STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife, *Plaintiffs*, vs. D.L. WHITE CONST., INC., DAVID L. WHITE and MICHELLE V. WHITE, husband and wife; and VERNON J. MORTENSEN and MARTI E. MORTENSEN, husband and wife, *Defendants*.	)	Case No. **CV 2002 222** MEMORANDUM DECISION AND ORDER ON REMAND RE: DAMAGES, and ORDER DENYING WHITES' MOTION FOR ADDITIONAL EVIDENCE ON EASEMENT LOCATION

I. PROCEDURAL BACKGROUND.

The present issue before this Court is the issue of damages, if any, to the plaintiffs, on remand from the Idaho Supreme Court's decision. *Akers v. Mortensen and White,* 147 Idaho 39, 205 P.3d 1175 (2009). The previous award of damages, trespass damages, damages for emotional distress and punitive damages, was vacated as "the question of damages flowing from Appellants' [Mortensens' and Whites'] conduct is inseparable from consideration of Appellants' easement rights." 147 Idaho 39, 48-49, 205 P.3d 1175, 1184-85.

On September 29, 2010, this Court issued its "Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: Easement Location." At the end of that 21-one page decision, this Court concluded:

> Based on the above, the location of the prescriptive easement across Akers' Parcel B land is as shown in Exhibit 6 and 7. Akers have proven such by a

preponderance of the evidence, even though Akers did not have the burden of proof. Whites and Mortensens have not proved any contrary location by a preponderance of the evidence when they had the burden of proof.

IT IS HEREBY ORDERED the prescriptive easement in favor of Whites and Mortensens across Akers' Parcel B land is as shown in Exhibit 6 and 7, and as described in Exhibit C to the Plaintiffs' Brief on Second Remand Regarding Location of Easement. Exhibit C to the Plaintiffs' Brief on Second Remand Regarding Location of Easement is attached hereto. That easement is 12.2 feet wide.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: Easement Location, pp. 20-21. The following procedural history is taken directly from that decision:

> This action is before the Court on remand a second time from the Idaho Supreme Court. The purpose of this remand is to determine the location of the prescriptive easement as it enters Akers' Parcel B land and turns south onto the property owned by Whites and Mortensens.
>
> To orient the reader, the land at issue has as its axis the quarter corners of Section 19 and 24, in Kootenai County. The Akers own the land to the north in two parcels: "Government Lot 2" to the east, which is in Section 19; and "Parcel B", the adjacent parcel to the west of Government Lot 2. All of Parcel B is in Section 24. Immediately to the south of Akers' Government Lot 2 is land owned by Reynolds, not a party to this litigation. Immediately to the south of Akers' Parcel B land is land purchased by defendants Whites and Mortensens. This litigation concerns Whites and Mortensens rights to use a roadway that connects White and Mortensens' property to Millsap Loop Road. That roadway crosses Akers' property at the southern edge of Akers' Government Lot 2 near, at or over the northern boundary of Reynolds' land. It is the exact location of the road as it enters into Akers' Parcel B that is the subject of this remand, specifically, the exact location of the road as it existed in that area between 1966 and 1980, for prescriptive purposes. The Court trial in this matter took place over fourteen days of trial testimony and occurred from September 2002 to May 2004. On January 2, 2003, this Court filed its "Findings of Fact, Conclusions of Law and Order." Later, the issue of damages was tried to the Court, and on April 1, 2004, this Court filed its "Memorandum Decision and Order on Reconsideration on New Trial Issues and Additional Findings of Fact, Conclusions of Law Regarding Damages, and Order." Defendants appealed to the Idaho Supreme Court. On December 30, 2005, the Idaho Supreme Court filed its first decision in this case. *Akers v. D. L. White Construction, Inc., et al.*, 142 Idaho 293, 127 P.3d 196 (2005).
>
> In that opinion, the Idaho Supreme Court affirmed this Court's findings as to the triangle area to the east. 142 Idaho 293, 299-300, 127 P.3d 196, 202-03. The Idaho Supreme Court reversed this Court's findings regarding an implied easement from prior use (142 Idaho 293, 301-02, 127 P.3d 196, 204-05) and easement by prescription. 142 Idaho 293, 303-04, 127 P.3d 196, 206-07. The Idaho Supreme Court affirmed this Court's finding that the express easement defendants had over plaintiffs' land was 12.2 feet in width in 1966, but expressed no opinion as to the width or scope of any possible easement by prescription or implied from prior use, leaving that issue to be resolved by this Court on remand. 142 Idaho 293, 304, 127

P.3d 196, 207. This Court was also instructed to revisit the trespass and damages issue after determining easement rights. 142 Idaho 293, 304-05, 127 P.3d 196, 207-08.

After the remittitur was issued by the Idaho Supreme Court, this Court held a hearing on April 19, 2006, wherein a briefing scheduled was issued. Additional briefing was filed and oral argument based upon that additional briefing was scheduled for June 22, 2006. On June 22, 2006, counsel appeared for oral argument. On September 7, 2006, this Court issued its "Order on Remand." At that time this Court held:

> **IT IS ORDERED** defendants have an easement by prescription, but not over the portion of Akers' property they excavated. The easement by prescription is as established prior to 1980, and that is a 12.2 foot wide strip located just inside the northeast corner of defendants' land, turning south immediately west of the west boundary of Government Lot 2 (where the express easement ends) and the east boundary of Parcel B.
>
> **IT IS FURTHER ORDERED** defendants have no implied easement by necessity.
>
> **IT IS FURTHER ORDERED** defendants are responsible for damages as previously set forth in the Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order filed April 1, 2004, pp. 12-29. The prescriptive easement does not expand the express easement, and the prescriptive easement over Akers' land in Parcel B is in a slightly different location than defendants' excavated on that parcel. Additionally, defendants placed fill from their excavation on Akers' Parcel B. Accordingly, even with the finding of an easement by prescription, all previous findings regarding damages remain.
>
> **IT IS FURTHER ORDERED** Akers are the prevailing party, entitled to costs as proven at a later hearing.

Order on Remand, p. 19. Specifically, this Court found the location of the pertinent portion of the easement to be as follows:

> An alternative reason Akers claim defendants fail on their claim for an easement by necessity is that at the relevant time period, 1966, the road to which they seek to establish an easement by necessity upon *did not exist*, at least not on Akers' land in Parcel B in the same location upon which defendants have excavated in recent times. As Akers point out, the road did not exist into Parcel B back in 1966. Plaintiffs' Reply Brief on Remand, pp. 3-4. Instead, the road went on to Reynold's land in 1966, and Reynolds is not a party to this litigation. According to Reynolds, the road was established in this century by defendant David White. Tr. Vol. I, p. 84, L. 16 – p. 85, L. 24. Reynold's testimony is corroborated by some of the exhibits. Exhibit I1 and J1 do not show this road along any part of Parcel B back in 1951 and 1958 respectively. Reynold's testimony is corroborated by the testimony of William Milsaps, as set forth in Finding of Fact 21:
>
> 21. * * * Bill Millsaps [sic] was also unclear as to

> whether the access road went on to Reynolds' property or whether it went on to that portion of plaintiffs[']s land west of the western boundary of Government Lot 2. Thus, in 1966, it is unclear whether one could access the Millsaps' [sic] 60 acres without traveling on the right of way outside Government Lot 2.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, pp. 7-8, Finding of Fact ¶ 21. This Court was not perfectly clear when it wrote Finding of Fact 26:

> 26. The curve into the Millsaps' [sic] property at the west end of the driveway in 1966 was east of its current location, in Government Lot 2. As stated *supra* in Finding of Fact ¶ 21, Bill Millsap was unclear as to the location of that "road" after it left Government Lot 2. William Reynolds testified that after the "road" left the west boundary of Government Lot 2, it turned sharply in a 90 degree bend then went south, essentially right around the northwest corner of Reynolds' land. This is corroborated by Defendants[']s Exhibit D41 (map from photos taken in 1978) D42 (represented by Mr. Reagan [former defense counsel] as a 1973 aerial photo), D43 (represented by Mr. Reagan as a 1973 map) and D44 (represented by Mr. Reagan as a 1973 aerial photo), and thus, this Court finds this to be the approximate route of the "road" in 1966. Mr. Reynolds testified Peplinski worked on this area of the road toward the end of his ownership, and in doing so, caused part of Reynolds' fence to fall down. Sherrie Akers similarly testified that it was well after 1980 that Peplinski altered the course of the road to the west of the western boundary of Government Lot 2.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, pp. 8-9, Finding ¶ 26. Any lack of clarity by this Court in Finding 26 was clarified in Finding 27.

> 27. With the Akers' permission, Richard Peplinski extended the driveway west of Government lot 2 and, with Akers's permission, used this driveway west of Government Lot 2 for farming and occasionally logging in the spring, summer and fall.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 10, Finding of Fact ¶ 27. What was testified by Reynolds, what this Court was persuaded by, and what this Court meant when writing Finding 26 was the route in 1966 was as shown on Exhibit D42, D43 and D44, but that the road essentially crossed and went south at the intersection or four corners formed by Government Lot 2 to the Northeast, Parcel B to the Northwest, Reynolds' land to the

Southeast, Peplinskis' (now defendants') land to the Southwest. At the very least, defendants have failed in their burden of proof on the issue of "apparent continuous use" of this entire route over Parcel B which they now desire. The road defendants constructed in recent times crosses Akers land in Parcel B further to the west than it did in 1966. Thus, contrary to the Idaho Supreme Court's finding, element two "apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent" is lacking in defendants' case on implied easement by necessity.

Order on Remand, pp. 6-8.

