11-5-2012

Akers v. D.L. White Construction Respondent's Brief Dckt. 39493

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

On the second remand of this case, this Court directed the trial court to determine two issues. One was the exact location of the prescriptive easement in Parcel B, which this Court confirmed was 12.2' wide. The other was a determination of which of Akers' damages could be reinstated in light of the location of the prescriptive easement over and across Parcel B.

Despite the limited scope of the last remand, White devotes a large portion of his brief recasting the facts of the case. First, White attempts to persuade this Court that the private road was reconfigured on the east end (near the disputed triangle) in such a manner that the original approach to Millsap Loop Road in Government Lot 2 was altered by Mr. Peplinski to encompass the Akers' curved approach and obliterate the original approach.

Second, White attempts to persuade this Court that Peplinki shortened the prescriptive easement road in Parcel B (on the west end) and that the prescriptive easement portion of the road is much wider than the 12.2' width confirmed by this Court on the second appeal. Both of these points are crucial to White's objective on appeal, which is to convince this Court that the prescriptive road as it existed from 1966-1980 extended further on Akers' property than it does today, and was much wider. Such a finding would allow White to extend and widen the prescriptive portion of the access road across Parcel B to accommodate development of their property, which was the original objective sought by White and Mortensen when Akers brought their suit for trespass.

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 in the first 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, which included the original 90° approach, and excluded the curved approach installed by Akers in 1982. 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 at 46, 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 permitted White and Mortensen to reach their property over the access road as it crossed Parcel B, but remanded for further fact finding on the exact location of the prescriptive easement and for a redetermination of damages in light of the location of the prescriptive easement. *Akers II*, 147 Idaho at 44, 48, 205 P.3d at 1180, 1184.

In the first appeal, this Court noted that White and 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, White and Mortensen acknowledged to this Court that if Akers owned the triangle parcel they would be liable for trespasses in that area. *Akers I*, 142 Idaho at 299, 127 P.3d at 202 (2005).

B. Course of Proceedings

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 posted cash appeal 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 2006-224 (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. I, 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 a 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 Plaintiffs' 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. R Vol. I, p 231. The trial court held that M.E. 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. *Id.* 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. The district court noted it had waited on rendering an opinion to hear White's motion to admit additional

evidence, noting time had been reserved for hearing on the motion, but it was never noticed for hearing. R Vol. II, p. 374.

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.E. 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 their 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 regarding the motion to reopen evidence 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 Plaintiffs' 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 White's 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 the Facts

1. Location of the Easement

The trial court relied upon Scott Rasor's survey (Plaintiffs' Trial Exhibits 6) of the easement as it crossed Parcel B to determine the exact location of the prescriptive easement in Parcel B. In their statement of facts, White contends that Peplinski shortened the access road in Parcel B after 1980 so that it entered his property at a point farther east than it had in the 1966-1980 period of time. There is no evidence in the record to support this contention.

Several witnesses gave testimony regarding the location of the prescriptive easement in Parcel B, also referenced as the "top of the hill" in testimony and the "Section 24 portion" of the access road. The following is a summary of the testimony contained in the trial transcripts which

demonstrates the district court's finding that the prescriptive easement Parcel B was concomitant with the easement road as surveyed and depicted by Scott Rasor in Plaintiffs' Exhibit 6.

i. Witnesses with Knowledge of the Road from 1966-1980

- ***BILL REYNOLDS' TESTIMONY***

Reynolds testified that in 1966, when Millsaps owned the 160 acre tract now owned by Defendants, the access road did not extend beyond Government Lot 2. The direction it took was at the section corner and came back along the fence line along Government Lot 2. White extended the road on the western side of Government Lot 2. Tr Vol. I, p. 84, ll. 16-25; p. 85; p. 86, ll. 1-10 p. 114, ll. 16-25; p. 116, ll. 17-25; 117, ll. 1-12. Reynolds agreed that Exhibit D-44 (represented as a 1973 aerial to Mr. Reynolds by defense counsel) was about right on how Reynolds recalled the configuration of the road in 1966. Tr Vol. I, p. 135, ll. 16-20; p. 138, ll. 23-25; p. 139, ll. 1-7. Referring to aerial photograph D-43, Reynolds testified the access road crossed into section 24 close to his property line and turned the corner at the top of the hill. Tr Vol. I, p. 140, ll. 24-25; p. 141, ll. 1-18; p. 146, ll. 17-25; p. 147, ll. 1-5. Mr. Reynolds testified Defendants' Exhibit 57 showed the top of the hill where the road takes the corner and begins moving south. He also indicated the photograph was close to how he recalled the 1966 access road, except it appeared wider, but was basically how he remembered the road. Mr. Reynolds agreed that 1993 sounded like the right time for the date of the photograph. Tr Vol. I, p. 154, ll. 1-16. Finally, Mr. Reynolds indicated that this portion of the road was approximately a 16% grade before excavation. Tr Vol. I, p. 171, ll. 19-25.

- ***WILLIAM MILLSAP'S TESTIMONY***

Millsap is the son of the original owners. Tr Vol. I, p. 86, ll. 11-13. Millsap testified that he lived in the Millsap Loop area 22-23 years. Tr Vol. I, p. 865, ll. 21-23. Millsap indicated

Exhibit D-44 depicted the road as it existed in 1966. Tr Vol. I, p. 866, ll. 1-12. Millsap testified that in 1958 he was 22 years old. He farmed the Mortensen/White property with his brother after 1958 and before 1966. Tr Vol. I, p. 870, ll. 24-25; p. 871, ll. 1-9. On cross–examination, Millsap contradicted his earlier testimony regarding Exhibit D-44, and testified his recollection of the top of the hill was that it took a wide curve, contrary to the depiction in Defendants' Exhibit 44. Millsap indicated that traveling west the turn was a left turn (south). Millsap indicated Exhibit D-44 was not accurate because there had been a lot of changes between the taking of Exhibit D-44 and when he was at the property. Millsap testified there was a big pine tree, but he did not know if it was still there. He indicated there was a gate that had brush near it. He testified the gate had brush on the south side, and there was a kind of triangle area with brush in it near the gate. Mr. Millsap also testified that another road he recalled was not shown on Defendants' Exhibit 44. Tr Vol. I, p. 902, ll. 15-25; pp. 903-904.

Mr. Millsap also testified that Plaintiffs' Exhibit 183 showed the top of the hill totally different than he recalled it being when he farmed. Tr Vol. I, p. 907, ll. 21-25; p. 908; p. 909, ll. 1-6. On re-direct, with reference to Plaintiffs' Exhibit 6, Mr. Millsap indicated that the curve into the 160 acres owned by his father was not all on the Akers' property. Mr. Millsap testified: "The turn, it come up – the road is just as it is. It came right on up past into Section 24 and then turned into the 160 acres." Tr Vol. I, p. 916; ll. 17-25; pp. 915-917, p. 918, ll. 1-17.

- ***RICHARD PEPLINSKI'S TESTIMONY***

Peplinski, son of a previous owner, Floyd Peplinski, who took title from Millsap, reviewed Exhibit D-44 and indicated he had a Quonset hut built on his father's property in about 1971, about 75 feet from the eastern boundary. He approximated the Quonset hut as a 30x40 feet structure that did not sit at a true east/west alignment. The east to west alignment was on the

diagonal of the building. Peplinski testified the Quonset hut was put in at the end of the access road. Mr. Peplinski testified that a portion of the access road was on Akers's property. Peplinski estimated that the road went west approximately 125-150 feet beyond the section 19/24 corner to the top of a knoll. Peplinski did not know whether this 150 feet stretch was all on Akers' property. Mr. Peplinski indicated that Defendants' Exhibit 157 showed a fence on the north side of the prescriptive easement road that was not on the road when his father purchased the property. Tr Vol. I, p. 779, ll. 16-25; p. 780-782; 783, ll. 1-15.

Peplinski testified he installed a gate at the top of the hill near the property line after he built the shop. Peplinski testified before installing that gate a barb wire gate post had been in that location. Tr Vol. I, p. 786, ll. 10-21. Peplinski indicated Exhibit D-57 showed the upper portion of the roadway before it turned into his property, and was taken close at the section corner and showed the road to the west as it curved into Peplinski's property. Peplinski acknowledged the road had been improved and slightly altered after his father's purchase. Tr Vol. I. p. 788, ll. 10-25; p. 789, ll. 1-16. Peplinski testified there was an agreement with Akers to change the road at the section 24 corner. Peplinski's recollection was that they widened out the corner of the access road, but did not stretch the road more westerly. Peplinski testified there was minimal change to the road as it crossed the Akers' property. Tr Vol. I, p. 798, ll. 14-25; p. 799; p. 800, ll. 1-6.

ii. Witnesses with Knowledge of the Road from 1980-2002

- ***DENNIS AKERS' TESTIMONY***

Akers testified he gave Floyd Peplinski (Richard Peplinski's father) permission to stretch out the upper road in Parcel B. Tr Vol. I. p. 564, ll. 22-25; p. 565, ll. 1-19. Peplinski lengthened the road at the top of the grade. Tr Vol. I, p. 603, ll. 13-21. Peplinski fenced the north side of the easement road. What was left of the fence at the time of trial from the "Y" in the road (where Akers' driveway splits from the access road to his house) up the road was originally put in by Peplinski. It was maintained at that location until Mortensen tore it down when excavating. Tr Vol. I, p. 614, ll. 5-13. The road as it originally existed went west and made a hard turn left (south) a few feet within Section 19. Tr Vol. I. p. 620, ll. 4-18. The road on the west end lies upon both White's and Akers' properties. When the Defendants excavated, , it lowered the grade of the road on White's side, and left the road on Akers' side higher. Tr Vol. I, p. 621, ll. 19-25; p. 622, ll. 1-13.

