any effect on the jury's decision and, if so, whether the effect allowed for a new trial. *Gillingham,* 142 Idaho at 23, 121 P.3d at 954. Furthermore, when a jury is improperly instructed, and the effect of the improper instruction has the cumulative effect of causing the jury to reach a conclusion that is not justified, the only conclusion which may be drawn is that a fair and impartial trial was not had. *See Griffith v. Schmidt*, 110 Idaho 235, 237-38, 715 P.2d 905, 907-08 (1986).

3. Trifurcation.

This trifurcation ruling came as a complete surprise to the Brattons. Although the Scotts moved for bifurcation, the trial court went beyond the Scotts' motion and, *sua sponte*, trifurcated the trial, an order which the trial court admitted was unprecedented and was partially based on the fact that the Court did not think that the Brattons would be able to make a *prima facie* case for liability (second segment), and then the damage section (third segment) would not be necessary. Further, as to the first segment, even though the trial court had ruled that the

equitable portion of the Brattons' Complaint was now moot, the trial court empanelled an advisory jury regarding the equitable relief, but only as to whether there existed an implied easement under the element in *Madsen*. Segment number two would be liability and, if needed, segment number three would be damages. The trifurcation order made it overly burdensome and sent the Brattons' counsel on the eve of trial back to work to fully reorganize their case.

The trial court's basis for trifurcation was to save time; in reality, it more than doubled the trial time, was confusing to the jury, and in violation of judicial premise of orderly and efficient litigation. An example of confusion came during the trial when the trial court stopped the Brattons' counsel during a witness examination to ask the jury to vote by a raise of hands whether the offered testimony had already been heard in the first segment. This was the first time that the Brattons' counsel was directed by the trial court that evidence in each segment could be used in subsequent segments. After the hand vote by the jury, Brattons' counsel was directed by the trial court to move to another subject.

4. The trial court's Jury Instruction No. 8 was in error.

The Brattons had received a partial summary judgment of their express easement, and the trial court had taken judicial notice of Idaho Code Sections 42-1102, 42-1204, and 42-1207. Idaho Code Section 42- 1102 allowed for an implied easement by operation of law, but the trial court refused to apply Idaho Code Section 42-1102 and held that this statute applied **only if** the easement was based on riparian rights and was trumped by case law.

The trial court based this ruling on case law cited by the Scotts; i.e., *Thomas v. Madsen,* 142 Idaho 635, 132 P.3d 392. The trial court ruled that *Thomas v. Madsen* stood for the premise

that the Brattons must prove the elements of *Madsen* on implied easement, even though they had an express irrigation easement and the rights afforded by Idaho Code Section 42-1102. The *Thomas v. Madsen* case did not deal with irrigation or Idaho Code Section 42-1102, but rather dealt with a driveway dispute. The Brattons argued that *Madsen* did not preempt application of Idaho Code Section 42-1102, but rather was inapplicable because of the express irrigation easement and the State of Idaho irrigation statutes. Based on the trial court rulings regarding the inapplicability of Idaho Code Section 42-1102, the jury's instruction No. 8 is the correct law of the state of Idaho:

INSTRUCTION NO. 8

> Plaintiffs claim that they have an implied easement over Defendants' property based upon prior use. In order to establish an implied easement by prior use, Plaintiffs must prove the following three elements:
>
> (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) That the easement is reasonably necessary to the proper enjoyment of the dominant estate.

Of note, the same jury deciding segment one would be the jury that would decide the remaining two segments. Because the jury was to take each segment and all of the jury instructions into consideration when deciding all subsequent segments, the improper instructions in the first segment impacted the view of the state of the law for the jury in all of the segments.

