8-2-2012

Akers v. Mortensen Respondent's Brief Dckt. 39182

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife, Plaintiffs/Respondents, v. MARTI E. MORTENSEN, Defendant/Appellant and D.L. WHITE CONSTRUCTION, INC.; DAVID L. WHITE and MICHELLE V. WHITE, husband wife; and VERNON J. MORTENSEN, Defendants.	Supreme Court No. 39182-2011 RESPONDENTS' BRIEF Related Supreme Court Case Docket Nos.: 39293-2011 and 39493-2011

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
DISTRICT JUDGE, PRESIDING

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I. INTRODUCTION

Since this case began, Marti E. Mortensen and Vernon J. Mortensen have divorced and are no longer represented by the same counsel; on appeal, they will be referred to as M.E. Mortensen and V.J. Mortensen for the sake of clarity. On appeal, M.E. Mortensen claims that the trial court erred in fixing the width and location of the easement. M.E. Mortensen also contends punitive damages are not justified by the facts of the case. M.E. Mortensen also contends if punitive damages are justified by the facts, the amount awarded is excessive. M.E. Mortensen also contends if any amount of punitive damages is justifiable, she is not responsible for such damages and her share of community property should not be subjected to execution to pay such damages. M.E. Mortensen contends that the trial court erred in awarding attorney fees. Finally, M.E. Mortensen contends that the trial court judge should have recused himself on remand.

II. STATEMENT OF THE CASE

A. Nature of the Case

The nature of this case and the facts of this case have been set out at length in *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 127 P.3d 196 (2005) (*Akers I*), *Akers v. Mortensen*, 147 Idaho 39, 205 P.3d 1175 (2009) (*Akers II*) and a related case, *Mortensen v. Stewart Title Guar .Co.*, 149 Idaho 437, 235 P.3d 387 (2010). In *Akers I,* this Court affirmed that the disputed triangle area located on the east end of the access road belonged to Akers. This Court noted on appeal that neither party contested the course, direction and width of the express easement as determined by the district court across Akers' property in Government Lot 2. In *Akers II*, this Court affirmed the trial court's finding that there was no implied easement across Akers' property in Government Lot 2 or across Parcel B. *Akers II,* 147 Idaho 39, 205 P.2d at 1182 (2009). This Court affirmed the district court's finding that Mortensen had a prescriptive easement across the Akers' property in Government

Lot 2 coextensive in scope with the express easement declared by the district court. *Akers II*, 147 Idaho at 47, 205 P.2d at 1183. This Court affirmed the trial court's finding that a prescriptive easement 12.2 feet wide permits Mortensen to reach his property over the access road, but remanded for further fact finding on the exact location of the easement and for a redetermination of damages. *Akers II,* 147 Idaho at 44, 48, 205 P.3d at 1180, 1184.

In the first appeal, this Court noted that Mortensen argued that ownership of the triangular parcel was especially significant because much of the Akers' claimed trespass damages took place in the disputed triangle. In the first appeal, Mortensen acknowledged to this Court if Akers owned the triangle parcel that they would be liable for trespasses in that area. *Akers I,* 142 Idaho 293 at 299, 127 P.3d 196 at 202 (2005).

B. Course of Proceedings

In *Akers II*, this Court remanded this case to the district court for further fact finding on the exact location of the easement and for a redetermination of damages. *Akers II,* 147 Idaho at 44, 48, 205 P.3d at 1180, 1184. Following filing of this Court's substituted decision on appeal and remittitur, the trial court received a surfeit of pleadings.

On May 4, 2009, V.J. Mortensen filed a motion for disqualification of the district judge for cause and a supporting memorandum. R Vol. I, pp. 43-49. No notice of hearing was filed. On May 6, 2009, the trial court noticed the motion for hearing for May 21, 2009. R Vol. I, p. 84. Akers' response to the motion was filed May 15, 2009. R Vol. I, pp. 50-66. V.J. Mortensen moved to strike this opposition response on May 19, 2009, claiming among other things that it was untimely. R Vol. I, pp. 67-69. An affidavit and memorandum in response to the motion to strike were filed by Akers on May 20, 2009. R Vol. I, pp. 70-81. On May 29, 2009, the district court entered an order denying V.J. Mortensen's motion to strike Plaintiffs' pleadings, finding that V.J. Mortensen had not articulated any prejudice. R Vol. I, pp. 82-83. White joined in the

motion to disqualify at oral argument. On June 1, 2009, the trial court entered an Order denying the motion to disqualify for cause. R Vol. I, pp. 84-90. On June 19, 2009, V.J. Mortensen filed a motion for reconsideration of the trial court's denial of his motion to disqualify for cause. R Vol. I, pp. 91-94. On June 30, 2009, the trial court issued its memorandum decision again denying the motion. R Vol. I, pp. 113-129.

