11-5-2012

Akers v. Mortensen Appellant's Reply Brief Dckt. 39182

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife, Plaintiffs/Respondents,	) Supreme Court Docket) No.: 39182
v. VERNON J. and MARTI MORTENSEN, Defendants/Appellants,	) Related Supreme Court Case) Docket No.: 39293; 39493
and D.L. WHITE CONSTRUCTION, INC., DAVID L. WHITE and MICHELLE V. WHITE, Defendants/Appellants.	) Kootenai County Docket No.:) 2002-222

APPELLANT MARTI MORTENSEN'S REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County. Honorable John T. Mitchell, District Judge, presiding.

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Table of Contents.

Table of Cases and Authorities

Statement of the Case

Marti Mortensen adopts and incorporates by reference Whites' appeal brief, which includes the following:

This case is an easement dispute. The basic layout of the properties involved in the case is seen in Trial Exhibit 6, a survey map produced In July, 2002. Mortensen acquired his property in 1994 from Peplinski (Trial Exhibit D-20) and previously owned by Millsaps. White's properly was acquired from Mortensen In 2001 and 2002 (Trial Exhibits D-21 and 0-22), part of the 160 acres that Mortensen obtained from Peplinksi.

The access road has been in the same location on Akers' property since as early as 1958. (Trial Exhibits 3 and J-1), seen clearly in 1965 aerial photographs. (Trial Exhibit K-I) Akers in 1982 altered the approach to the Access Road as it left the County road (Tr., Vol. I, p. 662, II 34), altering the travel portion of the easement that was being used by Peplinski. (Tr., Vol. I, pp. 661-62, II. 18-25,II.1-5). After Akers put in the curved approach Peplinski rebuilt the portion of the Access Road that tied into the new curved approach over the course of two or three days using fill material that he cut from the embankment on the south side

of the Access Road and adjusted the position of the Access Road in Section 24 so that it curved slightly south onto his property. (Tr., Vol. I, pp. 812-13, II. 13-25, 1-20) Peplinski continued to use the curved path approach of the Access Road to access his property until It was sold to Mortensen in 1994, as did Mortensen without opposition from Akers. (Tr., Vol. 1, pp. 251-52, II. 19-25 1-7). After Mortensen sold the property to White, Akers began blocking Appellants access to their respective properties and filed this suit.

On May 8, 2002, the district court entered a temporary restraining order, restraining Akers from blocking access to Appellants' property, but also prohibited Appellants' use of the curved approach to reach the Access Road. (Tr., Vol. 1, p. 78). This order precipitated construction of the 12.2 foot approach but that was not the original route traveled to use the Access Road.(Tr., Vol. I, p. 330, II. 147-19). In light of the district court's order, Mortensen and White began making Improvements to the area south of the curved approach, (Tr., Vol. 1, pp. 264-65, II. 10-25,1-21) so that Appellants could get to the Access Road from the County Road. (Trial Exhibit 769) The trial exhibits establish the Access Road's route as it left Government Lot 2 and crossed into Section 24. Trial Exhibits D42, D43 and

D-44, depicted the access road as It left the County Road, and made a wide curve into Section 19 before it turned Into Appellants' property. (Trial Exhibits D-42, D-43, and D44, E).

In January 2002, White began excavating on his property, changing grade to create a new access point. (Tr., Vol 1, p. 937-38, U. 3-25,1-2; Trial Exhibit 6) It is in this location that Judge Mitchell decided the Access Road crossed into Whites' property via a prescriptive easement.

On 1st remand Judge Mitchell ruled that the access road crossed into SECTION 24 into Akers land but immediately turned 90 degrees leaving Mortensens and Whites with a nonfunctional easement. On the 2nd appeal Mortensens and Whites were granted a new trial and judge. However that opinion was retracted and replaced with a substitute opinion months later. In the substitute opinion this Court determined that the prescriptive easement for the entire roadway was only 12.2. However the photographic and testimonial evidence is dubious. (White brief p. 21-22) The trial court declined to permit new evidence that would have shown the exact width and location of the easement with great specificity. (White brief p. 23)

Argument

Note – Appellant refers to some documents that will be the subject of a motion to Augment the Record with some older documents not included in the original Transcript for this appeal.