Akers testified regarding the property line in relation to the road. Plaintiffs' Exhibit 84 shows Mortensen's truck on White's side of the property line near the section corner. Tr Vol. I, p. 626, ll. 5-13. Akers testified Plaintiffs' Exhibits 66, 67, 68, 82, 83 and 84 showed the property stakes along the road. Tr Vol. I, pp. 704-706; p. 707, ll. 1-2. Akers drew the property line on the road on Plaintiffs' Exhibit 82 based upon survey markers showing how the road lies upon both properties. Tr Vol. I, p. 715, ll. 2-25; p. 716, ll. 1-23. Plaintiffs' Exhibit 50 also had the property line in relation to the road included in it. Tr Vol. I, p. 717, ll. 1-6.

Akers testified that Plaintiffs' Exhibit 79 was a series of photos showing the road before the digging occurred and after the digging commenced. Tr Vol. I, p. 718, ll. 12-25; pp. 719-721;

p. 722, ll. 1-8. When excavating the road, White reduced the grade of the road on his side of the property line by digging it out thus making a tunnel. Tr Vol. I, p. 575, ll. 11-25; p. 576, ll. 1-9.

- ***SHERRIE AKERS'S TESTIMONY***

Sherrie Akers testified that in 1980 the access road did not exist in the same configuration across Parcel B as shown on Plaintiffs' Exhibit 6. Akers testified that in 1980 the access road turned along the section line at the fence line. Tr Vol. I, p. 411, ll. 6-25; p. 412, ll. 1-8; p. 417, ll. 19-24; p. 419, ll. 17-19. Mrs. Akers noted that the road angled up to the barn. Tr Vol. I, p. 420, ll. 10-25; p. 421; p. 422, ll. 1-8. Mrs. Akers indicated that Mr. Peplinski lengthened the road after 1980. Tr Vol. I., p. 422, ll. 12-25.

- ***JERRY MORTENSEN'S TESTIMONY***

Mortensen testified that David White excavated at the top of the hill on his own property. Tr Vol. I, p. 271, ll. 11-23. In Plaintiffs' Exhibits 50 and 176, Mortensen indicated the truck in the photograph was his truck and it was parked on White's side of the property line. Tr Vol. I, p. 274 ll. 21-25; p. 275, ll. 1-16; p. 276, ll. 21-25. In reference to Defendants' Exhibit 57, Mortensen testified that the area where the access road moved south into White's property had not been changed during his ownership of the property. Mr. Mortensen testified Defendants' Exhibit 57 showed the top of David White's property, and that the gate depicted in the photograph was on White's property. Tr Vol. I, p. 343, ll. 13-25; p. 344. Mr. Mortensen also testified Defendants' Exhibit 47 depicted the road as it existed during his ownership taken from a perspective looking from White's property to Akers' property. Tr Vol. I, p. 346, ll. 5-22.

Mr. Mortensen testified that Plaintiffs' Exhibit 184 showed the 160 acres he purchased, and that the gate was on Peplinski's parcel. Tr Vol. I, p. 343, ll. 13-25; p. 344, ll. 1-2; p. 949, ll. 24-25; p. 950, ll. 1-15. Mortensen also testified that Defendants' Exhibit 57 showed the

Peplinski parcel near the point of the access road moving south into Peplinski's property and leaving Akers' parcel, and it showed a bearing tree. Mr. Mortensen did not indicate which of the several trees in the photograph was the bearing tree he referenced. Tr Vol. I, p. 951, ll. 11-25; p. 952, ll. 1-10.

- ***DAVE WHITE'S TESTIMONY***

White testified that Exhibit D-13 was a 1973 Department of Lands aerial of the property, and that Exhibit D-44was a blow up of that map showing the road. Tr Vol. I, p.390, ll. 2-25; pp. 391-393, p. 394, ll. 1-3.

White testified he had not changed any portion of the access road in any way at the top of the hill with respect to the portion that traversed Akers' property. Vol. I, p. 928, ll. 17-19.

iii. Expert Witness Testimony

- ***DAVID ENGLISH'S TESTIMONY***

David English, title officer for Pioneer Title Company, testified that at one point in time around 1945 there had been a 20x50 foot easement reserved across a portion of Parcel B for access to the 160 acres subsequently owned by Mortensen and White. Tr Vol. I, p. 857, ll. 3-25; p. 858, ll. 1-20; p. 860, ll. 14-20.

- ***SCOTT RASOR'S TESTIMONY***

Rasor is a licensed land surveyor. Rasor did a survey in the period around July 2002 and generated Plaintiffs' Exhibit 6 from the field data he collected. Tr Vol. I, p. 434, ll. 8-22. Exhibit 6 was prepared July 2, 2002. Tr Vol. I, p. 485, ll. 20-25; p. 486, ll. 1-4. Rasor estimated the grade of the road at roughly 18% grade at its steepest part. Tr Vol. I, p. 455, ll. 1-3. Rasor explained that Exhibits D-43 and D-44 were quad sheets. Tr Vol. I, p. 462, ll. 21-25. Regarding the accuracy of quad sheets, such as Defendants' Exhibit 43, Rasor indicated they are accurate

within 200 feet. Rasor testified that quad sheets cannot be accurately scaled;.surveyors rely on them for an idea of terrain and location of roads, but do not use them for any kind of accurate survey measurement. Some of the problems with aerial photographs identified by Rasor were that they could not "see" through trees and brushes and whether there's a tree growing over a road, or if a road is covered with brush on the edge of a road. Tr Vol. I, p. 462, ll. 20-25; p. 463-465, p. 466, ll. 1-3. On Exhibit 6, Rasor showed the prescriptive road in Parcel B as it existed at the time of preparing his survey on July 2, 2002. Vol. I, p. 551, ll. 5-25; p. 552, ll. 1-3.

- ***ALAN KIEBERT'S TESTIMONY***

Mr. Kiebert is a licensed land surveyor. Mr. Kiebert testified he did not personally survey the property. Tr Vol. II, p. 1829, ll. 5-14. Mr. Kiebert estimated from Defendants' aerial photographs marked as Exhibits W and K-1 that the access road extended west beyond the section line approximately 150 feet. Tr Vol. II, p. 1830, ll. 20-25; p. 1831, l. 1.

2. Damages

White contends there is no substantial or competent evidence in the record to support the trial court's findings regarding damages. The following are facts related to damages.

As a preface, Mortensen testified that Akers never blocked White's or Mortensen's ability to use the 1966 access road. The point was that White and Mortensen wanted to use a different route. Tr Vol. II, p. 1403, ll. 14-25; p. 1404, ll. 1-8. Mortensen also testified he was aware before he purchased the property that Peplinski and Akers had been in a dispute regarding the scope of Peplinski's easement rights. Mortensen further testified that all the majority of the acts that are discussed herein were done after the lawsuit in this matter was filed. Tr Vol. I, p. 256, ll. 10-25; p. 257, ll. 1-23. Mortensen testified he and White did not work on the access road. Tr Vol. I, p. 257, ll. 24-25; p. 258; p. 259, ll. 1-15. In openings during the portion of the

trial dedicated to damages, White's former counsel characterized the actions taken on the road as involving "what the defendants believe is routine maintenance on the road. None of their action caused damage, certainly not of a permanent nature, to the plaintiffs' property." Tr Vol. II, p. 1347, ll. 9-15.

i. **West End of Road**. Mr. Reynolds testified Jerry Mortensen and David White were lowering the prescriptive easement. The excavation work was near Akers' water and power lines. Tr Vol. I, p. 92, ll. 1-23, p. 159, ll. 4-25; p. 160, ll. 1-24; Plaintiffs' Exhibit 6 with witness modifications. Reynolds testified Shawn Montee, White's contractor, did the excavation on the west end. Tr Vol. I, p.85, ll. 8-18; p. 88, ll. 14-25; 00. 89-91; p. 92, ll. 1-23; Plaintiffs' Exhibit 67. Akers testified Shawn Montee brought his heavy equipment in through the back route. Tr Vol. II, p. 1229, ll. 4-12. Akers testified White's operator informed him he had been instructed by White to start at the Y at Akers' driveway and take the hillside grade down. Tr Vol. II, p. 1256, ll. 15-25; p. 1257, l. 1. The Defendants excavated the access road. Tr Vol. I, p. 68, ll. 1-14; p.1681, ll. 2-6. Part of the excavation removed the graveled, compacted road on Akers' property. Tr Vol. I, p. 683, ll. 13-25; p. 684, ll. 1-15; p. 732, ll. 18-25. Defendants also damaged a tree outside the right of way on the west end. The trial court also relied upon Exhibits 24, 46, 47, 48, 49 and 55 in arriving at its conclusion that there was excavation on the west end. Plaintiffs' Exhibit 79, page 3, Exhibit 61.