In the interim, V.J. Mortensen filed a motion for partial release of the bond to pay his outstanding attorney fees. V.J. Mortensen argued that the attorney fees were a charging lien against the cash bond. Both Akers and M.E. Mortensen objected to the release of the funds to V.J. Mortensen, and V.J. Mortensen replied to those objections. R Vol. I, pp. 95-113. On July 8, 2009, the district court denied V.J. Mortensen's motion for partial release of the cash bond to satisfy his attorney's fee lien, holding that an attorney charging lien does not attach to an appellate cash bond. R Vol. I, pp. 121-129. On January 8, 2010, the district court granted M.E. Mortensen's motion to transfer or release the cash bond, releasing the bond proceeds to M.E. Mortensen as the posting party, and requiring the funds be interplead in Boundary Case No. CV 2206-224 (the Mortensen divorce case). R Vol. I, pp. 156-163.

On July 8, 2009, the trial court entered an order granting leave for V.J. Mortensen's attorney to withdraw as attorney of record for V.J. Mortensen. R Vol. I, p. 130-132. On July 24, 2009, V.J. Mortensen thereafter appeared pro se. R Vol. I, p. 133-135.

On October 8, 2009, the trial court entered an order for mediation and an order regarding burdens of proof on remand on the issues remaining to be determined on remand. R Vol. I, pp. 136-138.

On October 22, 2009, Defendants filed a memorandum regarding the burden of proof on the easement location. R Vol. I, pp. 139-152. V.J. Mortensen does not include Akers' burden of

proof brief in the appellate record, although one was filed October 20, 2009. R. Vol. 1, p. 21. On December 1, 2009, the trial court entered its Order regarding the burdens of proof on the issues to be determined on remand and established a briefing schedule on the issue of the location of the prescriptive easement in Parcel B. Each party was ordered to submit a brief regarding location of the easement containing references to specific trial exhibits and citation to authority to support their arguments regarding the location of the easement as established at trial. R Vol. I, pp. 153-155. On January 2, 2010, the district court entered an order extending Defendants' briefing schedule regarding the easement location by one week, and adjusting Plaintiffs briefing schedule accordingly. R Vol. I, pp. 164-166. On January 22, 2010, V.J. Mortensen filed the Brief of Vernon J. Mortensen Supporting Location of Easement. R Vol. I, pp. 167-172. On March 29, 2010, the Brief of Defendants White RE: Section 24 Easement Location was filed. R Vol. I, pp. 173-205. On June 17, 2010, Akers filed Plaintiffs' Brief on Second Remand Regarding Location of Easement. R Vol. II, pp. 233-339. White filed a reply brief regarding the easement location on June 24, 2010. R Vol. II, pp. 340-357.

On March 30, 2010, M.E. Mortensen filed the Affidavit of Marti Mortensen and Motion for Partial Summary Judgment. R Vol. I, pp. 206-216. On April 14, 2010, Akers filed a Memorandum in Support of the Motion to Strike the affidavit and motion for partial summary judgment. R Vol. I, pp. 217-221. M.E. Mortensen responded to the Motion to Strike on April 27, 2010. R Vol. I, p. 222-225. On May 3, 2010, the trial court issued its memorandum decision and order granting Plaintiff's motion to strike. R Vol. I, pp. 226-232. The trial court held that the motion was premature as it had not yet ruled on the easement location or damages on remand. The trial court held that M. Mortensen could renew her motion for summary judgment or other dispositive motion regarding punitive damages if they were awarded following

determination on remand of the location of the easement across Parcel B. R Vol. I, p 231. In approaching the motion in this manner, the trial court noted it was preserving to M.E. Mortensen an opportunity to defend against punitive damages from a factual standpoint in the first instance, and if awarded, from a legal standpoint. R Vol. I, p. 232.

On June 30, 2010, White filed a Motion to Admit Additional Evidence RE: Easement Location. R Vol. II, pp. 358-367. (White also filed the Affidavit of Michael Hathaway in support of the motion which was not included in the appellate record.)

On July 1, 2010, the trial court heard argument regarding the easement location. R. Vol. I, p. 23. On September 29, 2010, the district court filed its Memorandum Decision, Findings of Fact, Conclusion of Law and Order RE: Easement Location. R Vol. II, pp. 368-388.

On November 10, 2010, Akers filed their Memorandum on Second Remand Re: Damages. R Vol. II, pp. 389-396. M.E. Mortensen filed her response brief regarding damages on November 17, 2010. R Vol. II, pp. 397-404. On November 19, 2010, Akers filed a brief in reply to M. Mortensen's response. R. Vol. II, pp. 419-431. On the same date, Akers filed an Amended Notice of Hearing on Remand Re: Damages scheduling oral argument for January 26, 2011. R Vol. I, p. 23, R Vol. III, p. 511. White filed a responsive brief on damages designated as a "reply brief" on January 18, 2012. R Vol. II, pp. 407-414. Akers filed a reply to White's response brief on January 25, 2011. R Vol. III, pp. 469-476.