1. Matters Incorporated by Reference

Respondents argue theat Marti Mortensen makes no argument about location of the easement, because we incorporated Vernon Mortensen's argument, and his argument was too poorly briefed to be considered. That issue is, we understand, as yet not fully resolved.

First, we incorporated the arguments of Vernon Mortensen and White Construction. Second, Vernon Mortensen's arguments, while perhaps not artfully couched, are nonetheless cogent and are set out below.

2. Punitive Damages

Judge Mitchell's damages against Mortensens and Whites today, now that they have an easement, remain the same as 8 years ago when the court ruled Mortensens and Whites were land-locked. The court's reasoning was that since

Mortensens and Whites knew they had no easement but still used the access road their trespass was wanton, Malicious and with trickery. His award, totaling $346,542.00 was based on his erroneous determination that the access road never crossed into section 24. Instead it turned south entered Reynolds' property and climbed a cliff before entering the 160. Almost half of the entire sum of damages against Mortensens and Whites are punitive damages against Mortensens. Judge Mitchell based all damages on three premises; that Mortensen was involved in other easement litigations, not supported by the record; that the access road was only 12.2 feet wide based on a survey in 2002 not of a road but of a travel path of a road and that Dennis Akers granted Mortensens permission to use the road when Vernon Mortensen supposedly met with Dennis Akers the day before Mortensens purchased the Peplinski 160 acres, also unsupported.

The primary purpose for punitive damages is deterrence of similar conduct. *Linscott v. Rainier National Life Insurance Co.*, 100 Idaho 854, 606 P.2d 958 (1980). We all agree that punitive damages may be awarded where there is "an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely

consequences." *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983). The issue focuses, however, on whether Mortensen's state of mind was "extremely harmful." *R.T. Nahas v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988). Where, as in that case, the scope of the easement is lawfully undefined, the extreme harmfulness cannot be readily established.

A. Mortensen's Recidivism

Judge Mitchell found "This is not the first time Mortensen has bought property low, sold quickly for a marked increase, then found himself in litigation because of lack of access to that property". (Tr. P. 570 at 596). In fact Judge Mitchell states this is the "primary reason the punitive damage awards are in different amounts as between Mortensens and Whites." [Tr. P. 570 at 589] But Appellant believes there is no evidence in the record to show such prior "other litigation." It is impossible to prove a negative, but Appellants have consistently asked the trial court to articulate what previous litigation is referenced, and Appellants believe there are no such.

Judge Mitchell stated:

This is not the first time Mortensen has bought property low, sold quickly

for a marked increase, then found himself in litigation because of lack of access to that property". (Tr. P. 570, at 596)

Judge Mitchell has reaffirmed this decision throughout the life of this ten year litigation whereupon he assessed huge punitive damages against Mortensens:

> This Court has assessed Mortensen differently as a recidivist due to his conduct in other situations and other litigations. All of which result in differing amounts of punitive damage awards. [Tr. P. 570 at 593]
>
> There is certainly proof that Mortensens were very consistent in their intimidation in this case and in other cases prior to and during this litigation. That is the primary reason the punitive damage awards are in different amounts as between Mortensens and Whites." [Id. Page 589, starting at line 37]
>
> And, at least as to Mortensens, that "repetitive antisocial conduct" has occurred in other litigation.....[Id. P. 590, starting at line 26]
>
> Campbell states "...that a recidivist may be punished more severely than a first offender [because] repeated misconduct is more reprehensible than an individual instance of malfeasance..." [Id. page 592, starting at line 44]
>
> Thus, this is not Vernon Mortensen's first time to enter the litigation rodeo....." [Id. At 600, starting at line 39]
>
> For Vernon Mortensen to now argue: "I am demanding Susan Weeks provide the case numbers [of this prior litigation]" entirely misses the point. It is not plaintiffs' burden to now prove the truth of what Vernon Mortensen failed to rebut at trial." [Id. Page 602, lines 3-5]

However, no one testified to Mortensens' prior access litigations and exhibits were

never entered into evidence. Mortensen couldn't rebut non- existing testimony or exhibits. That finding is unsupported.

