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Bratton v. Scott Respondent's Brief Dckt. 36275

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES E. BRATTON and MARJORIE I. BRATTON, husband and wife, Appellants, v. JOHN R. SCOTT and JACKIE G. SCOTT, husband and wife, Respondents.	Supreme Court No. 36275

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON
Honorable Renae J. Hoff, Judge Presiding

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case centers around a dispute over Appellants' easement rights. Appellants Charles and Marjorie Bratton ("Brattons") are seeking to expand the scope and use of an easement for ingress and egress and maintenance of an irrigation ditch upon the servient estate owned during the relevant timeframe by Respondents John and Jackie Scott ("Scotts"). The Brattons' easement rights arise from a written warranty deed agreed upon by the Brattons and former owners of the servient estate. Despite the clear terms of the scope and nature of the easement set forth in the warranty deed, the Brattons filed the underlying lawsuit in an attempt to expand the size and scope of this easement.

The Brattons further claimed that the Scotts were interfering with their easement rights. The Scotts, however, have only requested the Brattons exercise their easement rights within the scope of the written easement and respect the Scotts' property rights as owners of the servient estate.

B. Course of Proceedings

Respondents do not agree with many of the statements made in Appellants' description of the course of proceedings. (Appellants' Brief ("App. Brief"), pp. 2-4). The Scotts will therefore provide the Court with a summary of the course of proceedings relevant to this appeal as follows:

1. On June 28, 2007, the Brattons filed a Complaint and Demand for Jury Trial. The Complaint included a claim for declaratory relief requesting a declaration as follows:

> Plaintiffs have a recorded and express easement as granted by Harold E. Ford and Jeanette 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.

(R, pp. 5-6).

2. The Complaint also contained a claim for an injunction requesting that Defendants be precluded from "interfering with Plaintiffs' access and use of their easement on Lot 40 of the Fruitdale Farm Subdivision." The Brattons further requested the district court grant injunctive relief that "[w]ould allow the placement of a covered pipe or culvert system across the easement area with all costs thereto paid by the Defendants." (R, pp. 6-7).

3. In addition to the request for an injunction and declaratory relief, the Complaint contains the following causes of action: (1) negligence and/or willful wanton and/or intentional conduct; and (2) tortious interference with the right of privacy/tortious stalking. (R, pp. 6-8). In the prayer for relief, the Brattons requested declaratory relief in a judgment against the Scotts setting forth that "Plaintiffs have an express easement for three feet as set in its original location by Mr. Ford, that Plaintiffs have a 12 foot wide easement by implication in 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." (R, p. 8).

4. The prayer for relief also requested injunctive relief precluding the Scotts from "[v]erbally 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 Defendants be required to stay at a distance from Plaintiffs of at least 600 feet; . . . [and] that Defendants be required to pay all costs for a covered pipe or culvert system to be placed the length of Plaintiffs' easement ditch." (R, p. 8). The Complaint contained a demand for jury trial contained on the last page. (R, p. 9).

5. In Appellants' Opening Brief, they claim their equitable relief claims as set forth in the Complaint were never heard "[d]ue to the trial court's scheduling issues." (App. Brief, p. 2). This is an inaccurate statement. In fact, at no time during the pendency of this action did the Appellants ever make a motion for a preliminary injunction, permanent injunction, or any type of declaratory relief prior to the time of trial. In addition, at no time did the Appellants ever request dates from the district court for a hearing on such a motion that Scotts are aware of.

6. The Brattons did make a motion for summary judgment, which was heard by the district court on February 21, 2008. (Tr, Vo. I, pp. 29-32). In their motion, the Brattons requested a ruling that they be granted an express easement of three feet in width pursuant to the terms of the warranty deed. The Brattons further requested the court grant them as a matter of law an expanded easement of 12 feet in width under the theory of implied easement by prior use. Third, the Brattons requested judgment in their favor on the issue of whether the Brattons' easement rights were infringed upon. (Tr, Vol. I, pp. 31-32).

7. The Scotts, however, readily admitted the existence of the express easement as set forth in the warranty deed. Accordingly, the district court granted summary judgment to the plaintiffs on this issue noting that there was not an objection to the existence of the three foot expressed easement.

8. The Scotts did object to the existence of an easement 12 feet in width under the doctrine of implied easement by prior use, and to the claim for interference with easement. The district court denied summary judgment on both of these claims, ruling that under the undisputed facts the Brattons could not sustain the elements of a 12 foot easement by implication of prior use. (Tr, Vol. I, pp. 56-69). In fact, the district court stated with

respect to the Brattons' claim for a 12 foot easement by implication from prior use as follows:

> I think it's critical to deciding this case to note that the ditch was built because of the sale to the Brattons. That ditch was not built prior to the sale to the Brattons. Mr. Ford did not build the ditch to irrigate the other parcel of property. And if the Brattons had wanted a twelve-foot easement, they could have requested it.
>
> I conclude, therefore, that there is not an issue of fact to be heard by a jury in this case, and I'm going to grant summary judgment in the contrary to the defendants. They are opposing it, but the way I see it, that issue is done.

(Tr, Vol. I, p. 61, ll. 3-15).

9. Prior to trial, the Scotts made a motion to bifurcate the proceedings between the issues of liability and damages. (Tr, Vol. I, pp. 146-147). In response to this motion, the district court ruled that the trial would be heard in three separate phases. The first phase would involve the issue of whether there was a 12 foot easement by implication. During the second phase, the jury would hear the claims for negligent interference with easement and tortious interference with the Brattons' right of privacy. Finally, the third phase would be on damages, depending on the outcome of the second phase. (Tr, Vol. I, pp. 200-201).

10. Following a motion for reconsideration filed by the Scotts, the district court ruled that the issue of whether a 12 foot wide easement by implication from prior use had arisen was an issue that the court would decide, instead of the jury, given that this claim was pled in the Brattons' Complaint as an equitable action for declaratory relief. (Tr, Vol. I, pp. 250-252). The district court decided, however, to allow the jury to hear evidence on this issue and issue an advisory verdict. (Id.).

11. Pursuant to the district court's ruling, a jury trial was held commencing on September 3, 2008. At the end of phase one of the trial, the jury returned a special verdict form in favor of the Scotts answering as follows:

> **Question No. 1:** Have the Plaintiffs met their burden of proof by establishing that they have a 12 foot wide implied easement?
>
> **Answer to Question No. 1:** No.