On January 19, 2011, White filed a Supplemental Affidavit of Mike Hathaway. R. Vol. II, pp. 415-418. White filed another Supplemental Affidavit of Mike Hathaway on January 25, 2011. R Vol. III, pp. 477-481. On the same date, White filed a notice of hearing on a Motion to Admit Additional Evidence RE: Easement location for January 26, 2011 and a Motion to Shorten Time. R Vol. III, p. 512.

On January 24, 2011, V.J. Mortensen filed a "Motion to Correct Findings of Fact, Conclusions of Law and Order Filed 1-2-3 and Memorandum Decision and Order on Reconsideration, On New Trial Issues, and Additional Findings of Fact, Conclusions of Law Regarding Damages and Order filed 4-01-04" and an Affidavit in Support of the motion. R Vol. II, pp. 432-468. Akers filed a Response to the motion on February 11, 2011. R Vol. III, pp. 482-498. V.J. Mortensen filed his reply brief on February 18, 2011. R Vol. III, pp. 499-504.

At the January 26, 2011 hearing, the district court heard arguments regarding damages, and argument on Defendants' request to reopen the matter for the presentation of new evidence. Plaintiff was given an opportunity to file a post-hearing brief on the motion to reopen the evidence given the shortened time frame for hearing. R Vol. III, p. 512. A post-hearing memorandum was filed by Akers on February 16, 2011. R Vol. III, pp. 495-498. On March 18, 2011, the trial court issued its Memorandum Decision and Order on Remand re: Damages and Order denying White's motion for leave to submit additional evidence on the easement location. R Vol. III, pp. 505-544. V.J. Mortensen requested reconsideration of this decision on April 5, 2011. R Vol. III, pp. 545-569.

Although no notice of hearing had been filed, at oral argument on January 26, 2011, V.J. Mortensen requested that his motion to correct be heard. The district court declined hearing V.J. Mortensen's motion to correct on January 26, 2011 because neither Plaintiff's counsel nor the court had yet had an opportunity to review V.J. Mortensen's pleadings. R Vol. III pp. 512-513. On February 11, 2011, Akers filed a response to V.J. Mortensen's motion to correct. Akers agreed there was one mistake that needed corrected in the findings and opposed the remainder of V.J. Mortensen's request. R Vol. III, pp. 482-495. V.J. Mortensen filed a reply to Akers' response on February 18, 2011. R Vol. III, pp. 499-504. Oral argument was held on March 22,

2011. R Vol. III, p 572. On May 23, 2011, the trial court issued its memorandum decision denying V.J. Mortensen's motion to correct. R Vol. III, pp. 570-605.

On August 10, 2011, the trial court entered its Fourth Amended Judgment and Decree on Second Remand. R Vol. III, pp. 606-609. On August 24, 2011, White filed a motion to reconsider. R Vol. III, pp, 610-611.

On August 24, 2011, Akers filed a supplemental memorandum of costs incurred through August 24, 2011 and supporting affidavit. R Vol. III, pp. 612-628. White filed an objection and motion to disallow attorney fees on September 7, 2011. R Vol. III, pp. 629-632. White filed a Memorandum in Support of Objection to Claim for Attorney Fees on October 25, 2011. R Vol. III, pp. 661-668. On November 2, 2011, Akers filed a response to White's motion to disallow attorney fees. R Vol. III, pp. 669-679.On November 16, 2011, the trial court issued its decision and order denying Whites' motion to reconsider and granting Akers' claims for attorney fees. R Vol. III, pp. 682-701. M.E. Mortensen filed no objection to attorney fees.

M.E. Mortensen filed a Notice of Appeal on September 8, 2011. R Vol. III, pp. 633-641. V.J. Mortensen filed a Notice of Appeal on September 21, 2011. R Vol. III, pp. 642-651. M.E. Mortensen filed an amended Notice of Appeal on September 30, 2011. R Vol. III, pp. 652-660.

On November 7, 2011, this Court filed its Order consolidating appeal No. 39182 (M.E. Mortensen) and 39293 (V.J. Mortensen) into appeal No. 39182, and requiring all documents to bear both docket numbers. R Vol. III, pp. 680-681. On December 13, 2011, White filed their notice of appeal. R Vol. III, pp. 702-707.