Defendants again appealed to the Idaho Supreme Court. On June 4, 2008, the Idaho Supreme Court issued its opinion. However, no remittitur followed. On January 22, 2009, the Idaho Supreme Court issued its "Substitute Opinion" in this case. In pertinent part, the Idaho Supreme Court held:

> **2. The district court erred when it found that Appellants' prescriptive easement turned immediately south upon entering Parcel B.**
>
> Appellants argue that their prescriptive easement does not turn immediately south upon entering Parcel B, and instead extends further to the west around a hill before turning south onto Appellants' property. The district court found that the access road on Parcel B, prior to 1980, turned south immediately after entering Parcel B from Government Lot 2. The district court included an attached exhibit to its amended judgment that illustrated the location of Appellants' prescriptive easement on Parcel B. After the prescriptive easement crossed the boundary of Government Lot 2 into Parcel B, the exhibit indicates that the easement turns 90 degrees to the south and enters Appellants' property. However, this finding is not supported by substantial and competent evidence.
>
> The district court stated that it relied upon a number of exhibits when it concluded that Appellants' easement turned immediately south upon entering Parcel B, including Defendants' Exhibits 42 and 44. However, these exhibits, which are aerial photographs of the relevant property, indicate that the access road historically made a more gradual turn resembling a shepherd's crook rather than a 90-degree turn. Defendant's Exhibit 41, an aerial photograph from 1978 also shows that the access road made a gradual turn through Parcel B before entering Parcel A. Perhaps most telling is Plaintiff's Exhibit 253, which is a photograph of the shared boundary between Government Lot 2, Parcel B, and Parcel A, and the Quonset hut on Parcel A. While the photograph was taken in 2003 (well after the prescriptive easement was established prior to 1980), it is nonetheless informative. The photograph depicts a large hill to the south of the access road, which the access road gradually curves around. We recognize that the uncontroverted evidence showed that the Akers permitted Peplinski to extend the access road further to the west in Parcel B after the Akers purchased the property. However, the photograph

> does not support a finding that the access road previously turned 90 degrees to the south traveling straight up a steep hill in order to access Parcel A, as would be required if the access road had immediately turned 90 degrees upon entering Parcel B. In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellants' prescriptive easement on Parcel B. This issue must be remanded to the district court for additional fact finding consistent with this opinion.

Akers v. Mortensen and White, 147 Idaho 39, 47-48, 205 P.3d 1175, 1183-84 (2009). Following that January 22, 2009, opinion by the Idaho Supreme Court, this Court, aided by briefing and oral argument, issued an order on December 1, 2009, establishing:

> 1) Plaintiff has the burden of proof on all damage issues.
>
> 2) No additional evidence regarding location of the easement is needed, however, a metes and bounds description of the location as found by the Court will be necessary to comply with Idaho case law.
>
> 3) The defendants have the burden of going forward (burden of production) and the burden of persuasion (burden of proof) as to the location of the easement. *Palmer v. Fitzpatrick,* 97 Idaho 925, 927, 557 P.2d 203, 205 (1976). While the parties continue to negotiate an agreed location of the easement, the following applies absent that agreement.
>
> 4) Each defendant will submit a brief regarding location of the easement, with reference to specific exhibits in evidence and specific reference to previous decisions of this Court or the Idaho Supreme Court, and such brief shall be due on or before January 15, 2009.
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> The plaintiffs shall then submit a brief regarding location of the easement, with reference to specific exhibits in evidence and specific reference to previous decisions of this Court or the Idaho Supreme Court, and such briefs shall be due on or before January 22, 2009.
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> Each defendant shall then submit a response brief, if any, by no later than January 29, 2009, regarding location of the easement.
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> Each party is encouraged (but not required) to submit a metes and bounds description of their claim as to the location of the easement, along with their briefing.
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> 5) Once the Court determines the location of the easement (or the parties advise the Court that they have stipulated by agreement the location of the easement), the Court will establish a briefing schedule regarding the issue of damages.

Order Regarding Burdens of Proof and Order Establishing Briefing Schedule, pp. 2-3. On January 21, 2010, this Court extended that briefing schedule, based upon the parties' stipulation. On January 22, 2010, Vernon Jerry Mortensen *pro se,* filed his "Brief of Vernon J Mortensen Supporting Location of Easement." On March 29, 2010, Whites filed their "Brief of Defendants White Re: Section 24 Easement Location." On June 17, 2010, Akers filed "Plaintiffs' Brief on Second Remand

> Regarding Location of Easement." On June 24, 2010, Whites filed their "Reply Brief of Defendants White Re: Section 24 Easement Location." Oral argument was held on July 1, 2010. At oral argument on July 1, 2010, this Court was made aware of two additional pleadings filed by Whites the day before. On June 30, 2010, Whites filed an "Affidavit of Mike Hathaway" and a "Motion to Admit Additional Evidence Re: Easement Location." That motion was not noticed up for hearing. On July 1, 2010, at oral argument, the Court asked Whites' counsel if Whites were making a motion to continue the hearing scheduled for July 1, 2010, regarding the easement location. Whites' attorney indicated they were making a motion to continue the July 1, 2010, hearing. Akers objected. Argument was held on Whites' motion to continue. At the conclusion of that argument, the motion to continue was denied. In the intervening two months, Whites have not noticed up for hearing their Motion to Admit Additional Evidence Re: Easement Location. Counsel for Whites also contacted this Court's Deputy Clerk of Court and reserved a time on September 29, 2010, to hear a motion to add additional evidence, but no hearing was ever noticed up and no hearing was held. In case such motion was noticed, this Court waited for that time reserved for hearing before issuing this opinion. The Court's waiting for Whites to bring their Motion to Admit Additional Evidence to a head creates problems for the Court (Article V, Section 17, Idaho Constitution; I.C. § 59-502) as this matter has technically been under advisement with the Court since July 1, 2010. This Court will wait no longer on the issue of taking additional evidence.
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> Marti E. Mortensen has not filed any briefing regarding the easement location, but at the July 1, 2010, oral argument, adopted the submissions filed by the Whites.

Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: Easement Location, pp. 1-7.

After that decision was filed September 29, 2010, on November 10, 2010, plaintiffs filed "Plaintiffs' Memorandum on Second Remand Re: Damages" and a "Notice of Hearing on Remand Re: Damages" scheduling oral argument for November 24, 2010. On November 17, 2010, defendant Marti Mortensen filed "Marti Mortensen's Memorandum Re: Damages". On November 19, 2010, plaintiffs filed an "Amended Notice of Hearing on Remand Re: Damages" scheduling oral argument for January 26, 2011. On January 18, 2011, defendants D.L. White Construction, Inc., David L. White and Michelle V. White, filed "Reply Brief of Defendants White" and a "Supplemental Affidavit of Mike Hathaway". On January 19, 2011, plaintiffs filed "Plaintiffs' Reply Memorandum on Second Remand Re: Damages." On January 24, 2011, two days before the scheduled hearing, defendant Vernon Mortensen, pro se, filed a pleading entitled

"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 4-1-04", an Affidavit in Support of 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 4-1-04" and a "Motion for Shortening Time" to have that "motion" heard on January 26, 2011. On January 25, 2011, plaintiffs filed "Plaintiffs' Reply Memorandum to Defendants Whites' "Reply" Brief on Second Remand Re: Damages." Later in the day on January 25, 2011, defendants Whites filed "Supplemental Affidavit of Mike Hathaway" and various notices of hearing purporting to schedule a hearing on White's Motion to Admit Additional Evidence and a hearing on a motion to shorten time on that motion, all for hearing on January 26, 2011. [Recall from the procedural history reiterated above from this Court's September 29, 2010, decision, that on June 30, 2010, Whites had filed a "Motion to Admit Additional Evidence Re: Easement Location", but failed to notice such up for a hearing.] A "Motion to Shorten Time" was filed by Whites, but no "Motion to Admit Additional Evidence" has ever been filed by Whites.

At the hearing on January 26, 2011, which plaintiffs had scheduled for the hearing on damages, the Court heard argument on that issue as well as the issue of presenting any other evidence. The Court allowed plaintiffs until February 16, 2011, to file a brief on the issue of presentation of new evidence. Vernon Mortensen requested his motions he had filed two days before be heard. The Court denied that request, as the Court had yet to read those pleadings Vernon Mortensen had filed, because counsel for plaintiffs had not yet had the opportunity to read those pleadings, and because Vernon Mortensen had failed to clear such with the Court's Clerk for scheduling purposes.

On February 11, 2011, plaintiffs filed "Response to Motion to Correct Findings of Fact and Conclusions of Law and Motion for Reconsideration on New Trial Issues and Additional Findings of Fact and Conclusions of Law Regarding Damages" (defendant Vernon Mortensen's motion). On February 15, 2011, counsel for defendant Marti Mortensen filed an "Amended Notice of Hearing: Jerry Mortensen's Motion to Amend Correct Findings" for argument on March 22, 2011. While it is unusual for one party to notice up for hearing the motion of another party, such is permitted. On February 16, 2011, plaintiffs filed "Post-Hearing Memorandum Re: White's Motion to Admit Additional Evidence Re: Easement Location", and later that day, Whites filed "Supplemental Citation Re: Motion to Admit Additional Evidence Re: Easement Location." On February 18, 2011, defendant Vernon Mortensen, *pro se*, filed his "Reply to Akers Post-Hearing Memorandum Re: Whites' Motion to Admit Additional Evidence Re: Easement Location."

II. WHITES' MOTION TO ADMIT ADDITIONAL EVIDENCE RE: EASEMENT LOCATION.

In Whites' "Motion to Admit Additional Evidence Re: Easement Location" filed June 30, 2010, Whites made that motion pursuant to I.R.C.P. 11(a)(2) and I.R.C.P. 59(a)(2), and cited *Sinnet v. Werelus*, 83 Idaho 514 (1961) and *County of Bonner v. Dyer*, 92 Idaho 699 (1968). Motion to Admit Additional Evidence, p. 1. Whites ask the Court to admit the "newly discovered evidence on the issue of location of the prescriptive easement" (*Id.*), and Whites claim the "newly discovered evidence" consists of two photographs of the roadway in question as it existed in 1975 and 1982 were obtained from a United States Government website: "eros.usgs.gov." *Id.*, p. 2. Whites claim an even higher resolution of the 1982 photograph was "available but not yet in the possession of counsel for Whites as it has not been received from the USGS/EROS office of the United States Government." *Id.*

Nothing happened for over six months. In the interim period, on September 29, 2010,

this Court issued its Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: Easement Location." On January 19, 2011, Whites filed the Supplemental Affidavit of Mike Hathaway, which attached the aforementioned higher resolution photographs taken in 1982. That affidavit was signed on January 18, 2011. On January 25, 2011, Whites filed what appears to be an identical "Supplemental Affidavit of Mike Hathaway", but this one was signed on January 25, 2011.