Dennis Akers testified that White's excavation of the access road on the west end caused water to trespass on his property. Tr Vol. II, p. 1178, ll. 6-25; p. 1179-1196; p. 1197, ll. 1-14; Exhibits 260, 263, 270, 275, 257, 254, 239, 262, 266, 267, 274, 276, 269, 220, 221, 219 and 268.. Expert witness Terry Mort also indicated he observed some water damage to the road, mostly on the upper (west) end. Tr Vol II, p. 1089, ll. 5-25; p. 1090, ll. 1-13.

ii. **Disputed Triangle Area:** Reynolds testified White and Mortensen hauled approximately 5 to 6 loads of dirt into the triangle area, covered the driveway and some of Akers' curved approach area, and dozed out the gate. Tr Vol. I, p. 96, ll. 7-25; p. 97; p. 98; p. 99. ll. 1-23; Trial Exhibit 6 as modified. They tore out the fence post, and the gate went down. Tr Vol. I, p. 101, l. 25; p. 102, ll. 1-21. Mortensen was present during this operation and White's operator drove the dump truck. Tr Vol. I, p. 99, ll. 11-25, p. 100, ll. 106. A few weeks later, they did more work in the triangle area. Tr Vol. I, p. 103, ll. 8-25; Exhibits 23, 25, 26, 27, 28, 29, 30, 31 and 32. White was on the dozer. Tr Vol. I, p. 105, ll. 8-25, Exhibit 31. Mortensen was also present. Tr Vol., I, p. 106, p. 107, ll. 1-4. Reynolds personally observed the Defendants place the fill material in the disputed triangle. Tr Vol. I, p. 127, ll. 9-14; p. 160, ll. 11-23. When Reynolds inquired why they were placing fill in the disputed triangle area, Mortensen informed Reynolds they were taking these actions to force the matter to court. Tr Vol. I, p. 162, ll. 10-25. Reynolds did not consider putting 1 ½' of fill dirt in the disputed triangle to be routine maintenance. Tr Vol. I, p. 178, ll. 16-25. It appeared to Mr. Reynolds the dirt was placed to make a 60 feet wide road. Tr Vol. I, p. 191, ll. 16-25. Reynolds testified White and Mortensen brought in a Cat with a dozer to move the dirt around to develop a road. In developing the road, White and Mortensen dumped dirt in the disputed triangle and on Akers' curved approach. Tr Vol. I, p. 86, ll. 3-25; p. 87, p. 88, p. 89, l. 1.

Mortensen agreed there were two occasions in which Defendants, including White, dumped dirt in the disputed triangle area, which occurred after the lawsuit was filed and the court had issued its restraining order. Tr Vol. I, p. 264-265, 266, ll. 1-12. Mortensen testified both he and White worked in the disputed triangle area. Tr Vol. I, p. 268, ll. 6-25; p. 269, ll. 1-18; p. 307, ll. 3-25, p. 308, ll. 1-3; Exhibit 76, Defendant's

Exhibit 7; p. 333, ll. 14-25; p. 334, p. 335, ll. 1-22; p. 335, ll. 4-19; p. 961, ll. 22-25; p. 962, ll. 1-11. .

White testified he and Mortensen worked in the disputed triangle and the work was done before they obtained the Baker deed to the disputed triangle area. Tr Vol. I, p. 371, ll. 23-25; p. 372, p. 373, ll. 1-5, p. 380, ll. 8-25; p. 381, ll. 1-2. White testified he operated under the assumption he had 30 feet to work within. P. 388, ll. 1-4. White claimed the triangle solely by virtue of the Baker deed. P. 399, ll. 9-21; Defendants' Exhibit 23. Mortensen acknowledged that all the work in the disputed triangle was done after suit was filed and the court had issued its restraining order. p. 964, ll. 17-23.

D. Akers testified that after first dumping incident as officers cleared the scene, Mortensen commented to White he couldn't believe they had pulled it off and neither of them was in jail. Tr Vol. II, p. 1253, ll. 4-25; p. 1254, ll. 1-11.

iii. Curved Approach: Reynolds testified Defendants tore out Akers' gate the first time they brought out dirt to develop the road. Tr Vol. I, p. 91, 11, 23-25; p. 92, ll. 1-19. Dennis Akers testified that when Mortensen plowed out his gate, Mortensen had already cut the lock to the gate and could have passed through, so there was no need to rip out the gate. Tr Vol. II, p. 1254, ll. 12-25; p. 1255, ll. 1-4.

iv. Road Damage: White testified he used the road to haul gravel to his property and for hydro seeding work on his project. Tr Vol. II, p. 1541, ll. 13-25, p. 1542, l. 1.

Reynolds testified Mortensen and White damaged the road by walking a Cat up and down it which pulled up the oil finish and busted it up. Tr Vol. I, p. 109-113, p. 114, ll. 1-14, Exhibit 38. Dennis Akers testified that the Defendants delivered tracked vehicles

to the road on trailers, but then unloaded the heavy equipment at the east end and ran it up and down the road; purposely dropped the blade to tear up the road; and ran up and down the road just to destroy the surface. Tr Vol. II, p. 1213, ll. 17-25; p. 1214-1220; Exhibits 303, 304. The Defendants took the gravel off the surface of the road while bulldozing out Akers' gate. Tr Vol. II, p. 1225, ll. 24-25; p. 1226, ll. 1-3.

Expert witness Terry Mort, Mort's Dust Control, testified he was familiar with the road as he had put a 3 shot oil surface on the road approximately 2-3 years prior. Tr Vol. II, p. 1068, ll. 5-19. Mort testified the road had a good solid surface when he worked on it. Tr Vol. I, P. 1023, ll. 20-25; p. 1024, ll. 1-2;. Mort testified that tracked equipment will damage any road surface. Tr Vol. II, p. 1079, ll. 21-25; p. 1080, ll. 1-8; p. 1084, ll. 2-25; p. 1085, ll. 1-23; p. 1088, ll. 6-12. Mort indicated there was damage to the access road and it appeared to be from a Cat. Tr Vol. II, p. 1084, ll. 2-25; p. 1085; l. 1-23; 1088, ll. 6-12. Mort observed no evidence of tracked equipment using the road when he first applied the triple shot oil surface. Tr Vol. II, p. 1101, ll. 12-22.

v. No Trespassing Signs: Mr. Reynolds testified there was a no trespassing sign in two locations along the road. Tr Vol. I, p. 116, ll. 10-23; p. 117, ll. 6-25; p. 118, ll. 1-20.; Exhibits 46, 62 and 63. Mr. Reynolds testified there was a no trespassing sign posted at the east end of the easement at the time the gate was torn out. Mortensen testified there was a no trespassing sign posted on the curved approach. Tr Vol I, p. 259, ll. 2-25; p. 260. Mortensen testified the west end of the property was posted with a no trespassing sign. Tr Vol I, p. 274, ll. 21-25, p. 257 ll. 1-23, Exhibit 50; p. 287, ll. 1-4. Mortensen acknowledged there were no trespassing signs at the bottom and top of the road. Tr Vol., II, p. 1378, ll. 20-23. Dennis

Akers testified he posted "no trespassing" signs. One was on his curved approach, and one was at the border of Lot 2. Tr Vol. I, P. 580, ll. 11-20.

vi. Damage to Akers' Pickup Mortensen admitted he hit Akers' occupied pickup while working in the disputed triangle area. Tr Vol. I, p. 285, ll. 7-25; p, 286, ll. 1-22. Akers testified that Mortensen intentionally rammed his truck. P. 1250, ll. 18-24.

vii. Emotional Distress and Punitive Damages: Dennis Akers observed White's operator pull up and act like he was going to run Sherrie Akers over during one of the dirt dumping incidences. Tr Vol. II, p. 1251, ll. 19-25. White and Mortensen blocked the access road on several occasions on both ends. Tr Vol. II, p. 1252, ll. 9-24. White cursed at Akers and called them names. Tr Vol. II, p. 1250, ll. 3-14. White called Sherri Akers names and physically intimidated her while she cooperated in a sheriff's investigation of trespass in the disputed triangle area. Mortensen drove a bulldozer close to her to scare her; White's operator came at her twice with a dump truck. Tr Vol. II, p. 1325, ll. 4-25, pp. 1326-1327, p. 1328, ll. 1-9. White's employee told Mrs. Akers they were going to run her off of their place. He also threatened to dig a three foot ditch across the driveway so she couldn't use it. On several occasions, the dirt that was dumped on the driveway impaired Mrs. Akers' ability to use the driveway. Tr Vol. II, p. 1332, ll. 14-25; p. 1333, ll. 1-2. White even bullied Mrs. Akers from the stand at trial, yelling at her. Vol. II, p. 928, ll. 3-7, p. 95, ll. 20-25; p. 946, ll. 1-15.

Mortensen stipulated the county placed a stop work order, commonly referred to as a "red tag," on the work being done by White and Mortensen on the east end of the approach in the disputed area. Tr Vol. I, p. 273, p. 281, ll. 825; p. 282; Plaintiffs' Exhibits 95 and 96. White acknowledged he was red tagged by the county for work at the top of the hill (west end). Tr Vol. I, p. 936, ll. 14-25; p. 437, ll. 1-20..

Dennis Akers testified White trespassed behind the Akers' house. P. 1240, ll. 4-25; p. 1241, p. 1242, ll. 1-19. White admitted to being in the area that night, but denied being on Akers property. P. 1338, ll. 9-25, p. 1339, ll. 1-20.

Mortensen claims that Dennis Akers beat him up and the police were called. P. 267, ll. 1-17. There is no evidence that the police charged Dennis Akers with battery after talking to the parties. The prosecutor declined prosecution on Mortensen's allegation of battery by Akers. P. 1247, ll. 19-25; p. 1248-1249; p. 1250, ll. 1-2, Exhibit 310.