(R, p. 437).

12. The trial then proceeded to phase two during which the Brattons presented their evidence on their claims for negligent interference with easement and tortious interference with their right of privacy. At the close of phase two of the trial, the jury returned a special verdict form finding that the Scotts negligently interfered with the Brattons' easement and changed the irrigation ditch. The jury, however, found that the change to the irrigation ditch did not result in a diminished flow of water to the Brattons' property. In addition, the jury found in favor of the Scotts with respect to the Brattons' claim for interference with the Brattons' easement by threat of harm and interference with the Brattons' right of privacy. (R, pp. 439-442).

13. The case then proceeded to phase three of the trial on the issue of damages. At the close of this phase, the jury returned a verdict in favor of the Brattons awarding damages in the amount of $4,250 for changing the irrigation ditch without written permission. The jury further awarded damages in the amount of $2,250 to restore the irrigation ditch to its original state. (R, pp. 451-452).

14. The Scotts duly filed a motion for judgment notwithstanding the verdict requesting the district court reverse the damages award on the basis that the Brattons

presented no evidence to support a monetary award of damages.1 (R, pp. 454-473). This motion was granted by the district court and a judgment was entered in favor of the Scotts. (R, pp. 495-497; 551-553).

15. Thereafter, the Scotts made a motion for an award of costs and fees pursuant to Idaho Code § 12-121. (R, pp. 498-506). The district court granted this motion in part, awarding costs and fees to the Scotts in the amount of $54,329.56 and a judgment was entered accordingly. (R, pp. 649-654).

II. STATEMENT OF FACTS

In 1973, Harold and Jeanette Ford were the record owners of a parcel of real property in the Canyon County Fruitdale Farm Subdivision. (R, p. 12). The Fords divided the property into two lots, referred to as Lots 32 and 40. (Id.). The Fords then sold Lot 32 to the Brattons and executed a warranty deed which was duly recorded ("Warranty Deed"). (R, p. 12). In order to obtain irrigation water to Lot 32, which consisted in large part of pasture ground, the Brattons negotiated and received an express easement for the construction and maintenance of an irrigation ditch and ingress and egress along the boundary line of Lot 40 from the Fords. This easement is set forth in the Warranty Deed as follows:

> 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.**

(R, p. 12, emphasis added).

[1] The Scotts also moved for a directed verdict at the close of evidence of the damages phase of the trial on the same grounds. The district court deferred ruling until after the trial.

It was undisputed at trial and prior to trial that following the conveyance of Lot 32 to the Brattons, the Brattons proceeded to dig the irrigation ditch on Lot 40 owned at that time by the Fords (the "servient estate") within the easement granted in the warranty deed. (Tr, Vol. II, pp. 421-427; pp. 465-469).

During the trial, both Mr. Ford and Mr. Bratton testified that after conveyance of the easement in the warranty deed, Mr. Ford orally expanded the width of the easement from three feet to twelve feet. However, it was undisputed by both Mr. Bratton and Mr. Scott that this oral agreement was never reduced to writing. (Tr, Vol. II, p. 468, ll. 15-20).

In January of 1996, Mr. Ford conveyed the servient estate (Lot 40) via quitclaim deed to Genice Rawlinson. (R, p. 14). Approximately nine years later, Ms. Rawlinson conveyed the servient estate to her daughter, Respondent Jackie Scott, and son-in-law, Respondent John Scott, *via* a recorded deed. (R, p. 17). The deed transferring ownership of the servient estate to the Scotts conveyed 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.).

At the time the Scotts became owners of the servient estate, they were unaware that it contained an irrigation ditch along the boundary line. John Scott discovered the ditch shortly after he moved onto the property in the Summer of 2006 when he was mowing weeds on the property with his tractor. At that time, the ditch was covered in very tall weeds. (Tr, Vol. III, pp. 884-885). Mr. Scott testified that because he could not see the ditch at that time, he accidentally ran over it with the wheel of his tractor. (Tr, Vol. III, pp. 885-887). Mr. Scott then obtained a copy of the Warranty Deed from the county recorder's office and discovered

the easement over his property for an irrigation ditch. Mr. Scott later fixed the ditch so that Mr. Bratton's property could obtain irrigation water with the use of a loader bucket and small tractor in order to "back drag" the ditch and clean it up. (Tr, Vol. III, pp. 892-894). Mr. Scott did so with the agreement of Mr. Bratton. (Tr, Vol. III, p. 894). During phase one of the trial, a video taken by Mr. Scott was introduced into evidence showing that in the Spring of 2007, after Mr. Scott cleaned up the ditch, water adequately flowed through the ditch and reached Mr. Bratton's property.[2] (Tr, Vol. II, pp. 496-499). The Scotts also called to testify a professional videographer who had taken a video of the irrigation ditch after Mr. Scott had worked on it showing that irrigation water was clearly flowing through the ditch onto the Brattons' property. (Tr., Vol. III, pp. 1047-1048).

The problems between the parties primarily began when Mr. Bratton entered the Scotts' property in the Spring of 2007 and began burning the weeds around the irrigation ditch. The flames, however, swept onto the Scotts' property approximately 10 to 15 feet from the boundary fence along where the easement is located, burning a substantial section of the Scotts' property. (Tr, Vol. III, pp. 888-890). The Scotts attempted to stomp on the flames to put out the fire on their property. (Tr, Vol. III, pp. 890-891). Thereafter the Scotts placed no trespassing signs on their property to remind Mr. Bratton and others to access the irrigation ditch easement at the site of the easement only. Mr. Scott testified several times that he at no time refused to allow Mr. Bratton to access and maintain the irrigation ditch. Mr. Bratton further testified that he received an offer through the Scotts' counsel to turn on

[2] The Brattons claimed that in doing so, Mr. Scott moved the location of the ditch. This was disputed by Mr. Scott, however the Brattons produced no evidence at trial to refute the videos and photographic evidence introduced by the Scotts that showed water was adequately flowing through the ditch onto the Brattons property starting in the Summer of 2007.

the headgate at Mr. Bratton's request so that water could reach the Brattons' property. Mr. Bratton refused:

> Q: Okay. And then you recall that myself, through your counsel, offered the Scotts to turn the water on for you?
>
> A: That wouldn't work because I couldn't control the water the way I wanted to, put on how much I needed and be able to maintain the ditch like I had to.
>
> Q: Okay. But you think the idea of them turning on the water for you so that you don't have to come onto their property was a dumb idea, right?
>
> A: Yes, I do.
>
> Q: Okay. And you think its a dumb idea because you think you have to turn the water on when you want it and turn it off when you want it, correct?
>
> A: You have to control your water, yes. You're liable for it.
>
> Q: Even if you gave the Scotts the exact times and the amount of water, amount of turns on the head gate that you wanted the water, is it still a dumb idea?
>
> A: I wouldn't know how many turns I'd want on the head gate until I saw what kind of water I wanted.
>
> Q: Okay. You haven't even tried it, have you, Mr. Bratton? You haven't even tried or attempted to allow the Scotts to turn on the head gate for you so that water could get to your pasture; is that right?
>
> A: No. I didn't want any contact with them. I'm afraid of them.
>
> Q: Okay. And do you remember again in 2008 when the irrigation season came, I think it was in about June 2008, that the Scotts again offered to turn on the head gate to allow water to run through the ditch to reach your property?
>
> A: That water was not going to run through my ditch that I could control and take care of, no.

Q: Okay. Mr. Bratton, the question was, do you remember the offer in 2008 that was made against by the Scotts to turn the head gate on for you so that you could get water to your property? Do you remember the offer?

A: It's still a dumb idea.

Q: Okay. And so you didn't take them up at that time either, correct?

A: No, because I wanted to control my own water.

(Tr, Vol. III, pp. 1103-1104).

Thus, the evidence at trial showed irrigation water flowed through the ditch onto the Brattons' property in an amount sufficient to irrigate his pasture. Mr. Bratton, however, refused to turn on the headgates and work with Mr. Scott to irrigate his pasture. Instead, Mr. Bratton filed the underlying lawsuit. Mr. Bratton testified during the trial that he believed he had the right to do whatever he needed to do to take care of the ditch and could access the ditch any way he wanted because, "It's my easement. I've been doing it for 35 years and it was my right." (Tr., Vol II pp. 1092 – 1093) Mr. Bratton therefore appeared to have no real concern or respect for the Scotts' property rights.

III. STANDARD OF REVIEW

In Appellant's Opening Brief, they fail to identify the issues on appeal. While it is unclear, the Brattons appear to be appealing two issues as set forth in their standard of review section: (1) the district court's issuance of a judgment notwithstanding the verdict in favor of the Scotts; and (2) the district court's denial of the Bratton's motion for a new trial. (See App. Brief, pp. 8-9).

The Idaho Supreme Court has held that in reviewing a decision to grant or deny a motion for judgment notwithstanding the verdict, the Court applies the same standard as that applied by the trial court when originally ruling on the motion. *Olson v. EG&G Idaho, Inc.*,

134 Idaho 778, 781, 9 P.3d 1244, 1247 (2000) (upholding the district court's decision granting respondent's motion for judgment notwithstanding the verdict) (citation omitted). When ruling on a motion for judgment notwithstanding the verdict, the trial court must determine whether there is substantial evidence to support the jury's verdict. *Id.* (citation omitted). Upon a motion for judgment notwithstanding the verdict, the moving party admits the truth of all of the adverse evidence and all inferences that can be drawn legitimately from it. *Id.* at 782, 9 P.3d at 1248 (citation omitted). "It is not a question of no evidence on the side of the non-moving party, but rather, whether there is substantial evidence upon which a jury could find for the non-moving party." *Id.* (citation omitted). The Court will not make a finding of substantial evidence in favor of the non-moving party if it concludes "that there can be but one conclusion as to the verdict that reasonable minds could have reached." *Id.* (citation omitted). In deciding a motion for judgment notwithstanding the verdict, the trial court may not reweigh the evidence or consider the credibility of the witnesses, but must draw all inferences in favor of the non-moving party. *Id.* (citation omitted).

When reviewing a trial court's ruling on a motion for new trial, the Idaho Supreme Court applies an abuse of discretion standard. *Dyet v. McKinley*, 139 Idaho 526, 529, 81 P.3d 1236, 1239 (2003) (upholding district court's denial of appellant's motion for new trial) (citation omitted). A trial court has wide discretion to grant or refuse to grant a new trial, and on appeal the Court will not disturb that exercise of discretion absent a showing of manifest abuse. *Id.* (citation omitted). The test for evaluating whether a trial court has abused its discretion is as follows:

> (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal

> standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

Id. at 530, 81 P.3d at 1240 (citations omitted).

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

The Scotts present the following additional issues:

1. Did the district court err in applying section 42-1204 and 42-1207 of the Idaho Code to this case and instructing the jury on these statutes?

2. Did the district err in allowing evidence regarding an implied easement which contradicted the terms of the express easement contained in the Warranty Deed?

V. ATTORNEY FEES ON APPEAL

The Scotts are requesting an award of attorney's fees on appeal pursuant to section 12-121 of the Idaho Code on the basis that the arguments advanced by Appellants in this appeal are meritless and without foundation, as explained below.

VI. ARGUMENT

A. The District Court Properly Granted the Scotts' Motion for Directed Verdict.

The Brattons first challenge the district court's grant of a judgment notwithstanding the verdict, arguing this ruling constitutes an abuse of discretion. This Court must therefore determine whether there was substantial evidence presented by the Brattons during the damages phase of the trial to support the jury's verdict award of damages in the amount of $6,500.00.

1. Damages Must Be Proven To A Reasonable Certainty.

Idaho courts have held that a person asserting a claim for damages has the burden of proving not only a right to damages, but also the *amount* of damages. *Martsch v. Nelson*, 109 Idaho 95, 100, 705 P.2d 1050, 1055 (Ct. App. 1985) (emphasis added) (citing *Beare v.*

Stowe's Builders Supply, Inc., 104 Idaho 317, 321, 658 P.2d 988, 992 (Ct. App. 1983)).. Further, the amount of damages must be supported by substantial evidence and not based upon mere conjecture. *Id.*; (citing *Alper v. Stillings*, 389 P.2d 239 (Nev. 1964)). The evidence must be of sufficient quality and probative value that the trier of fact could reasonably conclude that an award of such amount was proper. *Id.* (citation omitted).