The Idaho appellate courts have long held that the giving of an incorrect instruction constitutes "such irregularity and error in law as to bring the case within Rule 59(a)." *Walton v.*

Potlatch Corp., 116 Idaho 892, 897, 781 P.2d 229, 234 (1989). In fact, when a jury verdict is rendered "on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial." *Walton*, 116 Idaho at 234. *See also, Corey v. Wilson*, 93 Idaho 54, 454 P.2d 951 (1969); *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956). Finally, the Supreme Court of Idaho held some 30 years ago that "[t]he trial court is under a duty to instruct the jury on every reasonable theory recognized by law that is supported at trial." *Everton v. Blair*, 99 Idaho 14, 576 P.2d 585 (1978) (citing *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966); *Domingo v. Phillips*, 87 Idaho 55, 390 P.2d 297 (1964); *Wurm v. Pulice*, 82 Idaho 359, 353 P.2d 1071 (1960)). In fact, the trial court "has a duty to grant a new trial where prejudicial errors of law have occurred at the trial, even though the verdict of the jury is supported by substantial evidence." *Sherwood v. Carter*, 119 Idaho 246, 262, 805 P.2d 452, 468 (1991) (citing *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974)).

Instructing on Idaho Code Section 42-1102 was fundamental to the Brattons' lawsuit, and instructing the jury with an incorrect statement of the law was a requirement that the Brattons could not overcome. This irregularity of the trial court permanently and unfairly led the jury to decide the full matter using an incorrect instruction on the law of irrigation easements.

5. Impediment of flow is not required for damage award.

The law clearly states that the Brattons could suffer harm or injury by a "change of the ditch **or** impediment of flow." *See* IDAHO CODE § 42-1207 (emphasis added). The Brattons met the burden that the Scotts changed the ditch. The trial court nevertheless disagreed with the express language of Idaho Code Section 42-1207, and refused to recognize the word "**or**" in the

statute. Instead, the trial court ruled that both elements were required and thus gave an instruction that required the jury to answer a separate question as to whether there was impediment of flow. The trial court then utilized that specific special verdict question regarding impediment of flow to deny most of the Brattons' damage evidence. This action by the court was an abuse of discretion and was instrumental in preventing a fair trial.

As noted above, when a verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial. *See Walton, supra.* Furthermore, because of the replication of the fundamental error in the court's jury instruction, there was a "cumulative effect" that certainly caused the jury to reach an unjustified conclusion. As such, "a fair and impartial trial was not had." *Griffith*, 110 Idaho at 238.

6. Trial court's warning on attorney fees.

The trial court, both on the record, in chambers, and off the record, warned the Brattons and their attorneys that if they did not prevail or if the award was **nominal**, then the trial court would award attorney fees to the Scotts. The trial court did not cite the basis of allowing for fees. This case was not an attorney fee matter in that there is no statutory basis for fees, and the case certainly was not brought on a frivolous basis. The trial court abused its discretion by continually warning that it would award attorney fees against the Brattons if they did not prevail or if the damages were decided by the trial court to be nominal.

7. Exclusion of plaintiff's evidence.

Based on the trial court's misinterpretation of the law with respect to irrigation easements, it excluded and limited a substantial portion of the Brattons' damages. The list of

exclusions set forth below is not meant to be a complete list, but is set forth to show the substantial nature of the Brattons' evidence that the trial court ruled inadmissible.

a. Evidence was excluded of crop loss and consequences.

Because the trial court misinterpreted the Idaho statutes on easements, specifically Idaho Code Section 42-1207, the trial court ruled that crop loss and consequences thereof would be excluded and based that ruling on the fact that the jury found no impediment of flow. Again, the Brattons argued that the statute, Idaho Code Section 42-1207, allowed for harm, without limitation, to the Brattons if there was impediment of flow **OR** if the ditch was changed.