Plaintiffs made the following legal argument in their "Post-Hearing Memorandum Re: White's Motion to Admit Additional Evidence Re: Easement Location":

> In their [Whites'] motion, White's rely on I.R.C.P. 11(a)(2) and 59(a)(4) for the basis of admitting the maps. Neither of these rules authorizes the admission of the maps into evidence at the close of the case. Rule 11(a)(2) allows the court to reconsider a decision it has made. It does not allow for the post trial submission of additional evidence.
>
> Rule 59(a)(4) allows the court to order a new trial when a party has "newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial." Akers objects to the court ordering anew trial in this matter. The evidence submitted is from a governmental source. It could have been discovered at any time before or during the trial of this matter. White presents no argument to this Court why he could not have discovered and produced this evidence at trial. To the extent that White's request is a motion for a new trial, Akers' object to it.

Post-Hearing Memorandum Re: White's Motion to Admit Additional Evidence Re: Easement Location, p. 2. This Court agrees with each point raised by plaintiffs. This Court also agrees that the cases cited by Whites: *Sinnet* and *County of Bonner,* neither direct a new trial nor the reconsideration based on this "new evidence".

This Court finds Whites have not met I.R.C.P. 59(a)(4) [I.R.C.P. 60(b)(2) has the same standard] and its requirement as to the "newly discovered evidence", the Whites "could not, with reasonable diligence, have discovered and produced at trial." This evidence is from the United States Government. This evidence exists now and it existed at the time of trial which took place on various dates from September 2002 to May 2004. Due to the protracted nature of this court

trial, the Whites also had the luxury of an inordinate amount of time in that a year and a half *during the trial* in which Whites, or any other party, could have found this evidence.

Additionally, this Court has looked at the photographs attached to the Supplemental Affidavit[s] of Mike Hathaway, and they certainly are not sufficient to cause this Court to grant a new trial. Even if there were a legitimate method for this Court to simply review this new material and reconsider its earlier decision, the photographs would not change this Court's decision. This Court, in its September 29, 2010, Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: Easement Location, *repeatedly* stated that the relevant time period for the easement location was 1966, the year that the dominant parcel was severed from the servient parcel. That was the pertinent time period as found by the Idaho Supreme Court:

> However, we remanded the case due to the lack of findings necessary for the resolution of the question of whether in 1966, when the dominant estate was separated from the servient estate, use of the access road through Parcel B was "reasonably necessary" to the enjoyment of the dominant estate.

Akers v. Mortensen, 147 Idaho 39, 45-46, 205 P.3d 1175, 1181-82 (2009), *citing Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005) (*Akers I*). Thus, these photographs of the road in 1975 and 1982 are not taken *at the pertinent time period*, which was, and still is, 1966. Also, there were other photographs considered by the Court, which were taken at times near 1975 and 1986. Thus, the fact that these "newly discovered" photographs are more clear is of no assistance to the Court. Whites' "Motion to Admit Additional Evidence Re: Easement Location" must be denied.

III. DECISION ON REMAND REGARDING DAMAGES.

This is the fourth time this Court has addressed the damage issue. The first was in this Court's 27-page Findings of Fact, Conclusions of Law and Order, dated January 2, 2003. The decision simply found that defendants had trespassed, plaintiffs had been damaged, punitive damages were warranted, and the extent of all damages to be proven at the second phase of trial

on damages. January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 25-27, ¶¶ 13-28. The second was in this Court's 29-page Memorandum Decision and Order on Reconsideration, on New Trial Issues, and Additional Findings of Fact, Conclusions of Law Regarding Damages and Order dated April 1, 2004. The third was in this Court's 20-page Order on Remand dated September 6, 2006. Order on Remand, pp. 13-16. In that most recent decision, five years ago, this Court held: "This Court finds most of defendants' actions of trespass involved activity outside the boundaries of this 12.2 foot easement." Order on Remand, p. 13. Nothing has changed in the past five years in that regard.

This disputed easement has two ends.

One end, the "triangle" area, or the east end, is where this easement begins at its intersection with Millsap Road. Much of the wrongful activity by defendants against plaintiffs took place in this "triangle" area. The two Idaho Supreme Court cases and this remand have nothing to do with the "triangle" area. Thus, as to this area of the easement, none of the damage issues have changed.

The other end is where, after leaving Millsap Road, traveling west along plaintiffs' southern boundary, the easement goes up a hill and then at its terminus, bends into defendants' Mortensens' 260-acre parcel. January 2, 2003, Findings of Fact, Conclusions of Law, and Order, p. 12, ¶31, p. 13, ¶32. In 2001, defendants Whites purchased from Mortensens the northern 80 acres of Moretensens' 260 acre parcel, and that 80 acres was contiguous to the southern boundary of Akers' land. *Id.,* p. 14, ¶34. On remand, this Court determined the location of the easement at this "terminus" end changed slightly.

The fact that one small portion of the exact location of the easement across Akers' land changed slightly due to this Court's decision on remand [the September 29, 2010, Memorandum Decision, Findings of Fact, Conclusions of Law and Order Re: Easement Location] does not

change this Court's decision as to damages suffered by the Akers. It is uncontroverted that White and Mortensen excavated and deposited soil on plaintiffs' land in the area of this slight change. In other words, the claim simply cannot be made that White and Mortensen performed *all* their earthwork within the boundaries of the easement. Such a claim would simply be an impossibility, and not in any way supported by the evidence before this Court. Also, the work performed by defendants on this terminus end caused specific damage to plaintiffs caused by defendants' actions in changing the water drainage of the area. Thus, even if all the earthwork performed by defendants were within the boundaries of the easement (again, an impossibility), there was collateral damage caused by defendants' actions.

The Court will examine the arguments made by the parties. But first, because the location of the prescriptive easement changed only slightly, and this Court now finds that change has no effect on damages, a review of this Court's most recent decision on the issue of damages, written five years ago, is in order:

> **D. DAMAGES.**
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> Defendants argue at length that trespass damages, emotional distress damages and punitive damages are not appropriate. (Defendants') Brief on Remand, pp. 9-41. Defendants' argument is premised on their claim they have done nothing wrong if they have a 25 foot wide easement by prior use or by prescription. As stated above, this Court finds no easement by necessity and the prescriptive easement is limited to 12.2 feet. The Idaho Supreme Court wrote: "[T]he question of whether and to what degree the Defendants' conduct constituted trespass on the Akers' property is intertwined with the scope and boundaries of the Appellants' easement." 127 P.3d at 207. This Court finds most of defendants' actions of trespass involved activity outside the boundaries of this 12.2 foot easement.
>
> There were wrongs visited by defendants upon the Akers at various points along this road. The Idaho Supreme Court decision did nothing to disturb this district court's decision regarding the ownership of the eastern portion of the roadway, or the express easements along the southern portion of Government Lot 2. This Court now finds no expansion of that express easement by prescriptive acts of defendants or their predecessors, and the Court finds no easement by prior use. Thus, the damages visited by defendants upon Akers along those locations does not change. This Court now finds the defendants have a 12.2 foot easement along Akers' Parcel B. However, as stated above, the use that defendants are allowed is "confined to the right as exercised during the prescriptive period" and "is limited by the purpose for which it is acquired and the use to which it is put." *Idaho Forest*

Indus., v. Hayden Lake Watershed Imporvement Dist., 112 Idaho 512, 515, 733 P.2d 733, 736 (1987); *citing Azteck Limited, Inc. v. Creekside Inv. Co.*, 100 Idaho 566, 568, 602 P.2d 64, 66 (1979). Thus, defendants had no right to take their 12.2 foot wide easement and excavate into the earth on Akers' land in their attempt to reduce the grade of the road to in turn attempt to meet minimum criteria for a subdivision. This is an express easement for agricultural purposes, that is now extended in length only, across Akers' Parcel B. It is not extended in width beyond 12.2 feet, it is not extended in purpose, and it is not extended in defendants' right to excavate. It is beyond cavil how defendants could have thought that they had any right to perform such earthwork, when at best they had to litigate to have any prescriptive right established across Parcel B.

Defendants argue at length that they did no excavation on Akers' land. (Defendants') Brief on Remand, pp. 18-19. This argument is not supported by the record. Tr. Vol. 1, p. 681, Ll. 3-6; p. 683, L. 13 – p. 684, L. 2; p. 685, L. 5 – p. 684, L. 4. Exhibit 24, 46, 47, 48, 49 and 55. Additionally, defendants' argument that they did no excavation is inconsistent with defendants' argument that the excavation they did was pursuant to their right to maintain or improve their easement (discussed immediately below). Finally, this issue has already been decided by this Court in Finding of Fact 44:

> 44. On or about January 3, 2002, defendants, without authority or proper permits, commenced excavation work on plaintiffs' real property in an attempt to widen plaintiffs' driveway and lower its grade for access to defendants' housing development. In doing so, defendants excavated portions of plaintiffs' real property, dumped dirt and gravel on plaintiffs' real property, damaged plaintiffs' fence, gate, lock, tree and other parts of plaintiffs' property.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 15, Finding of Fact ¶ 44; p. 25, Conclusion of Law ¶10. Defendants argue that since they have an easement they have the right to maintain the easement. (Defendants') Brief on Remand, p. 9. Defendants make the same claim regarding the right to make "improvements" on the easement. *Id.* p. 15. Defendants cited no case law to support this position. There is no case law which allows what defendants were trying to do: establish a 60-foot-wide right of way and reduce the grade of a steep hill so they could get approval for a subdivision over a strip of land that at best they had questionable easement rights upon. January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 18, Findings of Fact ¶ 51-53. That conduct is far beyond "maintenance". While such conduct amounts to "improvements", it is not allowed under the law. *Idaho Forest Indus., v. Hayden Lake Watershed Imporvement Dist.*, 112 Idaho 512, 515, 733 P.2d 733, 736 (1987); *Azteck Limited, Inc. v. Creekside Inv. Co.*, 100 Idaho 566, 568, 602 P.2d 64, 66 (1979); *Gibbens v. Weisshaupt*, 98 Idaho 633, 570 P.2d 870 (1977); *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 628, 277 P. 542, 545 (1929).