Where the only proof presented on the amount of damages requires that the trier of fact make a "blind guess" as to the amount of damages or loss involved, an award of damages is not proper. *See Beare*, 104 Idaho at 321, 658 P.2d at 992; (citing *Call v. Coiner*, 43 Idaho 320, 251 P. 617 (1926); *see also, e.g., Powell v. Sellers*, 130 Idaho 122, 937 P.2d 434 (Ct. App. 1997) (upholding the award of damages where the plaintiffs presented evidence of bids reflecting the amount to repair the ditch and the amount and value of trees that had been damaged). Similarly, the amount of damages must be established to a reasonable degree of certainty. *See Sells v. Robinson*, 141 Idaho 767, 774, 772 P.3d 99, 106 (2005).

In its Special Verdict Form, the jury awarded the Brattons the sum of $2,250.00 in damages to restore the ditch to its original state. (R., p. 451-452). The jury also awarded the Brattons damages in the sum of $4,250.00 for the Scotts' actions of allegedly changing the irrigation ditch without written permission. These awards are discussed separately as follows.

2. The Brattons Completely Failed To Meet Their Burden Of Proof At Trial Regarding Damages For Moving The Ditch.

Following the jury's Special Verdict following phase two of the trial, the only claim remaining during the damages phase of the trial was for negligent interference and changing the ditch without written permission. The Brattons lost their claims for infliction of

emotional distress and interference with the right of privacy. In addition, the jury specifically found that the Scotts' alleged actions had not resulted in a diminished water flow through the irrigation ditch. (R. pp. 439-442). Thus, the jury found no liability on the part of the Scotts with respect to the Brattons' claim for breach of privacy and interference by threat of harm. The jury found that the Scotts were negligent, but the negligence did not cause an impediment to the water flow in the ditch. The Brattons were left solely with recovery of damages for repair of their property, or more specifically moving the ditch back to the location they claimed it was in.

During the damages phase of the trial, the Brattons presented evidence with respect to the installation and maintenance of an above-ground ditch. However, the Brattons presented absolutely no evidence with respect to what this would cost. (TR. Vol. IV, pp. 1466-1484, 1495-1504). For example, there was no evidence presented to the jury with respect to how much the materials would cost, what the labor rate was for installation, the amount of time it would take, etc. The reason this crucial evidence was not presented is because it had not been disclosed in discovery and the district court therefore appropriately ruled that it could not be presented at trial. In other words, because the Brattons had not disclosed in discovery what repairing the ditch would cost, nor hired an expert to opine on these costs or disclosed a lay witness to testify regarding the actual cost of repairing the alleged injury to their property, the Brattons were precluded by the district court from presenting such evidence during the damages phase of the trial. The district court reasoned as follows:

> So that gives me guidance in what I have to decide here today. I have to view all of the evidence and all of the inferences drawn therefrom in favor of the nonmoving party, and I had to go back and look at the verdict forms which said there had been an inference and there had been – that the Scotts had taken action without written permission. And then I have to

> look if there's substantial evidence to justify submitting the case to the jury, or, as they say, "in other words, that there can be one conclusion as to the verdict that reasonable minds could have reached."
>
> And the discovery issue that I mentioned earlier was really the reason – I heard no estimates, no bids, no dollar amounts, no time, no materials. I did hear testimony that it would cost to move the ditch back where it was or to move it so it could be maintained, but I never heard a dollar amount.

(Tr, Vol V, pp. 1576-1577).

On appeal, the Appellants do not appear to be challenging the ruling to exclude this evidence, but are claiming that the jury was able to award damages in its absence. Appellants point the Court to *Smith v. Big Lost River*, 83 Idaho 374, 392, 364 P.2d 146 (1961), and argue the jury had a first hand opportunity to view the evidence. (App. Brief, p. 31) The *Smith* case does not involve a challenge to the amount of a damages award, but rather to the determination of the cause of damages. *Id.* Moreover, the court in *Smith* noted that "[t]he record of evidence introduced is voluminous" and "expert witnesses testified at length." *Id.*

Appellants also point the Court to several cases which stand for the basic proposition that damages awards are to be left to the purview of the jury, which can use their sound judgment. (App. Brief, p. 11), (citing *Shrum v. Wakimoto*, 70 Idaho 252, 256, 215 P.2d 991 (1950); *Gonzales v. Hodson*, 91 Idaho 330 (1966)). Yet none of these cases stand for the proposition that a plaintiff can simply ask the jury to award it damages to repair its property without any evidence whatsoever on what a reasonable cost would be for the repair, which is essentially what happened in phase three of the trial.

The only way the jury would have been able to award a dollar amount to the Brattons was through "guessing" or "speculating" what this might cost. This is improper. *See Beare*,

104 Idaho at 32, 658 P.2d at 992. The district court therefore correctly set aside the damages verdict as follows:

> I conclude that the motion for judgment notwithstanding the verdict on damages is hereby granted. And I base that on Watson, 121 Idaho at 659. 'There can be but one conclusion as to the verdict that reasonable minds could have reached, and when the conclusion does not conform to the jury verdict, then the court can entertain the judgment notwithstanding the verdict. The function of a JNOV is to give this court the last opportunity to order the judgment that the law requires.'
>
> I conclude that without estimates, bids, monetary amounts, time, materials, that the jury could not have concluded the amount of damages that they did and that they were making estimates.

(Tr, Vol. V, pp. 1579-1580).

3. The Award of Damages For Failure To Obtain Written Permission To Change The Ditch Was Not Supported By The Evidence.

The jury also placed an arbitrary number of $4,250.00 in damages as a result of the Scotts' failure to obtain written permission prior to the alleged move of the ditch. This award was not supported by the law. The written permission requirement is found in Idaho Code § 42-1207, which was included, in part, in Jury Instruction No. 24 given to the jury. Under *Allen v. Burggraff Construction Co.*, 106 Idaho 451, 680 P.2d 873 (1984), before recovery can be had based upon negligence or violation of Section 42-1207, the landowners are "required to show that relocation of the ditch actually caused a diminished flow of water to their properties." *Id.* At 452, 680 P.2d at 874. The court in *Allen* went on to state that "[p]roof of causation is essential to invoke the statute." *Id.* Thus, unless the Brattons were able to show an impeded water flow, they could not establish *causation* as a matter of law. If unable to establish causation in a negligence action, or action under Section 42-1207, no damages could be awarded – whether those damages are compensatory or nominal damages.