The trial court would not allow a special verdict question on whether the Scotts destroyed the Brattons' ditch, but rather would only allow the question of whether the Scotts changed the ditch. The jury found that the Scotts had violated the law by changing the ditch without written permission and that the change caused interference and that interference caused harm to the Brattons. Following the trial court's ruling excluding substantial crop loss damage, the Brattons made an offer of proof to include evidence of expert testimony, actual loss, and actual consequences of the injury proximately caused by the Scotts' actions. The crop loss and consequence thereto was the Brattons' largest element of damage, and by excluding all evidence pertaining thereto, the trial court in effect denied the Brattons their right to a fair and impartial jury trial. The trial court based all rulings on a misinterpretation of the statutory law regarding easements/right-of-ways, and that misapplication caused numerous errors. Since the trial court would not recognize that Idaho Code Section 42-1102 was controlling in this matter, and since the trial court found that Idaho Code Sections 42-1204 and 1207 only allowed damage to the

claimants' estate if flow was impeded, the judge's ruling on exclusion of damages was fundamentally flawed. The trial court clearly abused its discretion in the above-listed rulings against the Brattons.

b. Evidence was excluded on replacement of tiled ditch.

The trial court clearly and unfairly restricted the Brattons as to their damage evidence. First, based on the interpretation of Idaho Code Section 42-1207, in which the trial court ruled that impediment of flow was required to allow damages of anything other than replacing an aboveground ditch, the trial court excluded all of the Brattons' evidence as to the cost of replacing the tiled ditch. The whole case had been pled, discovered, and depositions had been taken with the premise that the Brattons were seeking damages to install an underground system. The trial court ruled that this evidence was excluded.

D. Judgment for Costs, Discretionary Costs, and Attorney Fees.

The Scotts did not meet the requirements of the cited statutes and rules in their motion for costs, disbursements, and attorney fees and, therefore, the trial court erred in awarding such costs and fees.

1. The Scotts are not the prevailing party.

In the case on review, the Scotts' award of JNOV did not disturb the unanimous special verdict questions in favor of the Brattons on liability (second segment). Under Idaho Rule of Civil Procedure 54, costs as a matter of right **may** be awarded to the "prevailing party." Initially, it is important to note that legal proceedings often fail to yield a wholly prevailing party, and there should be no award if the court determines that neither side prevailed. *Owner-Operator*

Indep. Drivers Ass'n v. Idaho Pub. Util. Comm'n, 125 Idaho 401, 407 (1984). Similarly, if both parties have prevailed ***in part***, the court may exercise its discretion to decline the award of costs to either party. *Burnham v. Bray*, 104 Idaho 550, 554-55 (Ct. App. 1983) (emphasis added). For its part, Rule 54 provides:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained. (Emphasis added.)

I.R.C.P. 54(d)(1)(B).

A determination that a party has prevailed "is a matter committed to the sound discretion of the trial court." *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 130 Idaho 255 (1997). However, the court of appeals has laid out a three-part inquiry to aid the trial court in its determination of the prevailing party: "The court must examine (1) the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) ***the extent to which either party prevailed on each issue or claim***." *Jerry J. Joseph C.L.U., Ins. Assocs., Inc. v. Vaught*, 117 Idaho 555, 557 (Ct. App. 1990) (emphasis added). *See Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 692 (Ct. App. 1984) (dismissal of a claim and when dismissal occurred were two of many factors considered in making a prevailing party determination).

Although the trial court has the discretion to find that a party "prevailed in part and did not prevail in part," it is also clear that the court is not "compelled to make a discrete award of

costs on each claim." *Id.* at 693. Instead, applicable precedent instructs "the ***total*** defense of a party's proceedings must be unreasonable or frivolous." *Magic Valley v. Prof'l Bus. Servs.*, 119 Idaho 558, 563 (1991) (emphasis added). *See also Seiniger Law Office, P.A. v. N. Pac. Ins. Co.*, 145 Idaho 241, 178 P.3d 606 (2008) ("I.C. § 12-121 applies to the case as a whole. Where there are multiple claims and defenses, it is not appropriate to segregate those claims and defenses for purposes of awarding costs and fees under I.C. § 12-121.") (internal citations omitted). There was no overall prevailing party in the matter. *See Int'l Eng'g Co. v. Daum Indus. Inc.*, 102 Idaho 363, 367 (1984) (even where plaintiff prevailed on several counts and defendant prevailed on only one issue, this Court did not disturb the trial court's determination that there was not a prevailing party). Given that this litigation was not "entirely favorable" to the Scotts, the Scotts are not the prevailing party and should not be awarded their claimed costs, and certainly not their discretionary costs and attorney fees. At most, the trial court can only find that the Scotts "prevailed in part and did not prevail in part." IDAHO R. CIV. P. 54(d)(1)(B) Even if the trial court did so find that both parties prevailed in part, the results of the verdict were mixed, and an award of costs, discretionary costs, and attorney fees to the Scotts is not appropriate.