C. Statement of Facts

M.E. Mortensen referenced this Court's withdrawn slip opinion 2008 Opinion No. 68 for her statement of facts. Given subsequent argument in M.E. Mortensen's brief, it appears M.E. Mortensen takes this approach because it is her position that the prescriptive easement road extended at least one hundred twenty-five (125) feet into Akers property. Akers disagrees with this statement of the facts. Defendants claimed at trial that the western end of the road had not been substantially altered through the years by either them or their predecessors other than excavation done solely on White's property by White and V.J. Mortensen. Plaintiffs' trial Exhibit 6, which was a survey of the road as it existed, showed the access road eased south as it passed over Parcel B. Only a small portion of the road actually passed over Parcel B. The majority of the road resides on White's property and the "shepard's crook" pathway referenced by M.E. Mortensen in page 5 of her opening brief lies solely on White's property after the road eases south.

III. ATTORNEY FEES ON APPEAL

Akers do not request attorney fees on appeal.

IV. ARGUMENT

A. Standard of Review

In *Akers II,* 147 Idaho at 1180-1181, 205 P.3d 43-44, this Court set forth its standard of review on appeal as follows:

> Review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (citing *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991)). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942

(1999) (citing *Sun Valley Shamrock Res., Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990)). A trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006) (citing *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 856, 55 P.3d 304, 310 (2002); *Bramwell v. South Rigby Canal Co.,* 136 Idaho 648, 650, 39 P.3d 588, 590 (2001); I.R.C.P 52(a)). If the findings of fact are based upon substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238 (citing *Hunter v. Shields*, 131 Idaho 148, 151, 953 P.2d 588, 591 (1998)). This Court will not substitute its view of the facts for that of the trial court. *Ransom*, 143 Idaho at 643, 152 P.3d at 4 (citing *Bramwell*, 136 Idaho at 648, 39 P.3d at 588). The findings of the trial court on the question of damages will not be set aside when based upon substantial and competent evidence. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 846, 172 P.3d 1119, 1121 (2007) (citing *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983)).

B. Marti Mortensen Provided No argument or Case Authority Regarding the Location of the Easement

M.E. Mortensen adopts in her opening brief as her argument on this issue the arguments presented by Appellants White and V.J. Mortensen and incorporates them into her brief. V.J. Mortensen's brief on appeal is a rambling discourse of disjointed thoughts and argument. Akers submit that even reading V.J. Mortensen's pleadings liberally, V.J. Mortensen advanced no argument regarding the easement location in Parcel B. Further, V.J. Mortensen provided no authority to support any argument regarding the location of the easement. This Court has consistently held it will not consider assignments of error not supported by argument and authority in the opening brief. *Jorgensen v. Coppedge,* 145 Idaho 524, 181 P.3d 450 (2008). Because V.J. Mortensen's brief suffers from this fatal deficiency, M.E. Mortensen's brief does so as well.

Regarding the width of the easement, V.J. Mortensen did provide some argument that the trial court was incorrect in utilizing the 12.2 foot width. However, this Court affirmed the 12.2 foot width in *Akers II*, and the width of the easement was not an issue for remand. Thus, the trial

court did not err in refusing to reconsider the issue of width on remand as it was not within the scope of the remand.

As to the adoption of the arguments of White, as of the preparation of this responsive brief, Akers has received no appellate brief from White, despite such brief being due June 4, 2012. On July 14, 2012, this Court issued an order of conditional dismissal of White's appeal, requiring their brief to be filed July 30, 2012. Since Akers has no brief from White as of the time of the preparation this brief, if such a brief is filed by White before the conditional dismissal becomes effective, Akers adopts herein their response to White's brief.

C. The Trial Court did not Err in Awarding Punitive Damages against V.J. Mortensen

1. There was a Basis for the Award of Punitive Damages

Idaho Code § 6-1604(1) provides "[i]n any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." Idaho case law requires the same. An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was "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) (citations omitted). The justification of punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that be termed "malice, oppression, fraud or gross negligence;" "malice, oppression, wantonness;" or simply "deliberate or willful." *Id.* The primary purpose behind an award of punitive damages is to deter similar conduct from happening in the future. *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 221, 923 P.2d 456, 465 (1996).

M.E. Mortensen contends on appeal there was no basis for the award of punitive damages. She arrives at this conclusion based upon her contention that there can never exist in an easement case facts sufficient to award punitive damages where the width of the easement has not been defined. The trial court relied upon *R. T. Nahas Co. v. Hulet,* 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988) in rejecting this argument. The trial court found significance in the portions of the decision emphasized below in the Court of Appeals reasoning.