Judge Mitchell also repetitively found Mortensens "harmed innocent purchasers" but does not name a single "harmed innocent purchaser" nor can the name of one be found in the trial record; not a single harmed innocent purchaser testify in court. There are no harmed purchasers. The trial court has no substantial and competent evidence to support that claim.

One who is unfamiliar with this case could read the many misrepresented facts and believe the trial was about Mortensens selling land to Akers and then not providing access and thus harming them while in truth Akers sued Mortensens and White in an effort to take away their legal access which they did until this case was appealed to the Supreme Court.

B. Prescriptive Easement

Judge Mitchell made a finding that Mr. Mortensen left a card with Akers indicating he was going to buy the Peplinski property. [Findings ¶4 p. 20] However Mr. Akers testified that he did not know Mortensen had bought the Peplinski property until 6 months later. [Trial Transcript p. 991 lines 13-22, 993

lines 18-25] Judge Mitchell's finding that Mr. Mortensen's use of the easement was occasional was contradicted by Mr. Akers's testimony. [Trial Transcript p. 627 lines 10-25]

Judge Mitchell has based his findings on a single false premise that when Mortensens bought 160 acres from Peplinski there was no legal access. That is what Judge Mitchell initially wrongfully determined eight years ago. However with the aid of the Supreme Court it has been determined that there never was an access problem. Judge Mitchell continues to base huge punitive damages against Mortensens as if his initial and erroneous opinion of lack of easement was correct.

Judge Mitchell found "credible the testimony of Dennis Akers that Mr. Mortensen left a card in Akers' door wanting Akers to call, that Mortensen was going to buy the land from Peplinskis the next day, that Akers then gave Mortensen permission." (FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, Filed 1-2-03, paragraph # 4, page 20) But Dennis Akers' own testimony establishes that six months after Mortensens purchased in September 1994 he still didn't know Mortensens had purchased the 160 acres.

Reagan: Okay. So as of the date of this deposition, March 6, 1995,

before this matter is resolved you know that the Peplinskis have already sold the property?

Akers: I didn't know that. I was told. I hadn't been shown nothing.

Reagan: If you didn't know why did you answer in the affirmative?

Akers: They told me that they'd sold it, but I hadn't seen nothing.

Reagan: Okay. Did you have any reason to dispute that the property had been sold from the Peplinskis to Mr. Mortensen?

Akers: Didn't know.

Reagan: You didn't know who bought the property?

Akers: No. They never said nobody's name or anything. All they said was that it could've been sold.

(Trial Transcript, page 991, lines 13-22)

Reagan: Okay. Isn't it true that you knew that Mr. Mortensen had purchased the property at the time your deposition is taken on March 6, 1995?

Akers: Does it have his name in here somewhere?

Reagan: 'Yes" or "no", Mr. Akers.

Akers: I don't know because at my deposition I never was told anybody's name or anything that I can remember.

(Trial Transcript, page 993, lines 18-25)

Judge Mitchell made a critical mistake when concluding Dennis Akers gave Mortensens permission to use the east curved portion of the road or any part of the road the day before Mortensens purchased the Peplinski property. Mortensens used the access road for seven years after purchasing from Peplinski and prior to Akers filing suit and falsely alleging Mortensens could only access their property with Akers permission now withdrawn. During those seven years Mortensens had

established a prescriptive easement on the east curved portion of the road. Judge Mitchell extinguished Mortensens' claim of a prescriptive easement on the east curved portion of the road based on Akers' permission to use that part of the road the day before Mortensens purchased the 160 acres from Peplinskis.

That Mortensens used the road frequently and openly for seven years is supported by V.J. Mortensens and Dennis Akers' testimony. However Judge Mitchell ruled that Mortensens' use of the road was infrequent.