III. ARGUMENT

A. Standard of Review

In *Akers II,* 147 Idaho at 1180-1181, 205 P.3d at 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. The District Court did not Abuse its Discretion with Respect to the Proposed Welch Comer Evidence Regarding the Location of the Prescriptive Easement

On appeal, White contends that the trial court erred in refusing to re-open the evidence. On October 22, 2009, White filed a brief regarding the location of the easement. Therein, White claimed that a sufficient description of the route and course of the area of the easement was not satisfactorily determinable based upon the record developed by Defendants at trial. White suggested that further testimony should be heard by the Court on the subject of a metes and bounds description of the affected area. White also indicated: "As an alternative, Whites note for the Court that Plaintiffs' Exhibit 6, and testimony in support thereof by Scott Rasor, depict the graveled surface in Parcel B that had been present prior to 2002. The Court could order a survey to provide a metes and bounds description of that area to accomplish a sufficient description of the origin and course of the easement area." R Vol. I, p. 139-140. The district court followed the second suggestion. White now claims it was error for the trial court to take such an approach because "newly discovered evidence" consisting of a map prepared by Welch Comer based upon a review of a 1975 and a 1982 aerial photograph provided better evidence of the location of the easement.

The remittitur in this matter was filed with the district court on April 25, 2009. R Vol. I, p. 18. The Welch Comer evidence was first presented to the trial court as an attachment to White's brief filed March 29, 2010 entitled "Defendants White Brief RE: Easement Location",

R. Vol. I, p. 173. A motion to admit additional evidence RE: Easement location and the Affidavit of Mike Hathaway were filed June 30, 2010, one day before the scheduled oral argument on the location of the easement. R Vol. I, p. 23. The Affidavit of Mike Hathaway was filed in support of the motion. This Affidavit indicated that at the request of White's counsel, the surveyor had searched online for USGS aerial maps that depicted the area in dispute and located a 1975 aerial map in March of 2010. The Affidavit continued that in June 2010, at the request of White's counsel, the surveyor had again searched USGS maps online and discovered a 1982 map. The affidavit indicated that on June 7, 2010, high resolution copies of the maps were ordered. R Vol. I, p. 344-357. At oral argument, White's counsel moved to continue the hearing. Akers objected and the hearing proceeded. R Vol. II, p. 373.

White never noticed the motion for hearing. On November 29, 2010, a year and a half after remittitur, and nearly three months after the hearing on the easement location, the district court issued its opinion regarding the location of the easement. The district court noted it had waited for White's to notice a hearing that they had reserved for September 29, 2010 to hear the motion to add new evidence to issue its opinion. However, White never noticed the hearing. Therefore, the district court issued its opinion. R. Vol. II, p. 374.

The additional evidence consisted of two aerial photographs obtained by Welch Comer Engineering. Also included was Welch Comer's opinion regarding the prescriptive easement location in 1966-1980 contained in a map prepared by Welch Comer dated January 21, 2010 based upon its review of a 1975 and a 1982 aerial photograph.

The decision whether to reopen a case and receive additional evidence before final judgment involves an exercise of discretion, and will not be disturbed absent a showing that such discretion was abused. *See Seubert Excavators, Inc. v. Eucon Corp.,* 125 Idaho 409, 416, 871

P.2d 826, 833 (1994). In *Idaho Power Co. v. Cogeneration,* 134 Idaho 738, 743, 9 P.3d 1204, 1209, (Idaho 2000), this Court examined when a matter can be reopened to submit additional evidence and held:

> This Court has recognized the power of a district court to reopen a case prior to final judgment. *See Davison's Air Service, Inc. v. Montierth*, 119 Idaho 967, 968, 812 P.2d 274, 275 (1991). Such action may be taken by the court on motion of a party or on the court's own motion. *See Bonner County v. Dyer*, 92 Idaho 699, 702, 448 P.2d 986, 989 (1968). However, a party seeking to reopen must show some reasonable excuse, such as oversight, inability to produce the evidence, or ignorance of the evidence. *See Smith v. Smith*, 95 Idaho 477, 481, 511 P.2d 294, 298 (1973).

The rules are silent regarding how a court should proceed when a motion has been filed and includes a request for oral argument, but the filing party never proceeds to notice the matter for hearing. The rules contemplate that the notice of hearing will be filed contemporaneously with the motion. However, even in cases where the party has properly noticed a motion for oral argument, the party is not absolutely entitled to have the motion heard. Rule 7(b)(3)(D) provides that if argument has been requested on any motion, the court may, in its discretion, deny oral argument by counsel by written or oral notice to all counsel before the day of the hearing, and the court may limit oral argument at any time. Given that White never noticed their motion for hearing, and given the trial court's ability to deny oral argument in its discretion, it was not error for the trial court to proceed with its opinion on the easement location given White's failure to notice its motion for hearing.

White's never provide any excuse why the USGS maps were not submitted at trial through its prior expert surveyor, Alan Kiebert. On its own initiative, the district court considered and discussed these exhibits and Welch Comer's testimony regarding the location of the easement in its decision regarding the location of the easement. Both the Welch Comer proposed alignment and the Rasor proposed alignment were discussed at length in the district

court's memorandum decision. The district court devoted eleven (11) pages of its decision discussing the Rasor alignment proposed by Akers and the Welch Comer alignment proposed by White and adopted by M.E. Mortensen. *See* R Vol. II, pp. 376-387. Thus, White is incorrect that the district court refused to consider its additional evidence.

C. Substantial and Competent, Albeit Disputed, Evidence Supports the Trial Court's Finding Regarding the Location of the Prescriptive Easement across Parcel B

The trial court concluded that the Rasor alignment was the location of the road as it existed from 1966 to 1980. Even though White suggested this approach at one point, White now argues on appeal there is a lack of substantial and competent evidence to support this conclusion because the Welch Comer evidence disputes it.

The testimony of the witnesses support this conclusion. In continuing to argue that the road extended farther west than found by the trial court, White fails to discern that although the road extended quite a bit farther west, only a limited portion was on Akers' property, with the majority located on White's property. White also stubbornly refuses to acknowledge that there is testimony that the road as it existed on Akers' property was not materially changed through the years.

The trial court heard from three witnesses who observed the road at some point during the 1966-1980 period. One was Mr. Reynolds, who has lived on the property his entire life, except for a short absence during a period of military service. Mr. Reynolds testified the access road crossed into Section 24 close to his property line and turned the corner at the top of the hill.

Another witness during the relevant time period was William Millsap, son of the original owner of the parent parcel. Mr. Millsap indicated Defendants' Exhibit 44 depicted the road as it existed in 1966. On cross–examination, Mr. Millsap testified his recollection of the top of the

hill was that it took a wide curve, contrary to the depiction in Defendants' Exhibit 44. Mr. Millsap also testified that Plaintiffs' Exhibit 183 showed the top of the hill totally different than he recalled it being when he farmed. On re-direct, with reference to Plaintiffs' Exhibit 6, Mr. Millsap indicated that the curve into the 160 acres owned by his father was not all on the Akers' property. Mr. Millsap testified: "The turn, it come up – the road is just as it is. It came right on up past into Section 24 and then turned into the 160 acres." Mr. Millsap agreed that Plaintiffs' Exhibit 6 accurately showed the road as it crossed Akers' Parcel B based upon his recollection.

The final witness who had knowledge of the road during the time frame was Richard Peplinski, another son of a predecessor in interest. Mr. Peplinski agreed the road had been changed after his father's purchase. Mr. Peplinski testified there was an agreement to change the road at the section 24 corner. Mr. Peplinski's recollection was that he and his father widened out the corner of the access road, but did not stretch the road more westerly. Mr. Peplinski testified there was a minimal change of the road as it crossed the Akers' property.

Without any cite to the record, White contends that "Peplinski adjusted the position of the Access Road in Section 24 so that it curved slightly south onto his property a short distance east of the former turn south onto his property." (Brief of Appellants White page 5-6.) This contention is not correct. As testified to by Peplinski, any changes he made to the access road as it crossed Parcel B were minimal, and consisted of widening out the corner. It did not consist of shortening or lengthening the road as it crossed Akers' Parcel B.