This Court has already dismissed defendants' arguments regarding "improvements" or "maintenance" of the easement, finding as a matter of law:

> 11. Defendants have a duty to maintain the easement, but do not have a right to develop the easement beyond the parameters as defined in the deed reserving the easement. Defendants specifically do not have the right to widen the driveway surface on plaintiffs'

> property, to reduce the grade of plaintiffs' driveway or to lengthen plaintiffs' driveway.
>
> January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 25, Conclusion of Law ¶ 11.
>
> The Court has previously found as an established fact that Mortensen's bad actions are not unusual in this case: "Defendant Mortensen has violated the Subdivision Ordinance on prior occasions and had thereby harmed innocent purchasers of property." January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 18, Finding of Fact ¶ 50.
>
> This Court has previously found that:
>
> Mortensen knew he had access problems when he purchased this land from Peplinskis. This Court finds credible William Reynolds' testimony that Mr. Mortensen approached him to sell an easement or trade some ground so Mr. Mortensen could get into his land through the easement over the south part of plaintiffs' land in Government Lot 2, but Reynolds refused. On re-cross examination of Mr. Mortensen by his own attorney, Mr. Mortensen first denied asking Reynolds if he could buy some of his property, but then sort of admitted William Reynolds could be telling the truth about that conversation.
>
> January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 22, Conclusion of Law ¶ 7.
>
> This Court finds all damages previously awarded remain. Specifically, all aspects of this Court's Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order filed April 1, 2004, pp. 12-29 are re-affirmed.

Order on Remand, pp. 13-16.

The following factual summary written by Akers is completely accurate, and this Court agrees with the conclusion that follows the accurate factual recitation:

> This Court found that Defendants, without authority or proper permits, commenced excavation work on plaintiffs' real property. Finding No. 44. Defendants were red tagged by Kootenai County and issued a stop work order. Finding No. 45. Defendants knew prior to excavation that the scope of the easement had been at issue between Plaintiffs and Defendants' predecessor in interest. Finding No. 46. Defendants intentionally ignored Plaintiffs' requests not to trespass. Finding No. 47. Defendants were cited a second time by Kootenai County for dumping fill dirt and excavating without a proper site disturbance permit. Finding No. 49. Defendant Mortensen has violated the subdivision ordinance on prior occasions and harmed innocent purchasers of property. Finding No. 50
>
> Nothing related to the location of the prescriptive easement across Parcel B changes these findings.

Plaintiffs' Reply Memorandum on Second Remand Re: Damages, p. 9.

Defendant Marti Mortensen cites *Ransom v. Topaz Marketing, L.P.*, 143 Idaho 641, 152 P.3d 2 (2006), for the proposition that "When a road easement is developed, the land may be modified: trees may be cleared, gravel may be laid, and fences may be built." Marti Mortensen's Memorandum Re: Damages, p. 2. Marti Mortensen does not favor the Court with a page citation, but this is an accurate quote found at 143 Idaho 641, 644, 152 P.3d 2, 4. As noted by Akers in their briefing, *Ransom* dealt with an *express* easement, where this case deals with an express easement over part of Akers' land, and then a *prescriptive* easement over a different portion of Akers' land, and under Idaho law the possible expansion of a prescriptive easement is much narrower than that allowed under an express easement. Plaintiffs' Reply Memorandum on Second Remand Re: Damages, pp. 2-3, citing *Beckstead v. Price*, 146 Idaho 57, 61 [64-65], 190 P.3d 876, 880, 883-884 (2008). But even as to an express easement, with which one is allowed to do much more than with a prescriptive easement, the Idaho Supreme Court in *Ransom* noted what one *cannot* do (which actions also describe what happened in the instant case):

> While it's not clear from the parties' briefing on appeal or the record, it appears that problems arose when, in creating the road, Lower pushed dirt onto other property owned by Farr West and made cuts onto Farr West's property, which had nothing to do with the creation or maintenance of the road itself. Additionally, during construction, Lower blocked off areas where water had traditionally crossed Farr West's property, altering the natural flow of the water runoff causing sink holes and sloughs.

143 Idaho 641, 642, 152 P.3d 2, 3. And, as the Idaho Supreme Court in *Beckstead* held:

> Recognizing that "[p]rescription acts as a penalty against a landowner[,]" this Court has stated prescriptive rights "should be closely scrutinized and limited by the courts." *Gibbens v. Weisshaupt,* 98 Idaho 633, 638, 570 P.2d 870, 875 (1977). The scope of a prescriptive easement is fixed by the use made during the prescriptive period. *Elder v. Northwest Timber Co.*, 101 Idaho 356, 359, 613 P.2d 367, 370 (1980); *Gibbens,* 98 Idaho at 638, 570 P.2d at 875 (quoting *Bartholomew v. Staheli,* 86 Cal.App.2d 844, 195 P.2d 824, 829 (1948)). The holder of the prescriptive easement "may not use it to impose a substantial increase or change of burden on the servient tenement." *Gibbens*, 98 Idaho at 638, 570 P.2d at 875 (quoting *Bartholomew,* 195 P.2d at 829).
>
> As to use, the Prices assert that during the prescriptive period there was no continuous use of the various means of transportation named in the Becksteads'

> complaint: trucks, campers, livestock trailers, four-wheelers, pedestrian traffic, and heavy equipment needed to improve the Beckstead Property. In the past, this Court has not required the scope of the easement specify particular vehicles or types of vehicles that can use the easement; **rather, we have characterized easement uses as residential, agricultural, or recreational.** *See Brown*, 140 Idaho at 443-44, 95 P.3d at 61-62. Thus, the scope of the easement should include any reasonable means of transportation for the character of use made during the prescriptive period.

146 Idaho 57, 64-65, 190 P.3d 876, 880, 883-84. (bold added). The first paragraph of this quote from *Beckstead* shows the restrictive nature of a prescriptive easement, which is all Mortensens and Whites have across the western portion of Akers' land, the terminus end of the easement. At most, the historical use of this prescriptive easement across the western portion of Akers' land was for very occasional use for agricultural purposes only. "The scope of a prescriptive easement is fixed by the use made during the prescriptive period." *Id.* But Mortensens and Whites completely ignored this. Mortensens and Whites *knew* that, *at best*, all they had was a prescriptive easement across the western portion of Akers' land. Mortensens and Whites knew there was a serious question as to their ability to access their land across Akers' land because *that is the sole reason why Mortensen was able to buy this land so cheap*. January 2, 2003, Findings of Fact, Conclusions of Law, and Order, p. 12, ¶ 31; p. 17, ¶ 48; p. 22, ¶ 7. Vernon Mortensen testified proudly at trial that he had purchased the first 160 acres for $250,000, at "a fraction of the price", due to the existence of the prior lawsuit Akers had with Peplinskis, from whom Mortensens bought this property. *Id.*, p. 12, ¶ 31. After the sale to Moretensens the title company that wrote the policy in Mortensens' favor wanted to obtain an express easement from Akers. *Id.* They were unable to do so. *Id.* Mortensen then sued his own title company. *Id.*, ¶ 33. Mortensens and Whites were all developers. *Id.*, p. 14, ¶ 34. Without any required permits, Mortensens and Whites excavated to lower the percentage of grade and tried to widen this easement across Akers' land to *sixty feet*, which historically had only been 12.5 feet wide. *Id.*, p. 15, ¶ 44; p. 18, ¶ 53; p. 16, ¶ 10. "The holder of the prescriptive easement "may not use it to

impose a substantial increase or change of burden on the servient tenement.'" 146 Idaho 57, 65, 190 P.3d 876, 880, 884. That is exactly what Mortensens and Whites tried to do. Unable to get access legitimately, the Mortensens and Whites bullied their way against Akers to create their own access. Their reason for doing this was to subdivide at least the 80 acres which Whites bought from Mortensens into sixteen five-acre parcels. January 2, 2003, Findings of Fact, Conclusions of Law, and Order, p. 14, ¶ 34.

This returns us back to the bolded portion of *Beckstead*, quoted above:

> In the past this Court has not required the scope of the easement specify particular vehicles or types of vehicles that can use the easement; **rather, we have characterized easement uses as residential, agricultural, or recreational.**

146 Idaho 57, 65, 190 P.3d 876, 880, 884. (bold added). Mortensens and Whites attempted to take what was at best occasional, seasonal, agricultural use, and attempted to turn it into full-time, year-round, fairly high volume, residential use. Since Akers were unwilling to simply "give" Mortensens an easement over the western portion of their land, Mortensens and Whites knew they would have to litigate any prescriptive easement. However, instead of choosing the civil alternative of filing a civil lawsuit, Mortensens and Whites chose to simply start excavating and widening. Instead of acting civilly, Mortensens and Whites chose to threaten and intimidate the Akers. And, at least for Mortensens, according to the testimony of Scott Rasor, whom this Court found to be credible, this was consistent with prior conduct. Vernon Mortensen had violated the subdivision ordinances on prior occasions and doing so had harmed innocent purchasers of other properties. January 2, 2003, Findings of Fact, Conclusions of Law, and Order, p. 18, ¶ 50; Tr. Vol. II, p. 539, L. 3 – p. 540, L. 20; April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 23, ¶ 31. This Court found that after the present lawsuit began, Mortensen purchased sixty acres near Akers' property, subdivided that property into five-acre parcels, sold four parcels and then found

himself in a legal dispute with the adjoining landowner regarding the legality of the subdivision and access to that subdivision. April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 23, ¶ 31. This Court wrote: "The easement-road dispute regarding access to these 60 acres is substantially similar to the dispute in the present case in that Mortensen is attempting to develop land with a disputed access and sell parcels of land to innocent purchases, thereby leaving the innocent purchasers with potential disputes with adjoining landowners, Kootenai County, the Fire District and the Highway District. Mortensen's testimony at Tr. Vol. III, p. 1425, L. 24 – p. 1426, L. 7." *Id.* The Court found:

> Mortensen has utilized substantially the same development strategy in the past. If not deterred, he is likely to engage in this conduct in the future. Scott Rasor testified about Mortensen's prior land development projects that harmed innocent Idaho land owners. Tr. Vol. II, p. 539, L. 3 – p. 540, L. 20. Mortensen admitted he is now developing and selling forty acres near the subject property in spite of another easement road dispute similar to the present case. Tr. Vol. III, p. 1425, L. 24 – p. 1426, L. 7. Even Mortensen's own expert Kiebert testified that he has testified in litigation on Mortensen's behalf on more than one occasion, that he has worked on subdivision projects for Mortensen before and that some of these projects the parcels Mortensen has sold have not been surveyed, that Mortensen works too fast in selling lots before they are surveyed, and that he has told Mortensen that it is not prudent to do that.