> Reagan: Besides logging what other uses did Mr. Mortensen make of the road during his ownership of the property?
> Akers: Um, I have no idea. He ran a backhoe up there day and night constantly making changes doing something. I don't know what he did. It was none of my business so-
> (Trial Transcript page 627, lines 19-25)

> Judge Mitchell: Mr. Mortensen testified he never asked Akers for permission to use any part of the road since he purchased in 1994, that he never tried to hide his travel from plaintiffs, although the frequency of his travel was rare.
> (FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER, Filed 1-2-03, paragraph # 4, page 20)

Judge Mitchell's many critical errors have been consistent throughout this litigation. Had the interpretation of evidence been correct, the facts would have been entirely different as would have been the conclusions.

C. Width of Easement

Judge Mitchell found the easement was only 12.2 feet wide, yet the testimonies of William A. Millsaps, (Tr., Vol. I, p.874 ,ll. 5-14) Richard Peplinski (Tr., Vol. l, p. 7 7 6, Ll. 22-25, p. 77 7, ll. 1 - I 6) and even Dennis Akers (Tr., Vol. I, p. 984,11. 8-18) all concur that the original road was 25 feet wide or wider. The 12.2 foot wide easement is the only basis that supports punitive damages for trespass.

Judge Mitchell ignored the competent and substantial evidence of four witnesses when determining that the access road was 12.2 feet wide. Not a single witness testified to that width. Four witnesses testified the access road was 25 feet wide or wider. Those witnesses included Richard Peplinski, W.L. Millsaps in the form of an affidavit, William A. Millsap, the son of W.L. Millsaps and even Dennis Akers. The only other witness to testify about the access road prior to Akers' arrival was William Reynolds who didn't give an opinion regarding the width. Instead he described the access as a two tire track trail but never mentioned the amount of flat ground on each side of each track.

The 12.2 width of the road was determined by a survey by Scott Razor made

in 2002 well outside the critical time between 1966 and 1980 and showed a travel path with flat ground on each side of that travel path.

> W.L. MILLSAPS: That roadway at said date served as ingress and egress for farming equipment which consisted of trucks and various types of field equipment such as combines which have a width of twenty feet or more. We contemplated that the width, although expressed in the reservation of easement, was to be at least thirty feet, so as to be able to handle the equipment and also to allow for proper preparation of the road surface and proper drainage with respect thereto. This was under- stood by the Grantees, Mr. and Mrs. Baker."

(See affidavit of W.L. Millsaps.)

Judge Mitchell found that only one Millsaps testified and that he contradicted his own testimony with his affidavit, but W.L. Millsaps who was deceased at the time of trial testified by Affidavit while his son William A. Millsaps who was living at the time of trial testified in person.

> Judge Mitchell: Defendants now argue the easement by prescription should be 25 feet wide. (Defendants') Brief on Remand, pp. 5-9. Defendants argue W. L. Millsap's testimony and Richard Peplinski's testimony at trial supports this conclusion. Id., pp,6-7. However, both Millsap and Peplinski were not as credible as William Reynolds. Millsap's trial testimony was contradicted by his affidavit, as noted by this Court in its 2003 findings of

fact.

(See page 11, lines 4-8 of the trial court's Order on Remand filed 9-7-06)

The testimonies of William A. Millsaps, Richard Peplinski and even Dennis Akers all concur with W.L. Millsaps affidavit that the road was 25 wide or wider.

William A. Millsaps testified as follows:

> Q: I'm gonna show you Defendants' Exhibit 44, and, I'm gonna tell you that this is a blow-up of an aerial map back from 1972. I'm gonna show you Millsap Loop Road coming up, curving around. That would be the rest of the loop, right?
> A: Yeah.
> Q; And then the access road into your property?
> A: Yeah, that's it right there.
> Q: Okay, does Defendants' Exhibit 44 accurately depict the road as it was in say, summer of 1966?
> A: Looks like it to me, yes.
> Q: Okay. Does the width of the road depicted in that exhibit, that aerial photograph look like about the width of the county road?
> ...
> A: Looks like it to me.
> Q: Is that your recollection of how the road was in 1966?
> A: Yes it is.
> ...
> Q: Okay, do you have any estimate for how wide the road surface was - - let's just
> say except this bog area that you maybe went around, about how wide was the rest of the road that you used up until 1966?
> A: Oh, I'd say twenty to thirty feet twenty-five feet, something like that
> Q: It wasn't just two tracks?