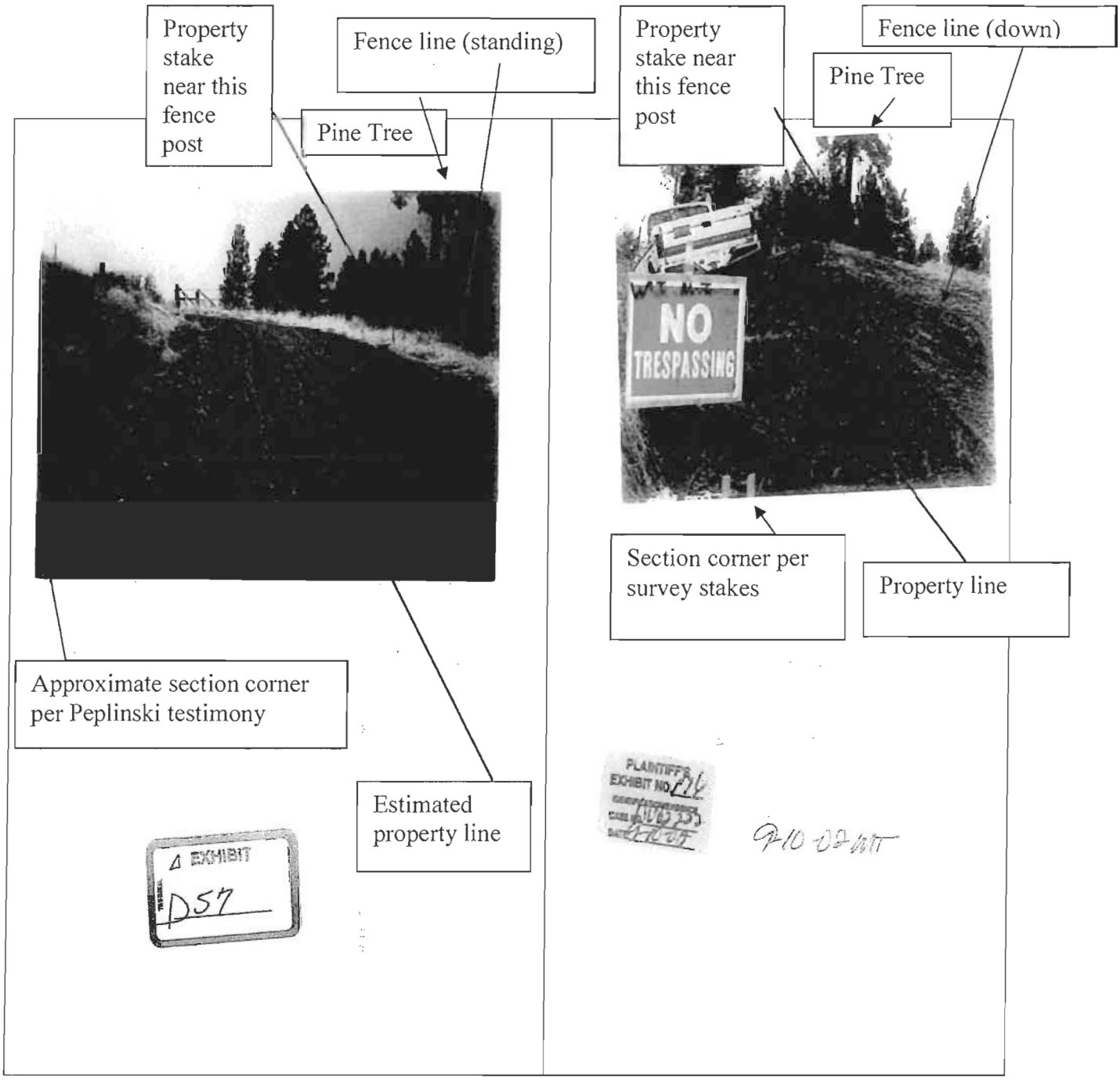
Also relevant to the analysis was the degree of change to the prescriptive easement portion of the road after 1980. Both Akers testified they allowed Floyd Peplinski to extend the prescriptive easement portion of the road further west. Richard Peplinski's testimony was that he widened the curve, but minimally changed the road as it crossed Akers' property.

Both White and Mortensen testified they made no changes to the road. Thus, at the time Scott Rasor performed his survey of the road, there had been very little changes made to it since 1966. The testimony regarding changes indicated that to the degree the road was altered it may have actually increased the burden on Parcel B (the widening of the curve). Thus, if there is an inaccuracy in the Rasor survey, it would be to the detriment of Akers.

Other evidence that supported the trial court's conclusion regarding the location of the easement included photographs admitted as evidence at trial. In their brief to this Court regarding the location of the easement, Defendant White has assumed that the access road as it extended westerly was entirely located in Section 24, and followed the section line until it turned south in the shepherd's hook configuration discussed by this Court in the second appeal. This assumption is not supported by evidence presented at trial. Evidence at trial indicated the road angles south in comparison to the section line.

There are two photographs that clearly demonstrate that this assumption is incorrect. Plaintiffs' Exhibit No 176, taken 1/26/02, contains property stakes at the Section 19/24 corner and a point along the north/south section line between Sections 19 and 24 on the opposite side of the road. Defendants' Exhibit 57, taken by Mr. Peplinski at a point after his father bought the property and improved it and estimated to be around 1993, shows the upper road before it turned into White's property. Both pictures were taken at strikingly similar angles. Further, certain features are discerned in both. These include the fact that they both show a property stake in front of a pine tree that does not have limbs on the lower portion of the trunk. The same stake appears to be in both pictures in the same location in front of a pine tree. The pine trees surrounding the pine tree in the forefront of the pictures appear to be similar in nature. There is a

fence line along the northern edge of the road, albeit in a different condition in each picture. The following comparison of these exhibits demonstrates these similarities.



From these photographs, it can be seen that the access road did not run parallel with the east/west section line through Section 24. Instead, it angled south and after leaving Parcel B, curved south (left) farther into White's property.

Finally, Rasor's survey is consistent with the 1945 easement reservation of a 20x50 foot strip that David English testified had been included at one time for an ingress/egress easement across Parcel B into White's property, before a merger of title extinguished it. White and Mortensen are the parties who presented this evidence as being relevant to the litigation. White now criticizes the trial court and claims the trial court erred in considering this evidence because it did not encompass the relevant time period.

Aerial photographs Exhibits J and J-1 were taken in 1958, before the relevant time period, yet White relies heavily upon them to show that the road remained virtually unchanged. For the same reason, the 1945 easement information is relevant. It addresses the configuration of a road that has remained virtually unchanged through the years. It was not error for the trial court to consider this evidence proffered by Defendants to corroborate the district court's conclusion regarding the location of the easement. The easement surveyed by Rasor fits within the reserved easement area and is consistent with the 1945 easement and the 1958 aerial photographs.

Although White disputes the location of the easement, the trial court did not err in locating the prescriptive easement across Parcel B. The trial court's findings and conclusion regarding the location across Parcel B is supported by substantial and competent evidence, and should be affirmed on appeal.

D. Following the Second Remand, White Acknowledged the Rasor Survey was the Proper Alignment

The trial court asked for briefing from the parties regarding location of the prescriptive easement as it crossed Parcel B. As previously indicated, White acknowledged the road had changed very little through the years and suggested using a metes and bounds description of the road as depicted in the Rasor survey. However, on appeal, White complains that the trial court erred in taking such an approach. White contends the Rasor survey is not substantial and competent evidence of the location of the access road as it crossed Parcel B during the relevant time frame.

The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error. *Thomson v. Olson*, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009); *State v. Caudill*, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985). One may not complain of errors one has consented to or acquiesced in. *Thomson*, 147 Idaho at 106, 205 P.3d at 1242. In short, White first invited the error he now complains about on appeal and may not be heard to complain that the trial court followed the course suggested by White.

E. The Width of the Prescriptive Easement was not within the Scope of the Remand

White also contends that the trial court following the first remand established the width of the easement at 12.2 feet wide. This Court did not remand this case for further examination of the width of the prescriptive easement on the second remand. In Part C.3 of the substituted opinion, the Court affirmed the trial court's determination that the width of the prescriptive easement was 12.2 feet wide. In fact, in a related case filed by Jerry Mortensen against his title insurer, this Court specifically interpreted its holding in *Akers II* as follows:

> This Court has twice heard appeals in the *Akers* case. *Akers v. Mortensen,* 142 Idaho 293, 127 P.3d 196 (2005) ("Akers *I*"); *Akers v. Mortensen,* 147 Idaho 39, 205 P.3d 1175 (2009) ("Akers *II*"). **In the most recent ruling, 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. The lower court's decision on remand is still pending. (Emphasis added.)

The trial court did not err in declining White's request that it revisit its decision regarding the width. The width of the easement was affirmed on the second appeal and was not within the scope of the remand.

F. The District Court did not Err in Refusing White's Request for a New Trial

White not only submitted additional evidence for the district court to consider on remand, they cited the district court to the rule of civil procedure regarding a new trial based upon the discovery of new evidence. White requested that their motion be heard at the hearing for damages even though a notice of hearing was never given for the motion. Akers agreed to have the motion heard as long as they were allowed to file a post-hearing brief in opposition to the motion. R. Vol. III, p. 495.

White claimed their motion to admit additional evidence regarding the easement location was supported by I.R.C.P. 11(a)(2), I.R.C.P. 59(a)(2) and Idaho case law. The trial court noted the new evidence consisted of two photographs of the roadway in question as it existed in 1975 and 1982, which were obtained from a United States Government website. R Vol. III, p. 513.

The district court correctly cited the standard under I.R.C.P. 59(a)(4) as the controlling rule for determining if a new trial was warranted. The trial court refused to order a new trial, holding that the new evidence could have been discovered with the exercise of reasonable diligence and produced at trial. Thus, the trial court properly perceived and applied the applicable rule.

Further, the district court indicated that the evidence was insufficient to cause the Court to reconsider its previous ruling regarding the location of the easement. The district court noted it had fully considered the evidence in its previous decision, and the photographs did not assist the Court in the determination it had to make as they appeared to be similar in nature to the other aerial photographs the district court had considered. R Vol. III, p. 515.