April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 24, ¶ 31. Thus, this is not Vernon Mortensen's first time to either the litigation rodeo, or the bullying rodeo. Mortensens and Whites knew that if they litigated the issue of the prescriptive easement across the western portion of Akers' land, the best they would have is a 12.5-foot-wide agricultural easement, and they needed much more than *that* to accomplish their subdivision. Bullying was the only option that *might* prove to be successful. It was a calculated risk by Mortensens and Whites, and had Akers not filed this lawsuit, no doubt it would have been successful.

This Court agrees with Akers:

> Before Defendant began digging and using heavy equipment across the easement, the road was a well maintained road. After Defendants "maintenance" efforts, the road was a disaster and Akers['] property was flooding due to the change in drainage patters caused by Defendants' excavation.

Plaintiffs' Reply Memorandum on Second Remand Re: Damages, pp. 3-4.

Without any support for its argument, Marti Mortensen makes the claim that "allowed use of the determined easement would still have caused water diversion." Marti Mortensen's Memorandum Re: Damages, p. 2. From a factual standpoint, this speculative claim finds absolutely no support in the record. From a legal standpoint, Marti Mortensen is wrong. The quote from *Ransom* immediately above demonstrates that the owner of the dominant estate cannot alter the easement so as to cause a water trespass on the servient estate. 143 Idaho 641, 642, 152 P.3d 2, 3. *Beckstead* tells us the owner of the dominant estate has "…a duty to protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate. 146 Idaho 57, 66-67, 190 P.3d 876, 880, 885-86, citing Walker v. Boozer, 140 Idaho 451, 455, 95 P.3d 69, 73 (2004).

Defendants exceeded the scope of their easement on the terminus end. Accordingly, plaintiffs remain entitled to treble damages for "Defendant's willful trespass…pursuant to I.C. §6-202." January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 26, ¶ 22. Marti Mortensen claims that "the record does not show that notices were posted *along the boundary of the easements* required [by I.C. § 6-202]." Marti Mortensen's Memorandum Re: Damages, p. 3. Whites make the same argument. Whites' Reply Brief on Remand, pp. 3-4. There is no requirement under I.C. § 6-202 that the "No Trespassing" signs be posted along the boundary of the prescriptive easement or that they be posted where the damage occurred. In Akers' response brief, Akers note several points in the record showing the location of "No Trespassing" signs in various locations: Plaintiffs' Exhibit 79, p. 1, photograph 13; Plaintiffs' Exhibit 84 and 176;

Plaintiffs' Exhibit 79, p. 1, photograph 8). Plaintiffs' Reply Memorandum on Second Remand Re: Damages, p. 8. This Court has already decided the issue more than eight years ago:

> 36. Plaintiffs revoked defendants' permission to use the curved approach and the driveway west of Government Lot 2 in January 2002. **Plaintiffs posted same with "No Trespassing" signs within 660 feet of each other.**

January 2, 2003, Findings of Fact, Conclusions of Law, and Order, p. 14, Finding of Fact ¶ 36; see also p. 25, Conclusion of Law , ¶ 13. (bold added). That finding has never changed in the intervening eight years. Akers are correct that the language of I.C. § 6-202 simply requires that the "No Trespassing" signs be located 600' apart in order to allow for an award of damages. Plaintiffs' Reply Memorandum to Defendants Whites "Reply" Brief on Second Remand Re: Damages, pp. 3-4.

Marti Mortensen claims: "In this case the Court must determine that the actions giving rise to punitive damages occurred outside of the now-determined easement." Marti Mortensen's Memorandum Re: Damages, p. 4. No citation to the record is given by Mortensen for this claim. There *is* no support in the record for that bald assertion. None of the "acts" of Mortensens and Whites changed as a result of this slightly different location of the easement at the terminus end. In fact, most of the "acts" of Mortensens and Whites took place at the triangle end of the easement. Thus, Akers remain entitled to punitive damages for Mortensens' and Whites' outrageous conduct.

Whites argue that since the easement rights were uncertain in this case, the Idaho Supreme Court has stated punitive damages are not appropriate, citing *R. T. Nahas Co. v. Hulet,* 114 Idaho [23, 29, 752 P.2d 625, 631 (Ct.App. 1988)]. Whites' Reply Brief on Remand, pp. 5-6. First of all, this was an Idaho Court of Appeals decision, not an Idaho Supreme Court decision. Second, as noted by Akers, what the Idaho Court of Appeals *actually* wrote was:

> Although we do not suggest that interference with unadjudicated rights never can satisfy the criteria for punitive damages, we hold that the record in this case falls

short of showing the extreme circumstances required for such an award.

Plaintiffs' Reply Memorandum to Defendants Whites "Reply" Brief on Second Remand Re: Damages, pp. 5-6, citing *R. T. Nahas,* 114 Idaho 23, 29, 752 P.2d 625, 631. Whites' counsel has wholly overstated the holding in *R. T. Nahas Co. v. Hulet.*

While Akers did not cite to the record in making the following recapitulation, the bracketed citations added by the Court show everything Akers claim is accurate:

> Defendants did much more than rely on their easement rights. They disregarded a court injunction. [Imposed May 8, 2002, made permanent by stipulation on June 5, 2002, and order of the Court June 14, 2002; April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 19, ¶ 13: "Defendant White consciously disregarded the Court's permanent injunction (restraining Defendants from trespassing on Plaintiffs' real property) by trespassing on Plaintiffs' property at night, behind Plaintiffs' home, in an effort to intimidate and frighten Plaintiffs, and did intimidate and frighten Sherrie Akers"] They disregarded county ordinances. [January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 15, ¶ 39] There were threats of physical violence against Plaintiffs. [April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 20, ¶ 18; p. 21, ¶ ¶ 19, 20, 21, 22; p. 22, ¶¶ 27, 28, 29] There were acts where Defendants tried to incite Plaintiffs to engage in physical violence. [*Id.*] There was purposeful damage to property not necessitated by maintenance of the easement. [January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 15, ¶¶ 40-45, p. 16, ¶ 47] There was an attempt to manipulate the county prosecutor. [April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 20, ¶ 17: Defendant Mortensen misrepresented facts to the Kootenai County prosecutor (making false claims of material facts) in an effort to persuade the prosecutor to prosecute Plaintiff Dennis Akers."] There was intimidation of witnesses during trial. [April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 21, ¶ 24]

Plaintiffs' Reply Memorandum to Defendants Whites "Reply" Brief on Second Remand Re: Damages, pp. 6. Vernon Mortensen and David White behaved incredibly boorishly, arrogantly, and intimidated the Akers and others. This Court found that even at trial:

> The Court has personally observed defendant David White while on the stand testifying, raising his voice and addressing Plaintiffs in anger and has heard testimony that he has yelled at Plaintiffs during recesses in the trial while Plaintiffs were waiting in the hallway in direct contravention of this Court's order prohibiting the parties from speaking with each other during the trial proceedings.

> The Court has watched defendant Vernon Mortensen testify, and has noticed time and time again, his inability to answer a question put to him, either by the opposing attorney or his own attorney. At trial on December 15, 2004, Mortensen was asked whether he sold four properties knowing there was an ongoing dispute over access. Mortensen went on a rant, claiming this was malicious prosecution, that Rule 11 sanctions should be imposed, and that he would not be intimidated by any of this. He claimed plaintiffs' counsel was trying to extort money from an insurance company and using us (he and White) as pawns to do so.

April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 22, ¶ 26.

In spite of all that, Whites now claim that: "Early in the trial of this case the Court observed that if an easement existed to White's property, 'there's not going to be any punitive damages.' (Tr. Vol. I, pp. 364-365)" Whites' Reply Brief on Remand, p. 6. That argument has no merit. A review of that entire passage shows that it was simply the Court suggesting again to Akers' counsel, that the issue of the easement and the issue of damages be bifurcated, because the nature and extent of the easement has relevance to the issue of damages. Tr. Vol. I, p. 364, L. 19 – p. 365, L. 17. That same logic (that the location of the easement be decided before the damage issues) was used by this Court in this most recent round of litigation following remand from the Idaho Supreme Court.

Regarding the damages for the emotional distress of Sherrie Akers, Whites argue:

> The record reflects that Sherrie Akers brought herself into a confrontation with White or Whites' employee in each instance in which she claims the incident caused her distress. One who intentionally creates a circumstance in which she finds herself emotionally distressed by asserting an unlawful right cannot justly contend that the person who is engaged in the lawful exercise of their rights has negligently cause them emotional distress. In this case, Sherrie Akers caused the circumstances that create any distress that she may have suffered when she chose to obstruct a vehicle operating on the express easement and when she chose to testify falsely regarding the location of the easement road at the top of the hill.