A: No,
Q: Was it ever just two tracks in the dirt?
A: Not that I remember.
(Tr., Vol. I, p.874 ,ll. 5-14)

Richard Peplinski confirmed Millsaps' testimony as follows:

Q: How wide was some of the equipment that you used this road for?
A: We had equipment as wide as 25 feet.
Q: Could you describe for us - - well, here, let me ask you this. Let's look again at
D-44. l realize that that blowup's a little bit fuzzy, but does that accurately depict the relative width of your access road compared to what is depicted in that photograph of Millsap Loop Road?
A: Looking at the picture and doing a comparison, yes.
Q: Is it fair to say that your private access road was nearly as wide as the county road coming up to it?
A: Yes.
Q: When your dad purchased the property in 1967, was that road just two tacks?
A: No.
(Tr., Vol. l, p. 776, Ll. 22-25, p. 77 7, ll. 1 - I 6)

Dennis Akers also testified the road width should be 25 feet:

Q: Basically under that agreement with the Peplinskis in terms of what - -was the road to be changed or stay the same as it was?
A: Well, that's basically what it was. It was to stay like it was which is 25 feet basically. That includes the ditches and edges.
Q: The ditches and the shoulder, the contour of the road?
A: Right, um-hmm.
Q: All of that 25 feet?
A: Right.

(Tr., Vol. I, p. 984,11. 8-18)

A 12.2' easement has to be found in order to impose damages and punitive damages against defendants, since the conduct giving rise to punitives is trespass outside the bounds of the easement.

> Judge Mitchell: Defendants argue at length that trespass damages, emotional distress damages and punitive damages are not appropriate. (Defendants') Brief on Remand, pp.9-41. Defendants' argument is premised on their claim they have done nothing wrong if they have a 25 foot wide easement by prior use or by prescription. As stated above, this Court finds no easement by necessity and the prescriptive easement is limited to 12.2 feet. The Idaho Supreme Court wrote: "The question of whether and to what degree the Defendants' conduct constituted trespass on the Akers' property is intertwined with the scope and boundaries of the Appellants' easement." 127 P.3d at 207. This Court finds most of defendants' actions of trespass involved activity outside the boundaries of this 12.2 foot easement. (Page 13, lines 12-20, ORDER ON REMAN filed 9-7-06)

12.2 feet was determined ignoring the testimonies of W.L. Millsaps, his son William A. Millsaps, Richard Peplinski and Dennis Akers and relying on a survey that did not represent a road but a travel path in a road and had nothing to do with the appearance or location of the access road between 1966 and 1980.

On second appeal this Court found Richard Peplinski's testimony was a credible

while referring to his testimony describing the access road crossing into section 24 and continuing west into Akers' property for about 120 feet before curving in the shape of a Shepard's crook southerly into the 160 acres refuting Akers' claim that the road turned south into Reynolds property before entering section 24.

D. Amount of Damages

As to the amount of damages, we cite *Cox v. Stolworthy*, 94 Idaho 683, 496 P.2d 682 (1972) modified by *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 904-905, 665 P.2d 661, 668-669 (1983) and argue that no policy of deterrence is furthered by the amount of the award since Marti Mortensen will not face easement disputes in the future.

Judge Mitchell's errors are the reason for this long-drawn-out litigation. Although Judge Mitchell states,

> The irony is that had Mortensens and Whites brought litigation to have their easement rights against Akers decided judicially, prior to their excavation and intimidation, this could have ended peaceably almost a decade ago.

[Tr. 570 at 591 line 13] Defendants are not responsible for the Court's errors that required three appeals and corrections by the Supreme Court.