White also cites to case law as authority for the submission of the additional evidence after trial, and asserts that the trial court did not properly apply this case law. Defendants cite to *Sinnett v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961). In *Sinnett*, an easement case was remanded to the trial court to set forth with precision and particularity, the origin, course and dimension, on the ground, of the area affected by a prescriptive easement that had been established. The Supreme Court granted the trial court on remand the right to take further testimony respecting the origin, course and dimension, on the ground, of the easement that had been established if the district court deemed it necessary. Later, in *County of Bonner v. Dyer,* 92 Idaho 699, 448 P.2d 986 (1968). the Supreme Court, citing to the *Sinnett* case, held that reopening or refusing to reopen a trial for the purpose of hearing further evidence on a particular issue is within the sound discretion of the trial court.

Even though the trial court had considered Welch Comer's expert opinion regarding the location based upon the two new aerial photographs, White requested the trial court consider the two aerial photographs in determining the location of the easement, claiming they were clearer than those presented at trial with aerial depictions. White completely ignored that the district court had already considered the photographs, and Welch Comer's opinion about what the photographs showed, in its determination of the location of the easement. Thus, the trial court did not abuse its discretion on remand.

G. The Trial Court did not Err in the Damages it Awarded

White contends on appeal that it is notable that the trial court has not altered its judgment regarding damages despite the change in location of the prescriptive easement in Parcel B. However, this consistency is not remarkable when one considers this Court's accurate observation in *Akers I, supra at* *, that "[o]wnership of the triangle is especially significant, according to [White and Mortensen], because much of the Akers' claimed trespass damages took place in the disputed triangle." The location of the prescriptive easement in Parcel B did not alleviate the trespasses by White and Mortensen in other locations, or the water trespass caused by alterations to the access road near Parcel B.

1. The Trial Court did not Err in its Award of Compensatory Damages

a. Measure of Damages

The measure of damages in the present case is addressed by the case of *Bumgarner v. Bumgarner*, 124 Idaho 629 (Ct. App. 1993).

> Where, as here, the injury to the land is temporary and not permanent, the owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury. *Smith v. Big Lost River Irr. Dist.*, 83 Idaho 374, 385, 364 P.2d 146, 157 (1961), cited in *Bradford v. Simpson*, 97 Idaho 188, 192 n. 1,541 P.2d 612, 616 n. 1 (1975); *Raide v. Dollar*, 34 Idaho 682, 683, 203 P. 469, 471 (1921); *McLaughlin v. Robinson*, 103 Idaho 211, 216, 646 P.2d 453, 458 (Ct.App. 1982).

Bumgarner, 124 Idaho at 639.

b. Scope of Compensable Damages

The trial court also utilized *Ransom v. Topaz Marketing L.P.,* 143 Idaho 641, 152 P.3d 2 (2006) in analyzing the scope of damages in this matter. In *Ransom v. Topaz Marketing L.P.,* the parties did not dispute that Lower had an express easement across Farr West's property. In its decision, this Court characterized the issue on appeal as: "The question becomes, what damage

was the natural effect of creating the easement and what damage was excessive, unnecessary and compensable under the law." *Ransom* at 646, 1529 P.3d at 7. This Court also held that "[a]s a part of the cause of action for trespass, the district court could appropriately consider whether there was an easement and could consider whether the work done by Lower exceeded the scope of work necessary to maintaining that easement." *Id.* The matter was remanded to the district court to determine if Lower exceeded his rights in developing the express easement, and to distinguish between temporary and permanent damages.

White cites to *Walker v. Boozer,* 140 Idaho 451, 951 P.3d 69, 74 (2004) for the proposition that White had a duty to maintain the easement. However, this same case also articulated that if there was a showing that the easement owner's maintenance of the easement created additional burden or interference with the servient estate, the easement owner could be responsible for damages. White contends that the district court erred in finding that White exceeded the scope of his easement rights because the work done within the easement was necessary to maintain the easement.

Turning next to the prescriptive easement on the west end of the access road, White claims that the trial court erred because there is no evidence of any trespass on this end of the road. There is substantial and competent evidence that White excavated the access road both on the Akers side of the property line and on his side of the property line. Given the facts cited to in the Statement of Facts, there is substantial and competent evidence that the changes in the contour of the road in Parcel B from this excavation caused water to trespass on Akers property. "Enter" and "entry" under I.C. §6-202 *et seq.* mean going upon or over real property, either in person or by causing any object, substance or force to go upon or over real property. I.C. §6-202A.

White contends that the trial court erred in finding that their activities with tracked vehicles was done with the intention of damaging the easement road and widening it and therefore Akers were entitled to $1,760 to repair damage to the road surface caused by the track vehicles.

On appeal, White argues that White and Mortensen used the road in a manner consistent with its historic and lawful use by the owner of the dominant estate. Further, White contends there is no evidence that the equipment could have been transported over the road on a trailer so as to prevent damage to the road.

White testified he used the road to haul gravel to his property and for hydro seeding work on his project. P. 1541, ll. 13-25, p. 1542, l. 1. However, it was not this activity that damaged the road surface.

On appeal, White claims they were filling in a boggy area on the road to render it passable and it was this activity that destroyed the road surface. Brief of Appellants White p. 34. There is no cite to the record to support this allegation of fact. There is no evidence that the road was not passable during White's ownership due to the "boggy area". The only evidence was that the boggy area (which lies toward the east end of the access road west of the juncture of the curved approach and the access easement in an area noted on Plaintiffs' Trial Exhibit 6 as containing 2 – 24" diameter culverts) was addressed in the early 1980's by Peplinski and Akers when they substantially improved the road by filling in the boggy area with boulders from the construction of Akers home, which elevated the road and installing culverts to drain water away from the road. Tr Vol. I, p. 578, ll. 8-18; p. 601, ll. 10-19; p. 636, ll. 5-15; p. 637, ll. 1-5; p. 812, ll. 2-12, p. 813, ll. 6-20; p. 830, ll. 1-9.

Evidence was presented that Peplinski and Mortensen had used the road thereafter without any damage to it. Extensive evidence was introduced that White and Mortensen's activities on the access road were unrelated to maintenance. According to the trial testimony included in the Statement of Facts, White and Mortensen purposely "walked" a Cat up and down the road with the express purpose of breaking up the oiled surface and damaging the road. Thus, the trial court did not err in awarding damages to repair damage to the road surface arising from White and Mortensen's malicious acts. Evidence of the condition of the road before and after White's "maintenance" were contained in the record, and showed the road surface had been destroyed. Plaintiffs' Exhibits 46, 50-54, 56, 66, 67, 71, 95, 219-221, 253, 254, 256, 257, 260, 262, and 263. Thus, the trial court's finding that White and Mortensen caused excessive and wrongful damage to Akers' property is supported by substantial and competent evidence.

c. Compensable Damages

Regarding the award of $6,000 for trespass damage to the disputed area, White contends that "careful" review of the record demonstrates that this work was actually done within the easement area, and not within the disputed triangle area. As noted in the Statement of Facts contained herein, there is substantial and competent evidence, albeit disputed, that the work was not within the easement area, but instead occurred within the disputed triangle and the Akers' curved approach.

Turning next to the prescriptive easement on the west end of the access road, White claims that the trial court erred because there is no evidence of any trespass on this end of the road. There is substantial and competent evidence that White excavated the access road both on the Akers side of the property line and on his side of the property line. Given the facts cited to in the Statement of Facts, there is substantial and competent evidence that the changes in the

contour of the road in Parcel B from this excavation caused water to trespass on Akers' property. "Enter" and "entry" under I.C. §6-202 *et seq.* mean going upon or over real property, either in person or by causing any object, substance or force to go upon or over real property. I.C. §6-202A. White caused a substantial water trespass upon Akers property.

Finally, White continues to maintain that it was appropriate for Mortensen to ram Akers' vehicle because Mortensen believed it was blocking the easement and interfering with exercise of White and Mortensen's easement rights. In actuality, Mortensen was working in the disputed triangle area, an area that was not part of the easement. Irrespective, as the trial court noted, one may not take the law into their own hands and ram another person's vehicle. Thus, the trial court did not err in awarding this component of damage to Akers.

2. The District Court did not Err in Finding White had Willfully and Intentionally Trespassed in Violation of I.C. § 6-202

White claims that the trial court could not award treble damages to Akers pursuant to I.C. § 6-202 because Akers did not post "no trespassing" signs, and because their activities were not willful nor intentional. White also contends there is not substantial and competent evidence of trespass on the west end of the road, and therefore the district court committed error.

a. Akers Properly Posted "No Trespassing" Signs

Turning first to the issue of posting, Idaho Code §6-202 provides in relevant part:

> Any person who, without permission of the owner, or the owner's agent, enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property; ... without lawful authority, is liable to the owner of such land,... for treble the amount of damages which may be assessed therefore or fifty dollars ($50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails.

White concedes that during the litigation, before any alterations to Akers' land, Akers had their property posted with three "no trespassing" signs at intervals less than 660 feet. To avoid a finding of trespass under such circumstances, White creates a legal fiction that there must be a "zone" posting.

Under White's zone theory, a "no trespassing sign" posted along a boundary line adjacent to an easement nullifies the signs. White further postulates under their zone theory that to be effective, the sign must be posted exactly at the location outside the easement area intended to be protected from trespass. White indicates that "only common law trespass applies to areas of real property beyond or outside the lines established by postings spaced at intervals of not less than 1 notice per six hundred sixty (660) feet along such property while the special sanctions apply inside or within the lines established by such postings." Brief of Appellants White page 33. White contends if this requirement is not met, the sign posting is insufficient to meet the statutory requirements and only common law trespass applies. White acknowledges there is no precedent in this jurisdiction that supports this contention, most likely because such an interpretation is an aberration of the law and completely contradictory to the provisions of the statute. White points to no legislative material that indicates the legislature intended for the statute to be interpreted in such a fashion.