> In the present case, we believe the record lacks substantial evidence that Hulet's actions were an "extreme deviation from reasonable standards of conduct" or were the product of an "extremely harmful state of mind." **Hulet arguably relied upon his water permit in diverting the water. Certainly Hulet was motivated by monetary gain. However, standing alone this is an insufficient basis upon which to find that the criteria for punitive damages have been satisfied.** Furthermore, the trial court's finding of "oppressiveness" is not supported by the record. It is true that Hulet violated the eventually determined water right of a neighbor. However, at that time the scope of Nahas' right was uncertain; it was not adjudicated until the 1981 trial. All of the acts complained of took place before Nahas had his rights adjudicated. **Although we do not suggest that interference with unadjudicated rights never can satisfy the criteria for punitive damages, we hold that the record in this case falls short of showing the extreme circumstances required for such an award.** Compare Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969) (punitive damages properly awarded against defendants who threatened to disrupt village water supply by disconnecting water system, putting debris in springs, threatening to kill persons who attempt to repair the system, and threatening to build a feed lot near the spring in order to contaminate the water). Accordingly, on remand the judgment must be modified to delete the award of punitive damages. (Emphasis added.)

R.T. Nahas Co. v. Hulet, 114 Idaho at 29.

It was not error for the trial court to rely upon this authority.

M.E. Mortensen argues on appeal, as she did to the trial court below, that the fact the exact location of the easement rights was unknown shows that the requisite mental state of intent cannot exist. (M.E. Mortensen Opening Brief at 6.) In advancing this argument, M.E. Mortensen does not challenge on appeal any of the findings of fact or conclusions of law made by the trial court regarding V.J. Mortensen's or White's actions.

In a well reasoned and thorough analysis, the trial court explained why it rejected M.E. Mortensen's argument. R Vol. III, pp. 517-543. Without repeating word for word the trial court's analysis, the trial court considered the unique facts of this case that established substantial evidence that the Defendants' actions were an "extreme deviation from reasonable standards of conduct" or were the product of an "extremely harmful state of mind." These facts included: (1) Defendants excavated on Akers' land beyond their easement width, (2) the excavation was not done to "maintain" the easement as claimed by Defendants, but rather to expand and develop the easement to accommodate development of their land, even though the prescriptive easement was limited to agricultural use; (3) the work was not done with proper permits, resulting in two stop work red tags from Kootenai County for dumping fill dirt and excavating without a proper site disturbance permit; (4) the excavation work resulted in water trespass on Akers property; (5) Mortensen was aware of the access problem over the Akers' property when he purchased his property; (6) Mortensen violated Kootenai County's subdivision ordinances on prior occasions and thereby harmed innocent purchasers of property; (7) Mortensen approached the neighbor, Bill Reynolds, to purchase an easement on his land to address the access issue; (8) the Defendants intentionally ignored the Plaintiffs requests that they not trespass on their land; (9) Defendants tried to intimidate Akers to obtain a greater right than they had; (9) there were threats of physical violence against Akers, and (10) the Defendants violated the terms of the preliminary injunction issued by the trial court.

The trial court's analysis that the activities in the vicinity of this easement exceeded even what is allowed on an express easement was correct. Citing to *Ransom v. Topaz Marketing, L.P.*, 143 Idaho 641, 642, 152 P.3d 2, 3 (2006), the trial court noted that even with an express easement a party may not push dirt onto other property owned by the burdened estate and make

cuts into the burdened estate's property which have nothing to do with creation or maintenance of the road itself, and alter the natural flow of water causing sink holes and sloughs. *Id.*

The trial court also addressed the prescriptive portion of the easement. Citing to *Beckstead v. Price*, 146 Idaho 57, 64-65, 190 P.3d 876, 883-884 (2008), the court noted that the use of the easement was not defined by the vehicles using it but rather by characterization as residential, agricultural or recreational, and the scope allowed should include any reasonable means of transportation for the character of use made during the prescription. The trial court observed that V.J. Mortensen knew of this limitation on the use of the easement because he testified that the access issue was the sole reason he was able to buy the property so cheap.

Similar to land barons of the early west, defendants pushed the boundaries of acceptable behavior for the sake of chasing a profit. They ignored county ordinances. They bullied the Akers. They lied about their actions, claiming they were innocently "maintaining" the road when it was clear they were obliterating a well maintained access road to the detriment of the Akers so they could widen it to accommodate their profit goals.

Their inappropriate actions continued at the court house. They intimidated witnesses who came to court to testify on behalf of Akers about Defendants' actions. Although it is hard to discern from a cold transcript such happenings, one such event was even recorded at trial during Mr. Regan's direct examination of D.L. White. D.L. White interrupted his own attorney's direct examination of him mid-question to make an intimidating comment to Akers, causing Akers' attorney to intercede. Tr Vol. I, p. 928, ll. 3-12. The trial court commented in its findings about the trial court's own observation of their intimidation tactics during trial. If ever a case demonstrated an appropriate set of facts as a basis for imposition of punitive damages on an easement case, it is this case. This Court should affirm on appeal the trial court's conclusion that

the above actions were an extreme deviation from standard conduct and the product of an extremely harmful state of mind.