Whites' Reply Brief on Remand, pp. 4-5. Whites cite no *legal* authority for their claim that if you bring yourself "into a confrontation", that you are then precluded from emotional distress damages. Whites cite to no *factual* basis in the record for this claim. Whites' claim that "The

record reflects that Sherrie Akers brought herself into a confrontation with White or Whites' employee *in each instance* in which she claims the incident cause her distress" is, quite simply, ludicrous. The Court has reviewed its various findings of fact, and can find no finding that indicates Sherrie Akers was the aggressor or brought herself into the confrontation. In fact, it is just the opposite. This Court has found that: "Defendants were confrontational with plaintiff Sherrie Akers on occasions when she sought to prevent their trespass on her property" (April 4, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 18, ¶ 3); "Mr. White bullied, threatened and intimidated Sherrie Akers as she tried to assist the police in their investigation of an occasion when Defendants trespassed" (*Id.*, ¶ 4); D.L. White Construction, Inc.'s operator purposely ran its dump truck toward Sherrie Akers and within two feet of her body, acting as though he were going to run over Sherrie Akers on an occasion when Defendants trespassed" (*Id.*, ¶ 5); "During the same time period as above, D.L. White Construction, Inc.'s operator threatened to run Sherrie Akers off her property and threatened to dig a three-foot ditch across Plaintiffs' driveway to impede her use of the driveway" (*Id.*, ¶ 6); "Defendants actually impeded Sherrie Akers's access to her work (she is a cardiac nurse at a Spokane hospital) by intentionally dumping dirt across Plaintiffs' driveway, which served no purpose other than to block Plaintiffs' ingress and egress" (*Id.*, ¶ 7). This Court found:

> Defendant White consciously disregarded the Court's permanent injunction (restraining Defendants from trespassing on Plaintiffs' real property) by trespassing on Plaintiffs' property at night, behind Plaintiffs' home, in an effort to intimidate and frighten Plaintiffs, and did intimidate and frighten Sherrie Akers. Dennis Akers testimony is found credible that the Friday before the last trial days, David White was found off the easement, clearly on Akers' land, thirty feet from their house, that Dennis Akers ran after him and saw White get in his truck, and when Akers told him "I've caught you again trespassing", white responded "Go to hell." This is in violation of this Court's prior orders. This Court finds not credible David White's testimony that he was not on the Akers['] property or the road on that night, that instead he was up on the other side of the barn on his own property. Dennis Akers testified that White has sat in his vehicle

> on Millsap Loop Road and watching the Akers' house. White did not rebut this. Dennis Akers testified that several times during this protracted trial, there were outbursts in the hallway by White and Mortensen. White did not rebut this, nor did Mortensen."

Id., pp. 19-20, ¶ 13. Whites' counsel to write: "The record reflects that Sherrie Akers brought herself into a confrontation with White or Whites' employee *in each instance* in which she claims the incident caused her distress", is so far from the truth it amounts to sanctionable conduct under I.R.C.P. 11(a)(1), against Whites' attorney Robert Covington. Idaho Rule of Civil Procedure 11(a)(1) reads in pertinent part: "The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." It is simply false for Whites' attorney to write "The record reflects that Sherrie Akers brought herself into a confrontation with White or Whites' employee *in each instance* in which she claims the incident caused her distress." Unfortunately, as shown in the next few paragraphs of this opinion, there is more sanctionable conduct by Whites' attorney.

> Whites attorney also writes:
>
> …Akers established for this series of events a standard of conduct that was equally or more as problematic as that of White. In a fist fight as in this case, punitive damages are not appropriate against one party engaged in conduct similar to that of his antagonist.

Whites' Reply Brief on Remand, p. 3. While the second sentence of that passage is simply *argument* (albeit without any merit), the first sentence is an *assertion of fact*, which is not "well grounded in fact". For the same reasons found in the record discussed immediately above, this

Court finds this statement of fact by Whites' counsel is completely false, unsupported by any legal argument, and sanctionable.

Whites' attorney provided no citation to the record nor did he cite to any portion of any of the Court's previous findings to support Whites' claim that: "she [Sherrie Akers] chose to testify falsely regarding the location of the easement road at the top of the hill." Likewise, Whites' attorney failed to provide any explanation as to how, even if that were accurate that she testified falsely (it isn't), how that false testimony could even remotely relate to the emotional distress issue. This Court found "…Sherrie Akers to be a very credible witness." Memorandum Decision and Order, and Additional Findings of Fact, conclusions of Law and Order, p. 23, ¶ 30. Counsel for Akers argues: "It is disappointing and disturbing to see White's counsel advance this unwarranted attack on Mrs. Akers." Plaintiffs' Reply Memorandum to Defendants Whites "Reply" Brief on Second Remand Re: Damages, pp. 5. It *is* an unwarranted attack. It is also a completely unsubstantiated attack. It is additional sanctionable conduct under I.R.C.P. 11(a)(1), against Whites' attorney Robert Covington.

Whites attorney made the following shocking argument:

> The Court improperly awarded Akers $1939 for damage to his truck for an occurrence that took place within the easement area. Defendants were engaged in lawful use of their easement when Akers obstructed passage of a tracked vehicle driven by Mortensen. Defendants were the owners of the dominant estate and Akers was not permitted to use the easement in a manner that interfered with use of the easement by owners of the dominant estate. Akers is not entitled to recover damages that he caused by obstructing lawful use of the easement. This component should not be allowed to Akers.

Whites' Reply Brief on Remand, p. 3. No legal citation is given for this argument. The only source for this argument that this Court can think of is "Might makes right." What difference does it make if Akers were parked in the easement, on Millsap Road or the mall parking lot? You don't run into a truck with a bulldozer, intentionally. Apparently, in the mind of Whites' attorney, if you have a bulldozer, you can simply move someone else's pickup out of the way if

you don't like where it is parked. Whether this took place on the easement is not relevant. Whether this took place on the portion that is an express easement or this took place on the portion that is an easement by prescription is not relevant. Whites' novel argument finds no support in the law, within the facts of this case or within a civilized society. While the Court can understand Whites' counsel trying to minimize the damage for which his client has already been found responsible, Whites' attorney's factual and legal claims must conform to I.R.C.P. 11(a)(1). In these instances discussed, they do not.

Idaho Rule of Civil Procedure 11(a)(1) makes imposition of a sanction mandatory when the court finds, as this Court does, that an attorney has violated the rule: "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." The unfounded statements by Whites' counsel that Akers' were the aggressors, that Sherrie Akers testified falsely, that "…Sherrie Akers brought herself into a confrontation with White or Whites' employee *in each instance*", are especially disturbing in light of the fact that Whites' conduct contributed to Sherrie Akers' emotional distress. In making these unsubstantiated statements, Whites' attorney is simply following suit on his clients' bad acts which began nine years ago, continued through the trial, and is perpetuated by counsel at present. The rule serves a separate cognizable purpose, focusing upon discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit. *State of Alaska ex rel. Sweat v. Hansen*, 116 Idaho 927, 782 P.2d 50 (Ct.App. 1989). However, this Court must consider the attorney's conduct in the filing of pleadings, motions or other papers, and not acts which are part of the trial itself. *Koehn v. Riggins,* 126 Idaho 1017,

895 P.2d 1210 (1995). In evaluating an attorney's conduct in filing a pleading, the district court must determine whether the attorney exercised reasonableness under the circumstances and made a proper investigation upon reasonable inquiry into the facts and legal theories before signing and filing the document. *Chapple v. Madison County Officials,* 132 Idaho 26, 80, 967 P.2d 278, 282 (1998). This Court finds Whites' counsel did not make a proper investigation prior to making these false statements, nor did he exercise reasonableness in writing those false statements and incorporating them into a brief which he signed. Largely due to the number of these false statements, this Court finds they were interposed by Whites' counsel for the improper purpose of harassment. The difficulty in determining the appropriate sanction is these false statements by Whites' attorney caused little, if any, delay, and caused little, if any, additional work by Akers' attorney. *Bell v. Bell,* 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992). Accordingly, the monetary amount of the sanction in this case should not be great. This Court awards to the Akers the sum of $2,000.00, imposed against Whites' attorney directly, as the sanction for the above described conduct.

Marti Mortensen now claims that punitive damages in this case "duplicates" the treble damages allowed under the trespass action. Marti Mortensen's Memorandum Re: Damages, p. 4. Marti Mortensen appropriately cites *Bumgarner v. Bumgarner,* 124 Idaho 629, 862 P.2d 321 (1993), where the focus should be on whether the defendant has incurred multiple penalties for the same wrongful act. Although Marti Mortensen does not direct the Court to a page number in *Bumgarner,* she apparently is referring to 124 Idaho 629, 642, 862 P.2d 321, 334. Marti Mortensen, again without citing to the record, argues: "There are no 'distinct acts' here: all the trespass damages arise from the same conduct that gives rise to the punitive damages." Marti Mortensen's Memorandum Re: Damages, p. 4. That claim is not supported by the record. As noted by Akers:

> Defendants were not punished twice for the same wrongful acts. As in *Bumgarner*, this Court in granting this [sic] the punitive damages award focused on the Defendants' act of subdividing and road building—undertaken in defiance of applicable ordinances, which acts were distinct from the damage to the road and property occasioned by the acts of trespass. The Court also focused on Defendants' action taken in violation of this Court's permanent injunction issued in the matter. Further consideration was given to the fact that the Defendants tried to bring prosecution to manipulate the legal system and intimidate Akers and that a witness, Bill Reynolds, was threatened to influence his testimony.

Plaintiffs' Reply Memorandum on Second Remand Re: Damages, p. 11. This Court agrees. The amounts of punitive damages awarded in favor of Akers and against Mortensens are different in amount from those awarded against Whites, to take into account the quality and quantity of their actions. There are a plethora of other actions by both Whites and Mortensens which warrant punitive damages, but for which statutory damages under the trespass statute, I.C. § 6-202 are wholly inappropriate. The trespass damages were purely compensatory. This Court held: "The evidence of the reasonable and necessary costs of repairs for the above damage cause by Defendants multiple willful trespasses is $17,002.85." April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 27, ¶ 2. The purpose of punitive damages is to deter defendant's misconduct, not to compensate plaintiffs for their losses. *Bumgarner,* 124 Idaho 629, 642, 862 P.2d 321, 334. That purpose was specifically stated by the Court as follows:

> 5. Looking at the criteria of *State Farm Mutual Automobile Insurance Co. v. Campbell,* Slip Op. No. 01-1289 (2003), p. 8, and award of punitive damage against Mortensen is appropriate. The harm caused to Akers was physical, emotion, and not just economic. Mortensen's conduct evinced an indifference to or reckless disregard of the health or safety of others. Mortensen's conduct was repeated, occurring over a lengthy period of time and even after Court order in this case, this was not an isolated incident. The harm resulted from intentional malice, trickery or deceit. Finally, compared to Mortensen and whoever is backing this litigation on Mortensen's behalf, the Akers are financially vulnerable in comparison. *Campbell* states "…that a recidivist may be punished more severely than a first offender [because] repeated misconduct is more reprehensible than an individual instance of malfeasance…" *Id.* p. 13, citing BMW of North America, Inc. v. Gore, 517 U.S. 558, 577 (1996). The amount of punitive damages likely to deter Defendant Mortensens from engaging in like conduct in

the future is $150,000.00.