In *Weaver v. Stafford*, 134 Idaho 691, 8 P.3d 1234 (2000), this Court held that the plaintiff could not recover any damages under Section 42-1207 of the Idaho Code because he failed to introduce any evidence of the historic flow rate of water to his property before and after the changes to the lateral ditch. *Id.* At 700, 8 P.3d at 1243. The Court noted that Section 42-1207 prohibits altering an irrigation ditch "in a manner which impedes the flow of water." *Id.* Thus, as a matter of law, the Brattons could not satisfy the causation element of their negligence action unless they could show impeded water flow. Not only did they fail to do so, the jury specifically found that the water flow had not been impeded.

The district court below indicated during previous argument that it would be proper for the jury to award nominal damages under Section 42-1207 in the absence of actual damages, if the Scotts failed to obtain written permission to change the ditch, and therefore allowed the Plaintiffs to proceed to the damages phase of the trial on this issue. Yet after the jury verdict the district court determined an award of $4,250.00 in damages was not nominal. (Tr, Vol. V, pp. 1580-1581). The district court therefore correctly reversed this award of damages and granted the Scotts a judgment notwithstanding the verdict.

Appellants argue that Section 42-1207 allows for damages, without limitation, if there was impeded water flow *or if the ditch was changed.* (App. Brief, p. 39). Yet the plain language of the statute does not support this argument. Section 42-1207 provides that when a ditch has been constructed across or beneath another's land, "the person or persons owning or controlling said land shall have the right at their own expense to change said ditch . . . to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal . . .." I.C. § 42-1207. The remainder of the statute discusses the

landowner's right to bury the ditch if certain conditions are met. *Id.* The statute makes clear that written permission of the ditch owner must be obtained before it is changed or buried by the landowner. *Id.*

The statute therefore does not state that the ditch owner is allowed recovery for harm if the ditch was changed without permission. It does not relieve the Brattons from their duty to prove causation, especially when read in light of this Court's opinion in *Weaver v. Stafford, supra.*, wherein the Court made clear that absent evidence of a reduction in water flow the plaintiff could not recover under Section 42-1207. 134 Idaho at 699, 8 P.3d at 1242.

B. The District Court Applied The Correct Legal Standard To Appellant's Claim For An Implied Easement.

Appellants argue that the district court erred when it ruled that Section 42-1102 of the Idaho Code did not apply to the Brattons' claim for an expanded easement of 12 feet in width, and thereafter declined to instruct the jury on this statute. (App. Brief, pp. 18-19, 35-37). Similarly, the Brattons take issue with the district court's decision to apply the law of implied easements by prior use as set forth in *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392 (2006), and instruct the jury accordingly. The Brattons instead insist that the proper legal standard to apply to their claim for an expanded easement of 12 feet in width is found in Idaho Code § 42-1102.

At the outset it is important to note that the issue presented to the jury in phase one of the trial was for the purposes of an advisory verdict only. The district court had ruled that this issue was one for the court to make the ultimate determination because the Brattons had specifically plead their implied easement claim as an injunctive claim and requested declaratory and injunctive relief only in the Complaint. (R. pp. 1-9; Tr., Vol. I, 246 – 252).

After hearing the evidence, the jury found that the Brattons had not proven a 12 foot implied easement or right of way of 12 feet, and the district court ruled in the same manner.

1. The District Court Applied The Correct Legal Standards To The Brattons' Claim For An Expanded 12 Foot Easement.

For the very first time, a mere day or so before trial, the Brattons cited and argued the applicability of Idaho Code § 42-1102, arguing that this statute controls their claim for an implied 12-foot easement. The Brattons then took this position throughout the trial, urging the district court to ignore the well settled caselaw regarding implied easements as set forth in *Thomas v. Madsen*, 142 Idaho 635, 132 P.2d 392 (2006). *See also, e.g., Beitzel v. Orton*, 121 Idaho 709, 827 P.2d 1160 (1992).

First, Appellants' Amended Complaint asserts a claim for an implied easement and at no point mentions a claimed right of way pursuant to statute. (R. pp. 1-9). Appellants also moved for summary judgment on their claim of implied easement, arguing the elements set forth in *Thomas*, which was denied. (R. pp. 47-60). Thus, throughout the duration of the lawsuit, Plaintiffs sought to expand the scope of the undisputed written easement through the legal doctrine of implied easement from prior use.

After the Brattons raised the applicability of Section 42-1102, in addition to several other statutes discussing irrigation water, the district court ruled that the law of implied easements could not be ignored, and the court would proceed to instruct the jury and consider the elements required by this Court to establish an implied easement by prior use, as had been plead in the Brattons' Complaint. The district court did, however, instruct the jury on Section 42-1207 of the Idaho Code. (*See* Jury Instruction No. 10, R, p. 407). This instruction was given following both phases one and two of the trial. (Id., Tr, p. 420). This instruction contained direct quotes from Section 42-1204 as follows:

> The owners or constructors of ditches, canals, works or other aqueducts and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others. The owners or constructors have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to 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 is reasonably adapted, to that work.

(R, p. 407, Idaho Code § 42-1204). The jury was therefore instructed following phase one of the trial that the owners of a ditch have the right to enter land for the purposes of cleaning, maintaining and repairing the ditch. This language is similar to that found in Section 42-1102, which was requested by the Brattons. The jury was therefore adequately instructed on both the statutory laws regarding rights-of-way for irrigation ditches and the law of implied easements found in *Thomas*. Moreover, the jury instructions given in phase one of the trial were to help the jury render an advisory verdict only. Thus, any error in instructing the jury during phase one of the trial constitutes harmless error as the district court made the ultimate determination on the scope and width of the Brattons' easement, as was specifically requested in the Complaint by the Brattons.

Finally, Idaho Code § 42-1102 is inapplicable in this case based upon the plain language of the statute. Section 42-1102 provides rights-of-way for irrigation rights and reads as follows:

> 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, canal or other conduit 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 water 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. . . .

I.C. § 42-1102. Under the statutory definitions, the Brattons are not claimants to land lacking sufficient length of frontage on a stream, nor is Plaintiffs' land "back from the banks of a stream." The statute is therefore inapplicable and the district court did not err when it declined to apply this statute.