The plain language of I. C. § 6-202 addresses the posting of a parcel of property, not lines or zones within a parcel of property. If a person enters an easement area to which they have a right, they are on that location of the property with lawful authority, and therefore not a trespasser. If they leave the easement area, they are not on that location with lawful authority. The landowner is not required to post zones within the property to comply with the requirements of I.C. § 6-202 when their parcel is subject to easement rights.

b. The District Court did not Err in Determining White's Actions were Willful and Intentional

White also argues that the trial court erred in applying I.C. § 6-202 because none of his acts were committed willfully or intentionally. In *Weitz v. Green*, 148 Idaho 851, 863, 230 P.3d 743, 755 (2010), this court held:

> Idaho Code § 6-202 does not contain an explicit requirement that the trespasser have acted in a willful and intentional manner. However, this requirement was read into the statute in *Menasha Woodenware Co. v. Spokane International Ry. Co.,* where this Court found the following reasoning from the California Supreme Court instructive: " While the statute does not so state in terms, it is clear, we think, that it was not intended to apply to cases in which the trespass was committed through an innocent mistake as to the boundary or location of a tract of land claimed by the defendant." 19 Idaho 586, 593, 115 P. 22, 24 (1911) (quoting *Barnes v. Jones,* 51 Cal. 303, 305, 1876 WL 1630 (Cal.1876)). *See also Earl v. Fordice,* 84 Idaho 542, 545, 374 P.2d 713, 714 (1962) (restating the standard established in *Menasha* that " it is necessary to establish the trespass was willful and intentionally committed" .)" Intentional" is defined as " [d]one with the aim of carrying out the act." *Black's Law Dictionary* 370 (3rd pocket ed. 2006). Willful is defined as " [v]oluntary and intentional, but not necessarily malicious." *Id.* at 779. It is apparent that under the facts of this case the Weitzes were not committing an innocent mistake in re-entering the property, cutting down vegetation, and erecting a fence. They had notice from the Greens that the property was in dispute. As the district court noted, to the extent Consuelo Weitz believed that an anticipated settlement between the Rogers Family Trust and the Greens would resolve the property dispute between the Weitzes and Greens, that belief was unreasonable. Based upon the record in this case we hold that the Weitzes acted willfully and intentionally, and therefore, I.C. § 6-202's trebling of damages should apply to the Weitzes' trespass.
>
> This Court strongly disfavors the resort to forceful self-help in resolving property disputes. *See Burke v. Prudential Ins. Co. of Am.,* No. 02C5910, 2004 WL 784073, at *4 (N.D.Ill. Jan. 29, 2004) (" Self-help in litigation is not condoned by the courts."); *Doles v. Doles,* No. 17462, 2000 WL 511693, at *2 (Va.Cir.Ct. Mar. 10, 2000) (" [P]ublic policy favors the settlement of disputes by litigation rather than by self help force ..."). When parties have entered into a conflict over real property the rights are usually fixed far in advance of the exchange of attorneys' letters, or subsequent filing of a lawsuit, motions, depositions, and hearings. Making a bold physical attempt to gain, or regain, possession or control of a real property interest, by demolishing or erecting gates or fences, bulldozing land, etc., results in no strategic advantage. Instead, passions become inflamed, positions become entrenched, damages are exacerbated rather than mitigated, and the parties end up spending far more money in litigation than

> their supposed interest was worth to begin with. Attorneys who counsel their clients to engage in self-help, without being certain that the respective rights and responsibilities have been settled, do their clients a disservice. Clients who ignore the advice of counsel and take matters into their own hands do themselves a disservice. In short, parties who attempt to solve a property dispute through their own forceful action do so at their own peril.

This same analysis applies to the present case. White claims their acts were neither willful nor intentional because the area was in dispute with conflicting evidence regarding ownership. White claims they had a genuine belief that they had the right to use the triangle area to access the express easement. However, it is not traveling over the area that has subjected them to damages for trespass. It is the fact that they had notice and actual knowledge that the ownership of the area was in dispute and chose to take matters into their own hands rather than waiting for the trial court to resolve the dispute.

The evidence shows that White trespassed into the disputed triangle area (long before he acquired a deed to it) and on Akers' curved approach. White excuses his trespass on appeal by claiming that he did not believe Akers' owned the property because even though Akers' eastern boundary called to the centerline of the public road, the course and distances in his deed did not place his eastern boundary to the center of the existing road. White cites to the record his testimony that he acquired a survey of Akers' property lines after litigation was commenced, and this survey showed the disputed area to lie outside Akers' property. However, White knew that ownership was disputed and that until the district court ruled on the ownership, it was not settled. White knew that his survey did not divest the trial court of this final determination. Therefore, he did not justifiably rely upon the survey.

In his brief on appeal, White does not explain how he believed he had a right to work within an area not owned by him and not a portion of his easement right across Akers property. At first, White speculated that the property belonged to Post Falls Highway District and he could

work in the public right of way area to develop a road. At trial, White never produced an encroachment permit that allowed him to work in a public right of way. Next, White contended Akers did not own the property, so if it was a trespass, it was not against Akers. Finally, long after the filing of the suit and the subsequent trespasses, White contended since he acquired the disputed property after the fact, no trespass therefore occurred.

It is the sequence and timing of events that support the trial court's trebling of damages. White knew the property he was working on was not owned by him. White knew Akers claimed the disputed property and this claim was part of the issues to be resolved in the litigation. White obtained a survey after the suit was filed supporting his interpretation of Akers' deed, but he knew this interpretation was disputed by case law that monuments control over courses and distances in deeds. Nonetheless, White blithely moved forward with work in the disputed area, ignoring the risk he was wrong regarding Akers' ownership.

From this sequence, it is clear that White knowingly took a gamble and was wrong. Thus, White willfully and intentionally trespassed on the curved approach and in the disputed triangle area on the east end of the access. The trial court therefore did not err in trebling the damages for trespass on this portion of Akers' property.

3. The Trial Court did not Err in Awarding Damages to Sherrie Akers for Negligent Infliction of Emotional Distress

In *Akers II,* this Court recognized that the district court predicated the award of damages for negligent infliction of emotional distress on Appellants' malicious behaviors while trespassing on the Akers' property. *Akers II,* 147 Idaho at 48, 205 P.3d at 1184. The damage award was vacated because the easement location remained uncertain.

Trespass is a tort against possession committed when one, without permission, interferes with another's exclusive right to possession of the property." *Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 549, 916 P.2d 1264, 1274 (1996). The district court found based on substantial and competent evidence that White committed the tort of trespass. Further, it is well recognized in Idaho law that it is the duty of the defendant, before and at the time of an occurrence, to use ordinary care for the safety of the plaintiff and the Plaintiffs' property.

White contends that because they were within the easement that any actions therein were sanctioned and did not breach any duty to Sherrie Akers. Threatening and intimidating Sherrie Akers with heavy equipment when she discovered White and Mortensen trespassing in the disputed triangle not only evinced a great disregard for her safety, it was connected to White's trespass in the disputed triangle. The incident wherein White tried to physically intimidate Sherrie Akers as she cooperated with the sheriff in the investigation of her trespass report again involved trespasses by White into the disputed triangle and the curved approach. Calling her names was related to her protest of White and Mortensen trespassing in the disputed triangle area. The comments of White's employee directed to Sherrie Akers that they couldn't wait to run Akers off their property and the threat by the same employee to dig a three foot ditch across her driveway to impede her use of the driveway were made in conjunction with the trespasses in the disputed triangle area. Thus, the events were all related to White's trespasses. In addition, during this relevant time period, White cursed Sherrie Akers and called her names. Further, White's late night outing onto Akers property within thirty feet of their house was a trespass that also scared Sherrie Akers. These combined acts constituted substantial and competent evidence of acts supporting a finding of emotional distress.

The last claim made by White with respect to this component of damage is that an easement is a contract, and therefore the dispute in this matter arose from breach of contract, and no recovery for emotional distress can be recovered. White did not raise this issue below. Further, a claim of trespass does not sound in contract, it sounds in tort. Akers never claimed that White breached a term of the easement. Rather, they claimed that his other activities outside the easement area were trespasses.

4. The District Court did not Err in Granting Punitive Damages

White cites to general Idaho case law regarding punitive damages. However, White does not direct the court's attention to a case specifically on point regarding punitive damages relevant to trespass. In *Weaver v. Stafford,* 134 Idaho 691, 8 P.3d 1234, 1244 (2000), this Court held:

> Punitive damages are thus appropriate in a trespass action when the defendant acted in a manner which was outrageous, unfounded, unreasonable, and in conscious disregard of the Plaintiffs' property rights. *See, e.g., Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund,* 128 Idaho 539, 549, 916 P.2d 1264, 1274 (1996). Where a trespassing defendant has notice that his activities constitute a trespass and nonetheless continues his trespass, the landowner plaintiff may be entitled to punitive damages. *See Aztec Ltd., Inc. v. Creekside Inv. Co.,* 100 Idaho 566, 570, 602 P.2d 64, 68 (1979). We review an award of punitive damages to determine whether the record contains substantial evidence to support the judge's finding of extremely unreasonable and malicious conduct. *Magic Valley Radiology Assocs., P.A. v. Prof'l Bus. Servs., Inc.,* 119 Idaho 558, 561, 808 P.2d 1303, 1306 (1991).