6. The amount of punitive damages likely to deter Defendant Whites from engaging in like conduct in the future is $30,000.00.

April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 28, ¶¶ 5, 6. Whites simply did not have the track record of similar conduct in other real estate transactions. Whites were not nearly so brazen in their attitude before the Court, as compared to Mortensens. Whites seemed to be the follower, with Mortensens the leader. Thus, the difference in the amount of the punitive damages awards against each couple.

Marti Mortensen claims that "large" (later referred to by Marti Mortensen as "huge") punitive damage awards are not appropriate in cases such as this because defendants are unlikely to perform similarly in the future, citing *Cox v. Stolworthy*, 94 Idaho 683, 688-89, 496 P.2d 682 (1972). Marti Mortensen's Memorandum Re: Damages, pp. 5-6. First of all, Mortensens *need* deterrence, because, as stated above, this has been Vernon Mortensen's *modus operandi*. There is no indication in the record that Mortensen will change his conduct in the future *absent* a punitive damage award. Indeed, there is every indication in the record that the imposition of punitive damages in this case is simply a calculated cost of doing business factored in with all of Mortensens' land acquisitions. Second, *Cox* states: "…the social purpose served by exemplary damages is the deterrence of the defendant and others from like conduct." 94 Idaho 683, 689, 496 P.2d 682, 688. Thus, it is not just the conduct of Whites and Mortensens in this case that is entirely at issue. It is also the conduct of those similarly situated (buying land cheap because it has access problems), and similarly disposed (who, subsequently to finding themselves unable to buy an easement, proceed to bully and intimidate) which must be deterred. Third, the conduct of Mortensens and Whites in this case are *much* different than the conduct of Stolworthy in *Cox*. Stolworthy bulldozed part of Cox' fence down and Stolworthy ran his sheep across Cox' land *on one occasion*. 94 Idaho 683, 684, 496 P.2d 682, 683. Stolworthy at all times admitted the

trespass but denied any malice. The jury imposed $5,000 in punitive damages; the district court upheld that award and refused a motion to reduce such. The Idaho Supreme Court upheld the award of punitive damages but felt the district court should have reduced that $5,000 award down to $2,000 and remanded back to the district court for such result. 94 Idaho 683, 692, 496 P.2d 682, 691. This Court agrees with Akers' argument: "As outlined above, there were numerous acts in the present case that far exceeded what appeared to be the relatively civil disagreement that was analyzed in *Cox*." Plaintiffs' Reply Memorandum on Second Remand Re: Damages, p. 12. The Idaho Supreme Court in *Cox* discussed the types of cases in which punitive damage awards are typically found:

> A pattern of factual situations may be discerned in the past cases decided by this Court which appears to be closely related to the size of the exemplary damage awards allowed on appeal. We believe the pattern is quite significant and can be usefully described for the guidance of the trial courts and will help determine the case at bar. The pattern seems to encompass at least three categories of situations.
>
> The first concerns those cases involving deceptive business schemes operated for profit and often victimizing numerous members of the public aside from the plaintiff. Clearly in such cases the award of exemplary damages should aim at making the cost of such repetitive antisocial conduct uneconomical. Thus, for example, in *Boise Dodge, Inc., v. Clark, supra,* cross-complainant was one victim of a fraudulent scheme. A generous award of exemplary damages served to remove the profit factor from the whole scheme. See, Comment, 'Automobile Dealership Fraud: Punitive Damages,' 7 Idaho L.R. 117 (1970). Cf. Barth v. B. F. Goodrich Tire Co., 265 Cal.App.2d 228, 71 Cal.Rptr. 306 (1968).
>
> The second category is illustrated by the *Village of Peck v. Denison* decision, *supra.* There defendants' repeated actions endangered the physical well-being and health of the several hundred citizens of the town. Where actual physical harm is threatened or actually inflicted on a person or persons the situation rises to a serious level of affairs. In such a case where the plaintiff's physical well-being is endangered, a substantial punitive damages award finds justification in the nature of the malicious conduct itself as well as the quality of the injury sustained.
>
> The case at bar fits neither of these categories. However, a third category of cases does seem applicable. These cases typically involve non-violent but nevertheless serious disputes between two parties. Often the dispute centers on an interest in real or personal property or an interference with a business operation. Here the action concerned an act of trespass to the plaintiffs' real property but no lives were endangered and there was no indication the defendant made a practice of acting in this fashion.

> In such situations in the past this Court has not looked favorably on large punitive damage awards for the apparent reason that the nature of the dispute did not warrant a severe penalty to the wrongdoer-an award out of proportion both to the activity complained of and the damages incurred.

Idaho 683, 691, 496 P.2d 682, 690. It is only that *third* situation in which the Idaho Supreme Court cautioned the amount of punitive damages *should* bear some relationship with the amount of actual damages incurred. Two facts which separate the present case from this third category must be noted. In that third category, the Idaho Supreme Court noted that "these cases typically involve non-violent but nevertheless serious disputes between two parties." *Id.* No physical violence was visited upon the bodies of the Akers, but emotional violence, intimidation and threats by Mortensens and Whites was visited upon them, *even throughout the year long court trial*. Second, the Idaho Supreme Court noted that in that third category, "…there was no indication the defendant made a practice of acting in this fashion." *Id.* While there is no proof that Whites made a practice of acting in this fashion *in other cases*, there is ample proof that David White was consistent in his intimidation of the Akers *in this case* over the course of a decade now, in this case. There is certainly proof that Mortensens were very consistent in their intimidation *in this case and in other cases* prior to and during this litigation. That is the primary reason the punitive damage awards are in different amounts as between Mortensens and Whites.

To sum up, there are important facts that separate the instant case from the third category mentioned in *Cox*, where the punitive damages *should* bear some relation to actual damages. That being the case, this Court finds that in the instant case there *is* a reasonable relation between punitive damages and actual damages. In the present case, the actual damages incurred were $17,002.85 costs of repairs for the multiple trespass damages, trebeled to $51,008.55, and emotional distress damages to Sherrie Akers in the amount of $10,000, while the amount of punitive damages were $30,000 against Whites and $150,000 against Mortensens.

Moreover, this Court finds the present case has earmarks of all three types of cases discussed in *Cox:*

> The first concerns those cases involving deceptive business schemes operated for profit and often victimizing numerous members of the public aside from the plaintiff. Clearly in such cases the award of exemplary damages should aim at making the cost of such repetitive antisocial conduct uneconomical. Thus, for example, in *Boise Dodge, Inc., v. Clark, supra,* cross-complainant was one victim of a fraudulent scheme. A generous award of exemplary damages served to remove the profit factor from the whole scheme.

Id. The present case fits this first category, as Mortensens and Whites conduct was essentially part of a deceptive business scheme. Mortensens (and later Whites) bought Peplinskis' property for cents on the dollar due to lack of access or at least questionable legal access. After they bought the property they then tried to buy access. Failing at that attempt to gain legal access, they began intimidating Akers. While two people (the Akers) were primarily hurt by the conduct of Mortensens and Whites, others were involved. Law enforcement was brought in on more than one occasion, county officials were impacted as zoning orders were violated, and witnesses were intimidated. Whites and Mortensens are guilty of "repetitive antisocial conduct" prior to this litigation, which necessitated this litigation, and which continued throughout this litigation. And, at least as to Mortensens, that "repetitive antisocial conduct" has occurred in *other* litigation and in *other* land transactions which did not result in litigation. This repetitive antisocial conduct must be made "uneconomical" for punitive or exemplary damages to have any of the desired effect. In this first category, damages should be "large" or "huge" as now complained about by Marti Mortensen, as the Idaho Supreme Court wrote: "A generous award of exemplary damages served to remove the profit factor from the whole scheme." *Id.* This Court finds the amount of punitive damages awarded against Mortensens was neither "large" nor "huge", and probably not even "generous" given the protracted nature of Mortensens' conduct, the severity and frequency of the intimidation. The award of punitive damages against

Mortensens was adequate. The same is true of the award of punitive damages against Whites.

> The second category is illustrated by the *Village of Peck v. Denison* decision, *supra*. There defendants' repeated actions endangered the physical well-being and health of the several hundred citizens of the town. Where actual physical harm is threatened or actually inflicted on a person or persons the situation rises to a serious level of affairs. In such a case where the plaintiff's physical well-being is endangered, a substantial punitive damages award finds justification in the nature of the malicious conduct itself as well as the quality of the injury sustained.

Id. The present case fits this second category as well. Mortensens and Whites committed "repeated actions" which, while not "endanger[ing] the physical well-being and health of the several hundred citizens of the town", certainly that conduct endangered the physical well-being and health of Sherrie Akers and, to a lesser extent, Dennis Akers. This is a case "Where actual physical harm is threatened…" In these cases "…a substantial punitive damages award finds justification in the nature of the malicious conduct itself as well as the quality of the injury sustained." *Id.* As mentioned above, the award of punitive damages against Moretensens was adequate; it was not "substantial". The same is true of the award of punitive damages against Whites.

Finally, as noted by the Idaho Supreme Court in *Cox*: "In arriving at such a [punitive damage] figure it would seem to be reasonable and good social policy in cases such as these to grant such an amount that a plaintiff would be encouraged to bring the dispute to the courts for settlement." *Id.* This Court finds the amount of punitive damages sufficient to do just that, and no more. The irony is that had Mortensens and Whites brought litigation to have their easement rights against Akers decided judicially, prior to their excavation and intimidation, this could have ended peaceably almost a decade ago. However, peaceable litigation would have ended with the same result, that being Mortensens and Whites having a 12.5-foot easement, the use of which, on the prescriptive end at least, cannot be expanded upon beyond its historical, agricultural, intermittent use. That outcome would have been unacceptable to Mortensens and

Whites given the subdivision they desired to create and the financial reward they intended to reap from that development.