Finally, no matter how the law and facts are viewed, the Brattons simply could not prove that an easement by implication from prior use had arisen to expand the width of the three foot express easement to 12 feet that they had a right-of-way on the servient estate which extended beyond three feet. This Court made clear in *Thomas* that in order to establish an easement by prior use, the party claiming such an easement must prove the following elements: (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. 142 Idaho at 638, 132 P.2d at 395. (emphasis added.)

In order to satisfy the second element of an implied easement by prior use, the Brattons needed to 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, 132 P.2d at 395. *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 Am Jur. 2d, Easements and Licenses, § 25. This element appears to be standard among jurisdictions and is explained

further as 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, 133 Idaho at 642, 991 P.2d at 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").

There was no dispute at trial, nor throughout the underlying proceedings, that the irrigation ditch was dug by the Brattons after they purchased Lot 39 from the Fords. Accordingly there was no way for the Brattons to prevail on a claim of implied easement by prior use and obtain an easement larger in width than the express easement contained in the Warranty Deed.

The Brattons argue on appeal that even if they could not establish all elements required for a common law implied easement, inclimate weather delayed placement of the ditch until after the conveyance of the dominant property. (App. Brief, p. 21). The Brattons then cite *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 827 P.2d 706 (1992). The *Phillips* opinion, however, does not stand for the proposition that the Brattons do not need to show the second element set forth in *Thomas* opinion of apparent and continuous use prior to separation of the dominant and servient estates. In *Phillips*, the court upheld the trial court's conclusion that the appellant had failed to prove all elements of an easement by implication and there is no discussion in this opinion of whether or not the apparent continuous use needs to have occurred prior to separation of the estates. Indeed, the court stated as follows:

> The creation of easements by implication rests upon exceptions to the rule that written instruments speak for themselves, and

> because implied easements are in derogation of such rule, they are not favored by the courts. The general rule is that the burden of proof rests upon the person asserting it to show the existence of facts necessary to create by implication an easement appurtenant to his estate.

Id. (quoting *Davis v. Gowen*, 83 Idaho 204, 210, 360 P.2d 403, 406-07 (1961)).

Appellants also argue that necessity is an element of an implied easement by prior use. While it is true that the third element of an implied easement requires that it be "reasonably necessary to the proper enjoyment of the dominant estate," this element is in addition to the remaining two elements, which include a showing that the apparent continuous use occurred before separation of the estates. *See Thomas*, 142 Idaho at 638-639, 132 P.2d at 395-96. The element of necessity therefore does not relieve the Brattons from also having to establish that the use occurred prior to separation of the estates.

In sum, the Appellants brought a claim in their Complaint for an easement by implication from prior use and requested a declaration or injunction by the court that such an easement had arisen. The Appellants changed their position the eve of trial and argued that the common law elements for proving an easement by implication from prior use no longer applied and that the controlling law is set forth in Idaho Code § 42-1102 *et seq.*, despite the fact that at no time did the Brattons plead a right-of-way. The district court, over objections of the Scotts, instructed the jury during phase one of the trial on both the common law elements of an implied easement by prior use and the statutory law set forth in Idaho Code § 42-1204. These instructions adequately covered both of the Brattons' inconsistent arguments. The district court then applied the correct legal standards found in the statutes and case law for implied easements by prior use and adopted the advisory verdict from the jury in favor of the Scotts. No error of law occurred that would warrant a new trial.

C. The District Court's Decision to Divide the Trial Into Three Phases Did Not Result in Any Harm to Appellants.

Appellants argue on appeal that the district court's decision to divide the trial into three phases constitutes an irregularity in the proceedings sufficient for the grant of a new trial pursuant to Idaho Rule of Civil Procedure 59(a) and the district court should have granted them a new trial on this basis. The Brattons, however, have failed to demonstrate how the decision to trifurcate the trial deprived them of a fair trial or was decided in error.

Under Idaho Rule of Civil Procedure 59(a)(1), the district court must consider whether there has been any irregularity in the proceedings, or any order of the court or abuse of discretion, which has deprived either party of a fair trial such that a new trial would be justified. *O'Dell v. Basabe*, 119 Idaho 796, 804, 810 P.2d 1082, 1090 (1991). The Brattons argue that the bifurcated[3] trial doubled the trial time, was confusing to the jury, and was in "violation of judicial premise of orderly and efficient litigation." (App. Brief, pp. 34-35).

This argument is without merit. The district court's decision to bifurcate the trial was rendered equally to all parties. The Scotts had to make the same pre-trial adjustments as the Brattons in the same amount of time. The Brattons received a partially favorable verdict in phases two and three of the trial and they asked for and received direction from the district court, on more than one occasion, regarding the scope of evidence during the trial. The Brattons simply have not shown how the decision to bifurcate the trial deprived them of a fair trial.

D. The Trial Court Did not Err in Awarding Partial Attorneys' Fees and Costs to the Scotts.

The Brattons challenge the award of partial attorneys' fees and costs to the Scotts on two bases. First, the Brattons claim that the Scotts were not the overall prevailing party in

[3] Plaintiffs refer to the bifurcation as "trifurcation."

this action, and second, the Brattons claim that the underlying action was not frivolous pursuant to Section 12-121 of the Idaho Code.

1. The Scotts Were the Overall Prevailing Party In This Lawsuit.

The determination of a prevailing party is within the sound discretion of the trial court. *J.R. Simplot Co. v. Chemetics Int'l, Inc.*, 130 Idaho 255, 258, 939 P.2d 574, 577 (1997). To determine which party is the prevailing party the district court must consider the final judgment or result obtained in relation to the relief sought by the parties. Id. R. Civ. P. 54(d)(1)(B). This Court has interpreted Rule 54(d)(1)(B) holding that a defendant is a prevailing party if he avoids all liability following a jury trial. *See Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 16, 719, 117 P.3d 130, 133 (2005). In *Eighteen Mile Ranch, LLC*, this Court stated as follows:

> Avoiding liability is a significant benefit to a defendant. In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. The point is, while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense.

Id. at 719, 117 P.3d at 133. Where a defendant escapes liability, and thus obtains "the most favorable outcome that could possibly be achieved," he is the prevailing party. *Id.; see also Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Ct. App. 2000) (holding that the defendant was the prevailing party where it received the most favorable outcome that could possibly be achieved when it received a dismissal of the case with prejudice and where the plaintiff gained no benefit as a consequence of the litigation).