2. Plaintiffs' action was not frivolous or without foundation.

As to attorney fees, Idaho courts follow the American Rule on the question of awards of attorney fees, which provides that "attorney fees are to be awarded only where they are authorized by statute or contract." *Hellar v. Cenarrusa*, 106 Idaho 571 (1984). Consequently, a party must provide legal authority supporting a fee request. *MDS Invs., L.L.C. v. State*, 138 Idaho 456 (2003). Rule 54 of the Idaho Rules of Civil Procedure, Idaho Code Sections 10-1210,

12-120, and 12-121 do not support the claim since the case was not brought frivolously, is not the subject of a commercial transaction, and there was never a hearing afforded by the trial court or given to Brattons' claim of equitable relief.

Under Idaho Code Section 12-121, the Scotts may only recover their attorney fees if the trial court determined that the Brattons' action was frivolous, unreasonable, or without foundation. Even if the trial court was persuaded that the Scotts were the prevailing party, Rule 54(e)(1) limits the award of attorney fees to a prevailing party pursuant to Idaho Code Section 12-121 to circumstances where "the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1); *Seiniger*, 145 Idaho at 215, 178 P.3d at 616 (2008). In making such a determination, "[t]he sole question is whether the losing party's position is so plainly fallacious as to be deemed frivolous, unreasonable or without foundation." *Severson v. Hermann*, 116 Idaho 497, 498 (1989). Even though the trial court is afforded broad discretion, it must make a "specific finding . . . supported by the record." *Id. See also Black v. Young*, 122 Idaho 302, 310 (1992) (acknowledging discretion of the court to make an award, but noting that an award is improper "where the record itself discloses" the reasonableness of a claim or defense); *J.M.F. Trucking v. Carburetor & Elec. of Lewiston*, 113 Idaho 797, 799 (1987) (overturning trial court's award of fees as arbitrary and inconsistent because it denied a motion to dismiss a claim because of reasonable factual conflicts on the record and subsequently granted attorney fees on grounds that the same claim was frivolously or unreasonably pursued). In this case, the record very clearly discloses that the Brattons' case was necessary and reasonable; it was not brought frivolously, unreasonably, or without foundation. Further, the Brattons

prevailed as to liability, which unanimous verdict remained undisturbed by the trial court's grant of Judgment Notwithstanding the Verdict to Defendants.

3. Brattons' claim was based on Idaho statutes.

In light of the fact that the Brattons presented a statutory basis for their Complaint, and the fact that the trial court had to resort to the canons of statutory construction to resolve the applicability of the statute, the Brattons' Complaint did not justify an award of attorney fees to the Scotts. Although the trial court is afforded broad discretion to award attorneys fees, it was reversible error to do so in these circumstances. The record clearly indicates that the Brattons reasonably pursued this complaint, which was well founded and based on the statutes of the state of Idaho. The record shows that the jury found unanimously in favor of the Brattons as to liability and injury.

IV. CONCLUSION

Based on the facts presented at trial and the clear statutory law controlling long-standing irrigation ditches, easements, and rights-of-way, Appellants respectfully request that the judgment n.o.v. and that the costs and fees awarded to the Scotts be vacated and that the Motion for New Trial be granted.

DATED this 10th day of February, 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Nancy J. Garrett – Of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2010, I caused a true and correct copy of the foregoing **APPELLANTS' BRIEF** to be served by the method indicated below, and addressed to the following:

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