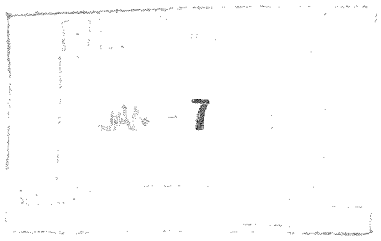
1-7-2013

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife, Respondents, vs. D.L.WHITE CONSTRUCTION, INC., An Idaho corporation; DAVID L. WHITE and MICHELLE WHITE, husband and wife; Appellants, and VERNON J. MORTENSEN and MARTIE E. MORTENSEN, husband and Wife, Defendants, Appellants.	APPELLANTS WHITES' REPLY BRIEF SUPREME COURT DOCKET NO. 39493-2011 District Court Docket No. CV 02-222



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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STATEMENT OF THE CASE

Much of the pending appeal revolves around the question of whether the record, especially the testimony and documentary evidence at trial, supports the conclusions of the trial court that fall within the scope of the case as it now stands. It necessarily follows that command of the evidence by the appellate court is of the first priority in making a judgment with respect to this appeal. The trial transcript and documentary evidence is very substantial and difficult to command thoroughly. Counsel for Whites has presented all of the relevant testimony on the subject of easement location in his briefing that was submitted to the trial court on this subject. The briefing is found in the Clerk's Record at pages 173-205. Copies of pages of the transcript were included by counsel for Akers in her briefing in the Clerk's Record at pages 233-367. Only by command of the record can the Court identify and properly weigh various erroneous statements of the content of the record. Counsel for Whites submits that briefing submitted in this matter by Akers frequently erroneously mis-characterizes the testimony in the record in an attempt to discredit Whites' contentions. An example is found in the third paragraph of Respondents' Brief that was filed on November 2, 2012 on page 26 where counsel states that Peplinski testified, "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." Peplinski's testimony on this subject is found verbatim at page 184 of the Clerk's Record where Peplinski testifies "Uh, it had a tendency to curve into our property more, and we changed the corner so it would widen out so we could turn into our Quonset hut more easily. ... Uh, minimal. Nothing actually changed (on Akers' property, parenthesis added) because we curved onto

our property." Careful reading of the transcript testimony and command of the documentary evidence will reveal that Peplinski meant that he did not change the road on Aker's property because he curved it south onto his property when he adjusted it position in 1983-84. Akers omitted mentioning that Peplinski testified that he curved the road more onto his property. Thus, the claim of Akers that counsel for Whites made an incorrect contention is flatly untrue, based upon the record. The point is that command of the factual details as presented in the record in this case is critically important and counsel for Whites urges the Court not to rely on characterizations by Akers of the evidence that are inaccurate or incomplete. Please consult the record directly and thoroughly.

ARGUMENT

Whites' argument in this brief will focus on areas of substantial dispute with Akers' contentions in their brief, especially erroneous descriptions of the record. Whites fully rely upon and remain committed to the arguments made in their opening brief in this appeal and in other briefs submitted in this matter on previous appeals and to the trial court. Silence on any issue presented in Akers' brief is not an indication of acquiescence in Akers' statement of facts, legal theories or argument.

1. **Did the District Court err in its decision regarding the size and location of the prescriptive easement determined by the Court?**

The analysis by Akers in Respondents' Brief attempts to demonstrate that the trial court's choice of location of the easement at the top of the hill is supported by substantial and competent evidence. Bear in mind that the trial court erred when it stated that the

relevant time for this analysis was 1966. Akers does not address this error by the trial court. Nevertheless, Akers analysis does the opposite in revealing a dearth of competent and substantial evidence because it relies upon a fundamental statement that is plainly contrary to the evidence. That statement is found on page 27 of said brief in the first paragraph where it is stated, "Thus, at the time Scott Rasor performed his survey of the road, there had been little changes made to it since 1966." As should be apparent, this statement is contradicted by Akers and Peplinski who agreed that the road was changed in location by Peplinski in approximately 1983 so that according to Peplinski, it curved more onto his property, and according to Akers, the road was extended to the west on Akers land. Though Akers claim is plainly untrue based upon the aerial photographs, both admitted and offered, and Peplinski's testimony is not contradicted, Akers then claims that the road location as depicted in Exhibits D57 and Plaintiffs' Exhibit 176 was the same as in 1966. D57 showed the road in approximately 1993 and 176 in 2002. This claim is stupendously false and could hardly have been made in good faith. Ironically, Akers points out the property corner stake near the "big tree" in D57 and Plaintiffs' 176 that marked the turning point according the Mr. Millsap, in other words, the westerly end of the road prior to 1983. Akers then further uses these exhibits to claim that they depict the turn of the road to the south during the relevant time for the prescriptive easement. A comparison of the 1998 aerial photograph to D44 will demonstrate that the road in 1998 was materially different in location than prior to 1980. This claim makes me wonder who wrote Akers' brief since they plainly did not present this evidence in a manner that is consistent with the record in this case.

The reasoning presented on this issue in Whites' initial brief is not diminished by the argument presented by Akers brief. Rasor's location of the roadway in 2002 was not the location between 1966 and 1980. There is no substantial or competent evidence to establish that the roadway turned south ten feet from the 19/24 corner as found by the trial court.