At the end of the trial and post trial motions, the Scotts received the most favorable

outcome possible – a complete avoidance of liability. Although the jury found in favor of the Brattons on their negligence claim, there were no damages awarded. The district court therefore did not abuse its discretion in determining the Scotts were the overall prevailing party.

2. Plaintiffs' claims were frivolously pursued and attorneys' fees were warranted pursuant to Idaho Code § 12-121.

Under Idaho Code Section 12-121, attorneys' fee may be awarded to the prevailing party where the court finds from the facts presented that the case was brought or pursued frivolously, unreasonably or without foundation. *See* I.C. § 12-121; Id. R. Civ. P. 54(e)(1). The district court found that, in many respects, the Brattons brought and pursued this case frivolously, unreasonably, and without foundation, and the Scotts were therefore entitled to an award of attorneys' fees.

An award of attorneys' fees pursuant to Section 12-121 is discretionary, must be supported by findings, and those findings must be supported by the record. *Conley v. Whittlesey*, 133 Idaho 265, 274, 985 P.2d 1127, 1136 (1999) (citations omitted). "When an exercise of discretion is involved, an appellate court conducts a three-step analysis: (1) whether the trial court properly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason." *Id.* (citation omitted). In *Conley*, the district court recited at length and in great detail its reasons for awarding costs and attorney fees to the respondents. *Id.* The record in that case showed that the plaintiff maintained that the easement at issue gave him *carte blanche* to make changes in the existing road as he saw fit. *Id.* The district court concluded that the plaintiff's position in that case was so plainly fallacious and violative of the rights of

the servient landowners that an award of fees to the respondents as the prevailing parties in the action was justified. *Id.* The plaintiff in that case failed to demonstrate an abuse of discretion on appeal, and thus the Idaho Supreme Court upheld the district court's award of attorney fees and costs to the respondents. *Id.*

A brief review of the record of this case reveals that the Brattons brought and pursued several frivolous claims resulting in an unnecessary expense of fees by the Scotts. In their original Complaint, the Brattons alleged that the Scotts made "physical bodily threats to Plaintiffs" and alleged a cause of action for "tortuous [sic] stalking" against them. (R, pp. 1-9). The tortious stalking claim was completely without merit and was dismissed upon motion made by the Scotts because Idaho does not recognize a private right of action for such claim. (R. pp. 18-35).

Thereafter, the Brattons amended their Complaint to again allege that Defendants had made "physical bodily threats to Plaintiffs." (R. pp. 94-110). Counsel for the Scotts then took the deposition of Charles Bratton on February 6, 2008. During his deposition, Mr. Bratton admitted that Mr. Scott did not threaten to harm him in any way. Mr. Bratton again admitted this at trial. (Tr., Vol. III, pp. 1075-1084). However, despite these admissions by Mr. Bratton, Appellants frivolously continued to advance their claim for negligence based upon physical threats by the Scotts all the way through trial. This forced the Scotts to have to continue to defend this meritless claim and to expend continued time and expense in fighting these admittedly baseless allegations. This claim was ultimately rejected by the jury but only after a costly trial.

Additionally, the Brattons moved for partial summary judgment on January 11, 2008, on the issue of whether they were entitled to an express three-foot easement as well as a 12-

foot implied easement by prior use. (R. pp. 47-48). The Scotts did not dispute the existence of the express three-foot easement as set forth in the warranty deed, rendering summary judgment unnecessary. In addition, as previously set forth, it was clear that the Brattons could not meet all of the elements set forth in *Thomas v. Madsen* and *Davis v. Peacock* for an implied easement by prior use. (R, pp. 124-134).

At the February 21, 2008 hearing on the Brattons' Motion for Partial Summary Judgment, the district court reviewed the pleadings and the court record and denied the Brattons' motion, in part, ruling from the bench that Plaintiffs have no more than a three-foot express easement, and that the Brattons had not presented any evidence that they maintained a 12-foot easement prior to the separation of the dominant estate. (Tr, Vol. I, pp. 56-61).

Despite the fact that the Brattons could not establish all of the elements for an implied easement as set forth in *Thomas v. Madsen*, they continued to assert this claim through trial. Again, the Scotts were forced to continue to defend a meritless claim by the Brattons. The jury ultimately found that the Brattons were not entitled to a 12-foot implied easement and the district court ruled in the same manner following trial on this issue. However, the Scotts were still forced to respond to, defend, and ultimately go to trial on this issue incurring significant attorney's fees on yet another baseless claim asserted by the Brattons.

Similarly, the Brattons' invasion of privacy claim was frivolous and completely unsupported, as a matter of law, by the evidence presented at trial. Liability for a claim of invasion of privacy by intrusion requires: (1) an intentional intrusion by the defendant; (2) into a matter, which the plaintiff has a right to keep private; (3) by the use of a method, which is objectionable to the reasonable person. *Jensen v. State*, 139 Idaho 57, 62, 72 P.3d 897, 902 (2003) (citing *62A Am Jur 2d, Privacy § 48 (1990)* and *Uranga v. Federated*

Publications, Inc., 138 Idaho 550, 67 P.3d 29 (2003); *Hoskins v. Howard, 132 Idaho 311, 317, 971 P.2d 1135, 1141 (1999)*. In order to constitute an invasion of privacy, an act must be of such a nature as a reasonable person can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligences, situated in like circumstances as the plaintiff. *Id.* At trial, the Brattons only presented evidence than the Scotts were staring at them and installing video surveillance on their home. However, the evidence also showed that the video surveillance was installed on the Scotts' home so that they could protect themselves. The Brattons presented no evidence that the cameras reached their property, and they do not even live at the property at issue, which is 10 acres away from the Scotts' home. Again, this claim was completely unreasonable and not founded in law or fact.

Also at trial, the Brattons were precluded from presenting evidence regarding their damages because they failed to disclose the same in discovery. Thus, despite the fact that the Brattons did not present any evidence regarding any amount of damages, they continued to pursue their damage claims which forced the Scotts to expend significant time and expense. The damage portion alone took one day of trial.

Every claim asserted against the Scotts, with the exception of the claim that the Scotts did not dispute, failed. The Brattons' tortious stalking claim was dismissed because it was unsupported by law. The Brattons' claim for declaratory judgment for an implied 12 foot easement was baseless, where they could not establish the legal elements for such a claim. The Brattons further took nothing from their negligence claim, which was based in part on admittedly frivolous allegations that the Scotts had physically threatened Mr. Bratton. The jury rejected the Brattons' tortious interference with privacy claim, which was based on

allegations that were unsupported by the law. The Brattons also brought a motion seeking punitive damages, which was denied.