Finally, Marti Mortensen argues, based on agency law: "Therefore MORTENSENS should not be responsible for any punitive damages occasioned by WHITE's conduct." Marti Mortensen's Memorandum Re: Damages, p. 6, citing *Openshaw v. Oregon Auto. Ins. Co,* 94 Idaho 335, 487 P.2d 929 (1971). (capitalization in original). Whites make the similar argument, but going the opposite way:

> Mortensen correctly drew the Court's attention to the well settled principle that a principal is liable for punitive damages based upon the 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 (1971). White personally should not be punished for conduct by Mortensen or the employee of D.L. White Construction, Inc. where the *Openshaw* standard is not met.
>
> The record does not indicate that White participated in or authorized events described in findings of fact from the April 1, 2004 decision numbered 5,67,8,9,11,12,16,20,24. Punitive damages arising from those findings fail the *Openshaw* test and should not be awarded.

Whites' Reply Brief on Remand, p. 7. It is ironic that nine years after this all started, the two who were specifically found by this Court to be acting in concert, would now apparently like to divorce themselves from each other's conduct. This protracted litigation was the result of the bullying tactics of Vernon Mortensen and David White, and now that the litigation appears to be winding down, those two appear to be turning on each other, distancing each other from the other, in an obvious attempt to lessen responsibility for damages caused. In doing so they fail to realize that damages were awarded for *past* actions. None of Whites and Mortensens *current* arguments change those *past* actions.

This Court has already found: "As set forth in the Conclusions of Law, defendants Vernon Mortensen and David White at all pertinent times are *jointly and severally* liable for compensatory damages to the Akers' property, for the trebled damages, and for Sherrie Akers'

emotional distress." April 4, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 18, Finding of Fact ¶ 2.n. This was because: "…this Court finds at all pertinent times they were each 'acting in concert' as defined by [I.C. § 6-803], in that they were 'pursuing a common plan or design which result[ed] in the commission of an intentional or reckless tortuous act.'" *Id.*, p. 28, Conclusion of Law, ¶ 4. This Court's decision is consistent with *Openshaw*. Regarding punitive damages, this Court awarded an amount of punitive damage in favor of Akers as against Mortensens which was *different* than the amount of punitive damage in favor of Akers as against Whites. These amounts were not joint and several as between Mortensens and Whites. This Court engaged in careful analysis as to the factual and legal reasons given for the punitive damage award against the Mortensens and the different award against the Whites. Seven years ago, this Court found as a matter of fact:

> 41. Vernon Mortensen has violated and disregarded Kootenai County ordinances and the orders of this Court for pecuniary gain, specifically to increase the value of his land development projects. In his actions, testimony and demeanor he has shown a conscious disregard and disrespect for the law. He has harmed innocent North Idaho landowners, including Plaintiffs, by this conscious disregard for the law. As such, it is highly likely that he will continue to harm Plaintiffs and other Idaho landowners unless he is deterred from engage in like conduct in the future.

April 1, 2004, Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 25, Finding of Fact ¶ 41. Nothing has changed that finding of fact. This Court discussed Mortensen's assets at length. *Id.*, pp. 23-25, Findings of Fact ¶¶ 31-39. This Court then found as a matter of law:

> 5. Looking at the criteria of State Farm Mutual Automobile Insurance Co. v. Campbell, Slip Op. No. 01-1289 (2003), p. 8, an award of punitive damage against Mortensen is appropriate. The harm caused to Akers was physical, emotional, and not just economic. Mortensen's conduct evinced an indifference to or reckless disregard for the health or safety of others. Mortensen's conduct was repeated, occurring over a lengthy period of time and even after Court order in this case, this was not an isolated incident. The harm resulted from intentional malice, trickery or deceit. Finally compared to Mortensen and whoever is backing this litigation on Mortensen's behalf, the Akers are financially vulnerable in comparison. Campbell states "…that a recidivist may be punished more

> severely than a first offender [because] repeated misconduct is more reprehensible than an individual instance of malfeasance…" *Id., p. 13, citing BMW of North America, Inc. v. Gore,* 517 U.W. 559, 577 (1996). The amount of punitive damages likely to deter Defendant Mortensens from engaging in like conduct in the future is $150,000.00.

Id., p. 28, Conclusion of Law, ¶ 5. On the other hand, as to the Whites, this Court found as a matter of fact:

> 42. David White and D.L. White Construction, Inc., has violated and disregarded Kootenai County ordinances and the orders of this Court for pecuniary gain, specifically to increase the value of his land development project. In his actions, testimony and demeanor he has shown a conscious disregard and disrespect for the law. He has harmed innocent North Idaho landowners, including Plaintiffs, by this conscious disregard for the law. As such, it is highly likely that he will continue to harm Plaintiffs and other Idaho landowners unless he is deterred from engaging in like conduct in the future.

Id., p. 25, Finding of Fact ¶ 42. Nothing has changed that finding of fact. This Court separately discussed White's assets. *Id.,* p. 40. This Court then found as a matter of law:

> 6. The amount of punitive damages likely to deter Defendant Whites from engaging in like conduct in the future is $30,000.00.

Id., p. 28, Conclusion of Law, ¶ 6. Nothing in this Court's prior award, ratified today by this decision, is inconsistent with *Openshaw*. In addition to the multitude of occasions where Mortensens and Whites acted in concert, this Court has also taken into account the situations where conduct was purely that of Mortensens or purely that of Whites. This Court has assessed the differences in their financial situation. This Court has assessed Mortensen differently as a recidivist due to his conduct in other situations and other litigations. All of which result in differing amounts of punitive damage awards.

Whites claim this Court:

> …did not articulate specific reasons for its award of punitive damages against Whites, stating only "That the amount of punitive damages likely to deter Defendant Whites from engaging in like conduct in the future is $30,000. The trial court did not specify a clear and convincing standard of proof for its findings of fact with respect to Whites or Mortensens, despite the requirements of Idaho Code Section 6-1601(9).

Whites' Reply Brief on Remand, p. 6. First of all, it is not I.C. § 6-1601(9) that sets forth the "clear and convincing standard of proof". That standard is articulated in I.C. § 6-1604(1). If in fact this Court seven years ago failed to mention that standard, it does so now. This Court specifically finds that Akers have proven, by clear and convincing evidence, oppressive, fraudulent, malicious *and* outrageous conduct (they only needed to prove one type of conduct, they proved them all) by both Mortensens and Whites, under I.C. § 6-1604(1). This Court seven years ago, as reiterated in this decision, *did* articulate specific reasons for its award of punitive damages against Whites. In addition to Finding of Fact ¶42 quoted entirely immediately above, the Court also found:

> 13. Defendant White consciously disregarded the Court's permanent injunction (restraining Defendants from trespassing on Plaintiffs' real property) by trespassing on Plaintiffs' property at night, behind Plaintiffs' home, in an effort to intimidate and frighten Plaintiffs, and did intimidate and frighten Sherrie Akers. Dennis Akers testimony is found credible that the Friday before the last trial days, David White was found off the easement, clearly on Akers' land, thirty feet from their house, that Dennis Akers ran after him and saw White get in his truck, and when Akers told him "I've caught you again trespassing", White responded "Go to hell." This is in violation of the Court's prior orders. This Court finds not credible David White's testimony that he was not on the Akers property or the road on that night, that instead he was up on the other side of the barn on his own property. Dennis Akers testified that White has sat in his vehicle on Millsap Loop Road and watching the Akers' house. White did not rebut this.

Memorandum Decision and Order, and Additional findings of Fact, Conclusions of Law and Order, pp. 19-20, Finding of Fact ¶ 13.

Finally, at oral argument on January 26, 2011, counsel for Whites, in discussing his clients' financial situation relative to punitive damages, made the claim that his clients have "been destroyed by this process." Counsel for Marti Mortensen made a similar argument on January 26, 2011, explaining the fact that Marti Mortensen has divorced Vernon Mortensen in the intervening eight years since trial, that "Marti Mortensen would tell you she's broke", and "Jerry Mortensen is in a substantially bad financial condition." First, there is **no proof** of this

fact. No affidavits were submitted from the Whites. No affidavits were submitted by Marti Mortensen. Vernon Mortensen filed a 32-page affidavit on January 24, 2011, but it does not reference his financial situation. Second, neither counsel for the Whites nor counsel for Marti Mortensen, nor Vernon Mortensen, *pro se*, have bothered to cite this Court to any legal authority that the financial situation of the perpetrator at the time of remand proceedings is relevant as compared to the perpetrator's financial situation at the time of the wrongful conduct and the trial. If it is the *conduct* of the defendant that is to be deterred, it makes no sense to consider that defendant's financial situation at any time other than proximate to the conduct. It would make no sense to consider a defendant's financial situation seven years before the bad conduct. Why then, as advocated by Whites' counsel and Marti Mortensen's counsel, would it make any more sense to consider a defendant's financial situation seven years *after* the bad conduct occurred? There is nothing in *Robinson v. State Farm Insurance*, 137 Idaho 173, 45 P.3d 829 (2002), or IDJI 9.20.5 that would indicate such an absurd result.

III. ORDER.

IT IS ORDERED White's "Motion to Admit Additional Evidence Re: Easement Location" is DENIED.

IT IS FURTHER ORDERED

IT IS FURTHER ORDERED defendants are liable for all damages as previously set forth in the Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order filed April 1, 2004, pp. 12-29. The prescriptive easement does not expand the express easement, and the prescriptive easement over Akers' land in Parcel B is in a slightly different location than defendants' excavated on that parcel. Additionally, defendants placed fill from their excavation on Akers' Parcel B. Accordingly, even with the finding of an easement by prescription, all previous findings regarding damages remain.

IT IS FURTHER ORDERED Akers are the prevailing party as against Mortensens and Whites, and Akers are entitled to costs as proven at a later hearing.

IT IS FURTHER ORDERED Akers are entitled to attorney fees as set forth above. The amount of prior attorney fees are as previously awarded. The amount of attorney fees subsequent to the Idaho Supreme Court's most recent Remittitur will be determined at a later hearing.

IT IS FURTHER ORDERED the Akers are awarded the sum of $2,000.00, imposed against Whites' attorney directly, as the sanction for the conduct described above.

IT IS FURTHER ORDERED that plaintiffs' attorney prepare a judgment consistent with the above Opinion and this Order.

Entered this 18th day of March, 2011.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Leander James	Robert Covington	Richard Deissner	Vernon J. Mortensen
Susan Weeks	208 762-4546	509 326-6978	P. O. Box 1922
208 667-1684			Bonners Ferry, ID 83805

_____
Deputy Clerk