2. **Did the District Court err in refusing to consider and admit additional proffered evidence relevant to the location of the easement in the area specified on remand for the purpose of accurately and precisely locating the easement?**

Akers seriously misconstrues the meaning of the suggestion of Whites' counsel in his brief on Easement Location dated October 22, 2009 when Akers claims that the area referenced by Whites counsel on Plaintiffs' Exhibit 6 was the area chosen by the trial court. Whites counsel referred to the "graveled surface" depicted in Exhibit 6. The "gravel surface" to which Whites' counsel referred is shown on Exhibit 6 as the area between the fence constructed by Akers on the north and the north boundary of the "10' – 12' wide travel surface". This is the area occupied by the roadway after 1983 and is confirmed by the marked fence that Akers had constructed along the north side of the access road as it crossed Akers' property in Section 24. Akers' argument that Whites' counsel agreed that the route of the travel surface shown on Plaintiffs' Exhibit 6 is untrue and contrary to Whites' contention throughout this case. Had the Court chosen to commission a metes and bounds description of the area intended by Whites' counsel, the easement location would have been much closer to one supported by the evidence.

As presented in their initial brief, Whites rely upon the authority of *Sinnet v. Werelus,* 83 Idaho 514 (1961) and succeeding cases as the basis on which the trial court should have taken additional evidence to properly locate the easement at the top of the hill. This authority does not require oversight, ignorance or inability to justify taking evidence to properly locate an easement such as in issue in this case, though counsel explained to the court in Whites Motion to Consider Additional Evidence that the online data base on which the offered photographs were found did not have a viewer in 2002 that showed the details of the photographs that were available when they were found by Welch Comer Engineers in 2009. R. Vol. II, p. 360-361. In all respects Whites submit that their initial brief on this appeal, pages 23-27 thereof, demonstrates that the trial court abused its discretion in failing to consider additional evidence to locate the easement.

3. **Did the District Court err in its award of damages, treble damages, punitive damages, damages for emotional distress and attorney fees?**

Central to the questions on damages and attorney fees is the question of whether I.C. 6-202 applies in this case. If it does not, then Akers damages should be determined under common law trespass theories. As argued previously, Whites do not believe that I.C. 6-202 applies in this case as Whites conduct was not willful or intentional within the meaning of that statute and the requisite posting did not include the areas of the access road in which all relevant activity occurred.

Akers' brief erroneously states as fact that the "boggy area" that into which White placed fill material after he was instructed not to use the curved approach was west of the junction of the curved approach with the access road along the south boundary. In fact, as

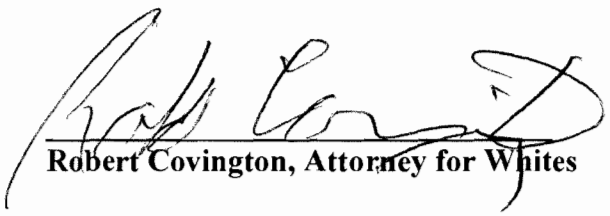
the relevant photographs show, the filled area was east of that junction immediately south of the disputed triangle, an area that had not been used for access since Akers constructed the curved approach in approximately 1982. This is significant because that area is within the express easement, steep and required fill to permit passage by grass seed trucks and other equipment after use of the curved approach was precluded. The fill did not impair Akers' access over the curved approach or on the access road in the express easement. The damages Akers claimed at trial as related to the fill material was to return the disputed triangle to its condition prior to Whites' purchase of the property in December, 2001.

In understanding this case it is important to have command of the timeline of events and Whites' conduct. Briefly, Whites purchased the property on December 20, 2001, in a transaction in which their right of access to their property over the access road was insured by Stewart Title Company through its agent, North Idaho Title Company. On January 2, 2002 Whites began work on their property by commencing excavation at the top of the hill to adjust the road design on their property, not on Akers' property. Whites used the curved approach to travel up the hill for this work. This work was red tagged due to lack of permit and a permit was issued on January 3, 2002. Akers sued Whites on January 10, 2002. The complaint focused on excavation by Whites at the top of the hill where the work was red tagged. After Akers complaint was filed and use of the approach by White was discontinued, White had the property surveyed to determine its boundaries in the area of the access road and the approach to the access road from the county road. The boundaries indicated by the survey did not include the approach area. White undertook to use the old entry to the access road through what became known as the disputed triangle area. During the spring of 2002 White place fill material in this area to allow his equipment, specifically

a grass seed truck to go up the road to distribute grass seed over the recently excavated ground on Whites' property. By June, 2002, this work was completed, the litigation was in full swing and Whites work on the site had ended. During the work on the site in the winter and spring of 2002, several confrontations happened involving White, Dennis Akers and Sherry Akers, Mortensen and an employee of D.L. White Construction, Inc. White himself was involved only in the confrontation with Sherry Akers and the Kootenai County Sheriff at the beginning of the dispute. None of these confrontations involved any physical contact between the parties. White did not control or authorize any of the conduct by Mortensen or the employee of D.L. White Construction, Inc. insofar as it involved Sherry Akers.

In this context, Whites submit that I.C. 6-202 does not apply and punitive damages are not warranted nor are the findings of the trial court applying I.C. 6-202 and punitive damages supported by substantial and competent evidence. Any damages to which Akers may be entitled for use of the disputed triangle area should be governed by the common law of trespass.

Respectfully submitted this 3rd day of January, 2012.



Robert Covington, Attorney for Whites

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2013, I caused to be served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, First Class, postage prepaid thereon, to the following:

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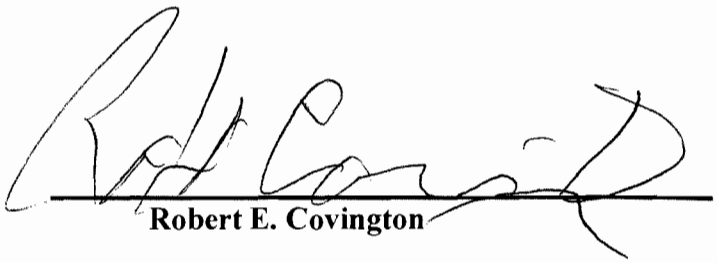

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