In ruling on the Scotts' motion for fees pursuant to Section 12-121, the district court reasoned in part as follows:

> Now, further comments. Idaho has never recognized the tort of tortious stalking, so the defendant is clearly the prevailing part with regard to that. And because Idaho does not have a cause of action, I believe I find that that claim was pursued frivolously.
>
> Then as to the threat of harm by Mr. Scott to Mr. Bratton and the invasion of privacy, it is my conclusion that that was also pursued frivolously, and the jury's verdict does support that. On the other hand, the jury's verdict, of course, supports the claimed – the claims made by the plaintiff that the easement was interfered with and that the ditch was changed and that there was no written permission.
>
> And that written permission question did create a lot of concerns, and I conveyed those to counsel – I think most of them were in chambers – because the legislature did change the statute, and it was changed after the express easement between the parties – or the predecessor to the party. But in any event, it was the current state of the law, so that question was asked.
>
> And I don't know that that was ever clearly defended against the defense. I mean, I don't remember them trying to justify it. But in any event, I think it was a finding that I had to have the jury make.
>
> The plaintiffs clearly had their express three-foot easement, but the jury concluded that they did not have an implied easement for twelve feet. That three-foot easement was never disputed by the defendants. In fact, the plaintiffs conceded it existence from the outset of the case.
>
> The jury found no invasion of privacy. The jury found that Mr. Bratton never threatened the defendant.
>
> So I am called upon to determine under the statute prevailing parties, and I am permitted to determine whether a party to an action prevailed in part and did not prevail in part and to

apportion costs.

Ultimately, there was a prevailing party in the lawsuit in my mind, that being the defendants. And as a result, I am going to award them costs as a matter of right, and then the discretionary costs in the sum of $9,753.41.

The dicier part of this obviously is the attorney's fees. It is true that I don't think this was ever a case for punitive damages. In fact, I get frustrated and maybe stated when I was ruling that I see it brought too often, it seems like. It's got to be extreme and outrageous conduct. Ms. Garrett argued that it was the kind on conduct based, I guess on the threats of harm.

And I will tell you that I considered having the defendants refile an itemized bill with regard to their attorney's fees, and that would have been in relation to awarding them costs with regard to their defense of the frivolous allegations of threat of harm by Mr. Scott to Mr. Bratton, frivolous allegations of invasion of privacy, frivolous allegations of implied easement, the bringing of punitive damages, and that was based on the verdict.

So I thought, well, maybe the thing to do would be to have their firm sort out all of those issues and resubmit a new affidavit for potential objection by the other side.

I decided, after looking over those itemized bills and considering everything that occurred at the trial and how so many of these issues wrapped and twisted around each other in the various facts, that it would be more appropriate – and particularly in light of the verdict form, the second verdict, that I read into the record, that it would be more appropriate to afford – or accord the defense – defendant attorney's fees in half the value that they are seeking in the document memo filed.

And again, that kind of goes to how the jury came down on their answers to the questions in the special verdict form.

I think ultimately when you look at that, that that's a fair apportionment of costs in this case, and so at this point, that is my ultimate decision.

(Tr, Vol. V, pp. 1625-1628).

In its opening brief, the Brattons state the record very clearly discloses that the

Brattons' case was necessary and reasonable and was not brought frivolously or unreasonably or without foundation. (App. Brief, p. 43). The Brattons, however, have not addressed the individual bases for the Scotts' request of an award of fees under Section 12-121 or the district court's rationale as quoted above. This case involved multiple motions brought by the Brattons which were denied by the district court and deemed frivolous. The district court was in the best position to review the case as a whole as the district court had presided over the case in its entirety and was very familiar with how the case was prosecuted and argued by the Brattons. Thus, the statement in Appellants' Brief that the record is clear that their case was not frivolous is not enough to show that the award of fees should be set aside.

E. The District Court Erred In Applying Section 42-1207 and 42-1204 To The Issue of whether the Brattons' Easement Was 12 Feet in Length.

After the Brattons asked the court to apply I.C. §§ 42-1207 and 42-1204 to this case on the eve of trial, the Scotts strenuously objected on the basis that these statutes were inapplicable. (Tr, Vol II, pp. 532 – 534; Vol I, pp, 241-243) The Brattons have an express easement which sets forth the parameters of their irrigation ditch. The Brattons therefore should not have been allowed to use these statutes or the theory of easement by implication, to contradict the terms of the express easement, which are unambiguous. In *Phillips Industries, supra,* the Court held that when interpreting and construing a deed, the court's function is to carry out the real intention of the parties, which is limited to the language of the deed if it is unambiguous. *Id.,* 121 Idaho at 697 –698.

The Brattons did not argue that the warranty deed is ambiguous. Thus, the jury should have never been allowed to hear evidence that contradicted the express easement contained in the warranty deed or to have considered the statutes which would allow for a

right of way in contradiction to the terms of the express easement.

VII. CONCLUSION

As stated many times by counsel for the Scotts throughout the transcript of the proceedings, this was an unfortunate case brought and prosecuted by the Brattons which resulted in an unnecessary and unwarranted expense by both parties. The undisputed evidence at trial was that any alleged changes to the irrigation ditch by the Scotts at no time resulted in an impediment of water flow to the Brattons' property. Nonetheless, the Brattons deliberately refused to avoid any harm to their property and refused to turn on the irrigation water or allow someone else to turn on the irrigation water and instead prosecuted this lawsuit with vigor. Idaho law, however, at no time provided the Brattons with the justification to do so.

The Scotts respectfully submit that the Brattons have not met their burden to show that the district court erred in granting a judgment notwithstanding the verdict or declining to grant the Brattons' motion for a new trial. The Brattons have failed to establish any errors of law that would have resulted in a different outcome in this case. The Scotts therefore request this Court deny the appeal and award the Scotts their costs and fees on appeal for having to yet again defend the Brattons' claims.

DATED: April 8, 2010

PERKINS COIE LLP

By: Shelly Shannahan
Shelly C. Shannahan, Of the Firm

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 8, 2010, 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 Shannahan

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