2. The Trial Court did not Abuse its Discretion in the Amount Awarded as Punitive Damages

M.E. Mortensen also claims in a conclusory statement that the amount awarded was excessive and constituted an abuse of discretion by the trial court, yet M.E. Mortensen provides no argument detailing why the amount awarded was an abuse of discretion, or excessive other than claiming it goes "far beyond deterrence and is merely punishment." The trial court expressed in its amended findings of facts and conclusions of law, the amount awarded was done for deterrence. The actions taken here were for the sake of profit, and the risks were a weighed business decision. V.J. Mortensen had a history of making development choices that harm others to maximize his profit. His choices were a matter of expediency because the profit outweighed the money damages any person objecting to his tactics could obtain.

Further, both Defendants in this matter disregarded a preliminary injunction issued by the trial and proceeded forward as they chose. Their actions rendered the trial court's order useless. Unless deterred, such actions encourage both the Defendants and future owners in land disputes to disregard the court system and move forward with similar conduct.

It is exactly this type of conduct that punitive damages are recognized as deterring. This distinction was recognized and called out in *Boise Dodge, Inc., v. Clark*, 92 Idaho 902, 909, 453 P.2d 551, 558 (1969); wherein this Court recognized that:

> [T]hose who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his

> expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

M.E. Mortensen provides no substantive argument as to why the amount awarded by the trial court was excessive. The trial court heard testimony regarding the wealth of the Defendants, their goals in making a profit, and their history of similar conduct. Its award was well supported by these facts. M.E. Mortensen does not contend on appeal that it was an abuse of discretion for the trial court to consider these factors in setting the amount of punitive damages. Thus, M.E. Mortensen has failed on appeal to make any showing that the trial court abused its discretion in the amount it awarded as punitive damages.

3. Any Issue Regarding M.E. Mortensen Avoiding Imposition of Punitive Damages Against Her was Waived on Appeal

Despite two other appeals having been presented to this Court, for the first time on appeal M.E. Mortensen seeks to have this court rule as a matter of first impression that a spouse's community property assets are not liable for punitive damages awarded against the spouse. That holding would stand regardless of the marital status of the spouse. This issue was not raised in the first or second appeal. M.E. Mortensen claims it was not raised because it was not ripe for appeal as she was not divorced from V.J. Mortensen at that time. However, this issue has nothing to do with the status of the marriage, and could have, and should have, been raised on the first appeal.

Further, the issue has not been preserved to be raised in this appeal. M.E. Mortensen in her recitation to the course of proceedings below indicates on appeal that the trial court struck her motion for summary judgment regarding allocation of punitive damages. She phrases her issue on appeal with respect to this issue as: "May Marti Mortensen assert a claim to avoid

imposition of punitive damages against her?" M.E. Mortensen is careful not to claim the court disallowed the claim or erred by arriving at the wrong legal conclusions. This avoidance is because the trial court did not rule on this issue.

M.E. Mortensen filed a motion for partial summary judgment that she was not responsible either personally or as to her share of the community estate for punitive damages assessed for actions of V.J. Mortensen. R Vol. II, p. 210. Akers contended, without addressing the merits of the motion, that such a motion was not subsidiary to the remand and should not be considered on remand. R Vol. II, p. 217-221. M.E. Mortensen maintained her motion was subsidiary to the remand. Further, M.E. Mortensen contended that she could not have raised the issue sooner in the case because it was not ripe until after her divorce from V.J. Mortensen in 2006. R Vol. II, pp. 222-225. The trial court issued a memorandum decision granting Akers motion. However, in doing so, the trial court did not reject or otherwise rule on M.E. Mortensen's motion. Rather, the trial court recognized that the primary issue on remand was the location of the easement in Parcel B. The trial court acknowledged that subsidiary to that issue was the extent of Defendants' trespasses, if any. The trial court noted that this Court specifically called out negligent infliction of emotional distress, if any, was an issue for remand.

The trial court relied upon *Mountainview Landowners Co-op Ass'n v. Cool (Mountainview II)*, 142 Idaho 861, 136 P.3d 332 (2006) and *State v. Hosey,* 134 Idaho 883, 11 P.3d 1101 (2000) as controlling authority on the issue of whether an item is subsidiary to a remand when not specifically addressed in the remand. The trial court concluded that whether the issue raised in M.E. Mortensen's motion was a subsidiary issue on remand was not very clear. The court indicated it could see reasons why M.E. Mortensen's liability could, and could not, be a subsidiary issue on remand.

At that point, the trial court struck the motion for summary judgment because it had not yet determined the location of the easement on remand, and until such was addressed, it would not be addressing the issue of punitive damages on remand. The trial court noted that *after* the trial court's decision on the location of the easement and *after* determination of punitive damages, M.E. Mortensen could renew her motion for summary judgment or make some other dispositive motion to Court on whether she should not be held liable for punitive damages because "[i]t is only fair to allow Marti Mortensen be heard on this legal argument, albeit at a later time." R Vol. II, p. 231. The trial court noted it was taking the action it did because it made the best use of the court's resources as there was no decision yet, and waiting allowed M.E. Mortensen an opportunity to defend against punitive damages from a factual standpoint and a legal standpoint.