3. Attorneys Fees

Marti Mortensen did not object to the amount of attorneys claimed, but rather to the underlying decision to award them. AKERS entitlement to attorneys fees flows from IRC 6-202 and applies only to those fees incurred to enforce the trespass provisions of that statute. The fees must apportioned pursuant to *Bumgarner v. Bumgarner*, 124 Idaho 629, 862 P.2d 321 (1993).

4. Punitive Damages Allocable to MARTI MORTENSEN

Respondents correctly assert that the issue is whether the conduct giving rise to damages benefitted the community. [Respondent's brief at 21] But the state of mind required to establish punitive damages, "malice" or "extreme wrongfulness" *Manning v. Twin Falls Clinic & Hospital, Inc.* 122 Idaho 47, 830 P.2d 1185 (1991), quoting *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983) should not be applied to an innocent spouse.

Community liability for spousal torts is based on agency principles, and agency law does not necessarily impose punitive damages against a principal for an agent's acts absent authorization or ratification. *Manning v. Twin Falls Clinic & Hospital, Inc.* 122 Idaho 47, 830 P.2d 1185 (1991). Thus while a spouse may be engaged generally in an activity intended to benefit the community, as in *Hegg*

v. I.R.S., 28 P.3d 1004, 136 Idaho 61 (2001), where he steps aside from that activity to commit malicious acts, liability should not apply to a spouse absent authorization or ratification.

AKERS argues that Marti Mortensen waived this issue by failing to raise it in prior appeals.

A. This Issue was Within the Scope of Remand

Issues that are "subsidiary to the actions directed by the appellate court" may be addressed on remand. *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142 Idaho 861, 136 P.3d 332 (2006); *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000). *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175, 1183 (2009) included the issue of joint and several liability in its remand.

This issue was subsidiary for one simple reason: the Supreme Court recognized that the whole issue of punitive damages could not be decided until the exact limits of the easement were known. Therefore only after that decision was made could punitive damages even be addressed. Once addressed, the question of applicability to Marti Mortensen was appropriately before the court.

B. New Events

Mortensens were not divorced when the underlying events occurred. That change of status is a critical event since Marti Mortensen had no reason to assert separate liability at the time this suit began. This Court should recognize an exception to permit a divorcing spouse to at lease revisit the issue when a case is remanded on appeal, since there is no prejudice to the other party.

5. Change of Judge

White Construction's brief at 45 discusses *Capstar Radio Operating Co. v. Lawrence*, __ Idaho __, __ P.3d __ (Slip Op. No. 38300, Supreme Court of Idaho May 29, 2012). That case is strikingly similar to this one: same judge, same appeals counsel (James, Vernon and Weeks), easement issues and a motion to recuse. This court, just as it had in the original, withdrawn opinion in *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175 (2009), directed that a new judge hear the case.

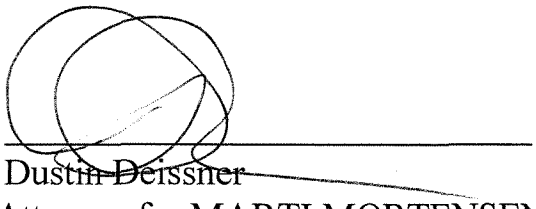
With all possible respect to Judge Mitchell and to this court, if a 10 year history of litigation and 'bad blood' justifies a change of judge in that case, it certainly does in this case. If nothing else, purely from an appearance of

impropriety standpoint, this Court should follow White's argument and require a change of judge.

Conclusion

This Court should follow the arguments by other appellants and remand this matter to correct the error is the location of the easement before a new Judge. Additionally this Court should find attorneys fees and punitive damages awarded were excessive and inapplicable to Marti Mortensen.

October 24, 2012



Dustin Deissner
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CERTIFICATE OF SERVICE

Dustin Deissner certifies:

I have on this date served the foregoing document upon the following parties by the following means:

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Dated ~~May 31, 2012~~
Oct 24, 2012

Dustin Deissner