White was aware that his ability to use and improve the curved approach and the triangle piece of property were disputed. White and Mortensen were aware that when Mortensen purchased his land, Floyd Peplinski was already involved in litigation against Akers over whether the access road was subject to an easement in favor of White's property. Akers warned White and Mortensen not to trespass on the portions of their property not subject to an express easement. Despite Akers' warning, White and Mortensen chose to interpret the property boundaries as they deemed fit and proceeded developing a road for their housing project.

Mortensen and White entered onto the Akers' curved driveway without permission on January 3, 2002. They dumped dirt and gravel, damaged a gate, and began excavating the road in order to widen it to feed the subdivision they had planned on their parcels. They continued this work in violation of county ordinance until they were red tagged.

These actions were much more than an innocent trespass. They occurred with notice that Appellants were trespassing. When displeased with Akers' challenge to their trespasses, White and Mortensen chose to respond by intimidation and bullying, as discussed in the Statement of Facts. To deflect attention from their own wrong acts, they falsely claimed that Dennis Akers had beat up Mortensen. These actions were extremely unreasonable and malicious conduct. They were proven to be so by clear and convincing evidence in the form of testimony and photographs. Thus, the trial court did not err in reinstating the award of punitive damages against White.

White also complains that the trial court looked at his and Mortensen's actions without singling out the specific acts perpetrated by White. White correctly notes the law makes a principal liable for punitive damages based upon acts of its agent only in circumstances in which the principal participated, or in which the principal authorized or ratified the agent's conduct. *Openshaw v. Oregon Auto Ins. Co.,* 94 Idaho 335, 487 P.2d 928 (1971). White contends there is no evidence in the record that White participated with Mortensen or ratified Mortensen's behavior in this matter.

Both Mortensen and White each want to divorce themselves from each other, claiming that the bad acts that happened in this case were attributable to the other person. Yet, the trial court found they were acting in concert.

In *Akers II,* this Court characterized the relationship as "[t]ogether, the Whites and Mortensens plan to subdivide and develop their respective properties." *Akers II,* 147 Idaho at 42, 205 P.3d at 1178 (2009).

In trial testimony, V.J. Mortensen testified White was going to be a "co-investor" with him in a different sixty (60) acre parcel until access issues occurred. Tr Vol. II, p. 1424, ll. 10-22. With respect to the property that is the subject of this litigation, V.J. Mortensen testified that "we" dumped fill dirt (in the triangle area). Tr Vol. I, p. 253, ll. 24-25; p. 254, ll. 1-20. V.J. Mortensen testified he operated the Caterpillar that spread the dirt. Tr Vol. I, p. 254, l. 25; 255, p. 256, ll. 1-22. V.J. Mortensen testified that the work he and White did complied with the court's injunction order. Tr Vol. I, p. 265, ll. 5-23. V.J. Mortensen testified he was working with White with his Cat in the easement area. Tr Vol. I, p. 285, ll. 7-22. It was a reasonable inference for the Court to find White and Mortensen were in a business relationship together and acting in concert.

Bill Reynolds testified V.J. Mortensen discussed using the easement for a housing development. Tr Vol. I, p. 86, ll. 11-25, p. 87, ll. 1-22. D.L. White testified that they were building a housing development that would increase traffic on the easement. Tr Vol. I, pp. 375, ll. 9-15. White also testified as to plans for running power to the housing development. Tr Vol. I, p. 379, ll. 11-15. Thus, the court's inference drawn from this testimony that White and Mortensen were working together on the road to widen it to accommodate their housing development was supported by substantial and competent evidence. The trial court's conclusion that White participated with Mortensen and Mortensen participated with White in the described events contained in the findings of fact are supported by substantial and competent evidence.

White also claims there is not substantial and competent evidence to support the finding that he trespassed behind Akers house. The premise for this argument is that Dennis Akers is not a credible witness because this Court disagreed with the district court's interpretation of Reynold's and Aker's testimony regarding the location of the prescriptive easement. An error by the trial court does not render a witness untrustworthy. White admitted he was in the area that night. It was not error for the trial court to weigh this evidence together with Akers' evidence and find White had trespassed.

White also claims that there is not substantial and competent evidence that he violated Kootenai County ordinances. White admitted his project was red tagged twice by Kootenai County. He remained evasive at trial regarding the reason for the red tags. The reasonable inference from the evidence is that White violated Kootenai County's ordinance in pursuing his housing development. Even ignoring the conflicting evidence regarding violation of the subdivision ordinance, White violated Kootenai County ordinances which resulted in the two red tags.

H. The District Court did not Err in its Award of Attorney Fees

A large portion of White's argument on this issue on appeal is a restatement of their position that I.C. § 6-202 does not apply. As discussed previously herein, the requisite signage was posted and the provisions of I.C. § 6-202 do apply.

White also claims the trial court erred in not apportioning attorney fees so that only those fees incurred in prosecuting the trespass claims are awarded. Citing to *Bumgarner v. Bumgarner, supra*, White claims that the trial court was required to apportion its award of attorney fees to only those fees reasonably incurred in prosecuting the trespass claim under I.C. § 6-202. The present case is factually distinguishable from the *Bumgarner* case. In *Bumgarner,*

there was a deed interpretation issue regarding what was meant when a mother granted each child a one-third interest of her lakefront lot when a road was involved. That issue aside, there was also an outright trespass onto the lot of Kent Bumgarner by Gary Bumgarner following Kent's express directions to Gary not to trespass on Kent's lot. The trial court apportioned the fees between the quiet title portion of the case and the trespass portion. The *Bumgarner* case did not involve the interpretation of an express general easement that did not include a width or a clearly defined location, or the fixing of rights pursuant to a prescriptive easement, as in the present case.

In the present case, this Court in the first appeal recognized that "[t]he question of whether and to what degree the Appellants' conduct constituted trespass on the Akers' property is intertwined with the question of the scope and boundaries of the Appellants' easement. Similarly, the question of damages flowing from the Appellants' conduct is also inseparable from consideration of the Appellants' easement rights." *Akers I,* 142 Idaho at 304, 127 P.3d at 207. This court held in Akers II, "[w]ithout a determination of Appellants' easement rights, it is impossible to determine the scope of Appellants' trespass." *Akers II,* 147 Idaho at 48, 205 P.3d at 1184. Unlike *Bumgarner*, the issue of the easement boundary and the disputed triangle ownership are inextricably entwined with the issue of the trespasses, and it is impossible to separate them. Similarly, the conduct that establishes the trespasses also provides the foundation for the damages of emotional distress and punitive damages. They are not separable. Thus, it was not error for the trial court not to apportion the fees.

I. Disqualification of Trial Judge

White asks this Court to exercise the remedy of removal of the trial court if the matter is remanded. White argues that the formula that this Court has established is that an appellant must

claim that the trial judge is biased and prejudiced because he was associated with Lee James in an organization before taking the bench, that Susan Weeks is Lee James's partner, and that the case has a long and complex history. White bolsters his claim of bias and prejudice by claiming the trial court in his decision aimed comments toward counsel which demonstrate the trial court's bias and prejudice. One such insult was that counsel's argument was incomprehensible to the trial court.

It is difficult for Akers to respond to these claims because this Court set no standard for removal on remand without cause when a fresh perspective is needed. Over twenty years in litigation has taught this particular attorney that losing clients often wish to attribute their loss at trial to bias and prejudice of the sitting judge. These clients often beg for a "fresh perspective".

The remaining arguments of White are more or less personal attacks on Akers' counsel. White claims there is some special connection between Judge Mitchell and Akers' counsel. While Akers' counsel could pull numerous decisions written by Judge Mitchell where he has made statements about their legal analysis that might be considered harsh, it serves no legitimate purpose. White apparently is concerned that Judge Mitchell and Leander James participated in ITLA together. Many attorneys participate together in legal activities. The trial judge in this case did not "pass his mantle" as ITLA president to Mr. James. Mr. James was a member of ITLA at the time the sitting judge was appointed, and one of its officers on his own merits. Mr. James was next in line to hold the position as president, regardless of whether the trial judge became a judge or not. Basically, White argues that the standard set by this Court is that a judge is presumed biased and prejudiced if the attorney appearing before him has participated in an organization with which the judge was previously affiliated. If this formula is taken to its absurd outer limits, all judges who were members of the Idaho State Bar are presumed biased and

prejudiced whenever a member of the Idaho State Bar appears before them because they were members in the same organization. It is difficult to believe this Court intended to set such a standard.

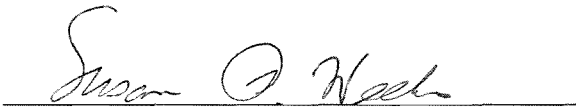
Further, unlike *Capstar v. Lawrence,* __ Idaho __, ___ P.3d ___ (Docket No. 383000, 5/29/12), the posture of this case is much more advanced. The trial in this matter concluded nearly ten years ago. The *Capstar* case had not yet proceeded to trial. Rather than adding a fresh perspective to this case, a switch in the trial judge at this point would wreak more havoc than the "fresh perspective" White seeks is worth.

IV. CONCLUSION

The trial court's findings are supported by substantial and competent evidence and its conclusions should be affirmed on appeal.

Submitted this 2nd day of November, 2012.

JAMES, VERNON & WEEKS, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 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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