The trial court's order specifically allowed M.E. Mortensen to raise the legal arguments contained in her motion for partial summary judgment at a later time. Following the entry of the trial court's decision regarding the location of the Parcel B easement, M.E. Mortensen never renewed her motion, nor did she file a similar dispositive motion.

The trial court's approach to M.E. Mortensen's motion was entirely appropriate and practical. Her motion was premature because the trial court had been directed on remand to determine the location of the easement and then address damages in light of its decision on location of the prescriptive easement on remand. M.E. Mortensen provides no explanation on appeal for her failure to abide by the trial court's directive to re-file her motion after the location of the easement was determined. M.E. Mortensen's failure precludes her from raising this issue on appeal.

Should this Court determine that M.E. Mortensen did not waive the issue by her failure to follow the trial court's directive to raise the issue after the determination of the location of the prescriptive easement across Parcel B, then it will have to address M.E. Mortensen's claim that this issue is subsidiary to the issues remanded in the second remand, and therefore did not have to be raised in the first or second appeal.

M.E. Mortensen claims that this issue was not waived on appeal because it was a subsidiary issue to the matters remanded by this Court in the previous remand. In *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142 Idaho 861, 205 P.3d 1175 (2006) (*Mountainview II)*, this Court discussed subsidiary actions a trial court could take on remand. The *Mountainview II* case involved the interpretation of a Use Agreement regarding use of a private beach for swimming. The trial court gave a broad interpretation to the swimming easement granted to beach users which this Court found overly broad. On remand, the trial court was directed to define the swimming easement in a more limited fashion.

After remand, the beach owner argued that the swimming easement did not include a right to use the beach as a trail to reach the swimming area on the beach (an ingress/egress easement). The trial court noted that this issue had not been raised until after the first remand and was not in the scope of the first remand.

The beach owner contended the trial court committed error by not addressing this issue following remand. The beach owner contended that although the issue was not raised in the first appeal with specificity, the matter of whether Association members could traverse the beach came within the broader issue of the scope of the easement, which, in turn, depended on the definition of "swimming" that was the subject of remand. The Idaho Supreme Court affirmed

the trial court's decision and rejected this argument. In addressing this issue, this Court observed:

> "Issues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whitted v. Canyon County Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002). However, "[t]he general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000).

Mountainview II, 142 Idaho at 866, 205 P.3d at 337.

M.E. Mortensen likely recognized that the only method in which she can seek to have this matter decided is to claim it is within the scope of the remand because the trial court was not specifically directed to take action on this issue. Thus, M.E. Mortensen may only raise this issue on remand if it is subsidiary to the actions directed by this Court to be taken by the trial court on the second remand.

This issue is not subsidiary to the issues of the location of the prescriptive easement in Parcel B. Further, even though it touches on the issue of punitive damages, it is unrelated to whether these damages should be *reinstated* following determination of the location of the prescriptive easement. It is not subsidiary to the question whether the revised location of the prescriptive easement on Parcel B changes the analysis of the *amount* of trespass damages to which Plaintiff may be entitled, or whether there was a breach of duty supporting intentional infliction of emotional distress. Therefore, it is not subsidiary and should not be considered on remand.

4. The Community is Liable for V.J. Mortensen's Punitive Damages

M.E. Mortensen requests on appeal that this Court for the first time reach the issue whether the community is liable for all tort obligations, even those which might be characterized

as separate. Given the nature of the facts of this case, this Court need not reach that issue in determining that the community is liable for all tort obligations.

This Court has held that debts incurred by one spouse's commission of an intentional tort can be satisfied out of community assets, even if the other spouse has no personal liability when intended for the protection of community property and in the interest of the community business. *See Hansen v. Blevins,* 84 Idaho 49, 367 P.2d 758 (1962). However, *Hansen* left open the issue whether community property is liable in all cases for the payment of obligations incurred by the tortuous actions of the other spouse.

M.E. Mortensen advances two arguments why this ruling should not apply in this case. The first is that she is now divorced from V.J. Mortensen. This argument has little weight to the legal analysis utilized by this Court in arriving at the *Hansen v. Blevins* holding. The issue is the marital status at the time the act occurred. At the time of the trespasses, the Mortensens were married.

The next argument presented by M.E. Mortensen is that punitive damages are awarded for willful and malicious conduct, and therefore such damages were not for the community benefit. M.E. Mortensen also contends she did not participate in or know about the trespass actions of V.J. Mortensen. Turning to the knowledge argument, it is difficult to believe that M.E. Mortensen was unaware of the present suit and the facts surrounding it, considering that she and V.J. Mortensen filed a pro se counterclaim, and M.E. Mortensen was the one to mail it to Akers. However, this factor holds no weight to the analysis of the community's obligation for the punitive damages. Further, there is no testimony in the record to support M.E. Mortensen's contention on appeal that she had no knowledge of what acts her husband was doing on the

Akers property, or of V.J. Mortensen's general business tactics used to develop their community property.

Similar to the case of *Hegg v. Internal Revenue Serv.*, 136 Idaho 61, 28 P.3d 1004 (2001), M.E. Mortensen wishes to argue she is an innocent (and newly divorced) spouse, and therefore any portion of community property which she obtained in the divorce should not be available for satisfaction of the punitive damages. However, as was discussed in *Hegg v. Internal Revenue Serv.*, a determination of innocence of the spouse in the acts is not the deciding factor. The court therein indicated the deciding factor was whether the community benefited or participated in the trespass. *Id.* at 63, 28 P.3d at 1006.

There is no dispute that at the time of the trespasses, V.J. Mortensen was managing a community asset being the acreage owned by both V.J. and M.E. Mortensen. Tr Vol. I, p. 205, ll. 4-25. V.J. Mortensen intended his acts to be for the protection of community property and in the interest of the community business. Thus, this case falls squarely within the holding of *Hansen v. Blevins,* 84 Idaho 49, 367 P.2d 758 (1962).

M.E. Mortensen argues that the holding of *Hansen* supports her position. It does not. In *Hanson v. Blevins, supra,* this Court noted that the deciding factor in holding the community responsible for the husband's torts was whether his acts were intended for the protection of the community property and in the interest of the community business. *Id* at 57, 367 P.2d at 762.

M.E. Mortensen urges the court to adopt an exception to this rule in the present case because the tort that was committed was done willfully and with malice. M.E. Mortensen contends that once a spouse engages in willful malicious conduct, the spouse is no longer seeking to benefit the community. That argument does not necessarily follow. In this case, the trial court specifically found that V.J. Mortensen has engaged in inappropriate conduct in

developing other properties with the intent of achieving a profit. The trial court found that V.J. Mortensen's behavior in the present case was motivated by the same desire. M.E. Mortensen does not challenge those findings on appeal. Thus, the trial court found that the entire purpose behind V.J. Mortensen's actions was to profit the community. Therefore, under the facts and circumstances of this case, this Court should hold that the community is liable for the punitive damages arising from V.J. Mortensen's torts.

D. The Trial Court's Award of Attorney Fees should be Affirmed on Appeal

On remand, Akers timely filed its Memorandum of Costs. M.E. Mortensen did not file an objection to costs as required by I.R.C.P. 54(d)(6). Thus, any objections she had are waived under the rule.

Further, her objections are without merit. In reviewing a trial court's decision regarding attorneys' fees, an abuse of discretion standard is followed. In determining whether a trial court properly exercised its discretion in an award of attorney fees, the Idaho Supreme Court considers (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

M.E. Mortensen provides no cite to the record in support of the error she claims. The trial court's decision was thorough and addressed the objections raised by White. R Vol. III, pp. 682-701. M.E. Mortensen contends that Akers failed to allocate fees, and that the record does not reflect an apportionment of fees. However, M.E. Mortensen must show on appeal that the trial court committed error in its decision awarding fees and costs to Akers. M.E. Mortensen

does not get to raise on appeal an issue that was not raised and argued to the trial court on the second remand. Thus, this issue was not preserved for appeal.

Further, even if it had been raised, this court has recognized that the question of whether and to what degree the Defendants' conduct constituted trespass on the Akers' property was intertwined with the question of the scope and boundaries of the defendants' easement, and similarly, the question of damages flowing from the defendants' conduct was inseparable from consideration of the defendants' easement rights. *Akers II* at 304, 127 P.3d 207. Thus, the trial court did not err in awarding the entirety of fees on these issues even though they may have overlapped.

E. The Trial Court did not Err in Failing to Recuse Itself

M.E. Mortensen echoes the argument of other appellants that Judge Mitchell should have recused himself on remand. She provides no argument or legal authority for this position.[1] Absent some argument, there is no merit to this argument on appeal. *Jorgensen v. Coppedge,* 145 Idaho 524, 181 P.3d 450 (2008).

V. CONCLUSION

V.J. Mortensen's appeal should be denied and the trial court's decision on the second remand should be affirmed.

Submitted this 31st day of July, 2012.

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[1] Akers acknowledges that the Supreme Court's Opinion in *Capstar v. Lawrence,* 2012 Opinion No. 80, released May 29, 2012, might be argued to stand for this proposition.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2012, I caused to be served a true and correct copy of the foregoing document by U.S. Mail addressed to the following:

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