

II. ANALYSIS.

This matter was appealed to the Idaho Supreme Court. At the time it was appealed, this Court had entered judgment in favor of the plaintiffs, the Akers, and against all defendants. In order to appeal, a party against whom judgment has been entered must post a cash deposit or supersedeas bond in the amount of 136% of the judgment amount. I.A.R. 13(b)(15).

As previously decided by this Court:

The purpose of the bond was to provide to "Plaintiffs security for payment of the judgment entered against said Defendants in the above entitled matter." Notice of Posting Cash Bond With Clerk of Court, Reply in Support of Motion to Release Bond for Attorney Fees Lien, Exhibit A. That Notice of Posting Cash Bond With Clerk of Court indicates that both defendants "Vernon J. Mortensen and Marti E. Mortensen, by and through their attorney of record, Terri R. Yost (now Pickens), of the firm Givens Pursley LLP (now with Pickens Law) have posted a cash bond in the amount of \$317,248.97, with the clerk of the District Court of Kootenai County..."

Memorandum Decision and Order Denying Defendant Vernon Mortensen's Motion for Partial Release of Bond to Satisfy Attorney Fees Lien, (filed July 8, 2009), p. 4.

This matter is now before this Court on remand from the Idaho Supreme Court for fact-finding only on the location of the prescriptive easement. On October 8, 2009, this Court held a status conference and all parties requested the opportunity to present briefing on the issue of which party carries the burden of proof with regard to the prescriptive easement issue on remand from the Supreme Court. The Court granted this request. At present, the only issues remaining are: (1) the location of the prescriptive easement and (2) any award, if appropriate, of damages and attorney fees. Each party has submitted briefing. This Court entered its Order on the Burdens of Proof on December 1, 2009; ordering: Plaintiffs carry the burden on all damages issues; a metes and bounds description of the easement location will be necessary; and the

defendants carry the burden of production and burden of proof as to the location of the easement.

A. Idaho Appellate Rule 13(b)(15) Requires Release of the Cash Appeal Bond.

In her brief, Marti Mortensen (Marti) requests the Court release the appeal bond to her directly or to the Boundary County Court under her pending divorce action there. Memorandum Supporting Motion to Transfer or Release Bond, p. 2. Marti makes this argument pursuant to Idaho Appellate Rule 13(b)(15). Marti argues there is no judgment to stay at this juncture and requests the Court return her money to her. *Id.*, p. 3. Marti also argues the bond money amount is traceable only to her, despite her concession that the bond was posted for the benefit of both her and Vernon Mortensen (Vernon). *Id.*, p. 4. As such, Marti claims interpleader of the bond amount in the pending divorce action between Marti and Vernon would be proper. *Id.*, p. 3, citing I.C. § 8-701.

In response, Vernon Mortensen (Vernon) argues the money was posted for the benefit of both he and Marti and should not be released absent an agreement of both. Brief in Opposition to Releasing Mortensen bond Money from the Court, p. 2. Vernon notes Marti has not pointed to any possible harm resulting from the bond monies remaining with this Court until a final determination in the *Akers v. White, et al.* matter. *Id.*

Marti cites Idaho Appellate Rule 13(b). Idaho Appellate Rule 13(b) uses permissive, not mandatory, language to allow the district court to rule on certain motions “...during the *pendency* of an appeal.” The appeal in this case is no longer pending. The appeal is complete. The case is remanded back to district court. However, subsection 15 of that rule allows the district court the discretion to take certain action

after the appeal is over. Subsection 15 reads in part: “If the district court stays execution or enforcement of a money judgment upon the posting of a cash deposit or supersedeas bond, the court may, upon motion or application, cause or direct any judgment lien filed to be released.” Subsection 15 continues: “If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal”. I.A.R. 13(b)(15).

Here, the case was remanded on the issue of location of the easement. 2009 Opinion No. 6, Substitute Opinion, (January 22, 2009), p. 12. This Court has since ordered, while defendants collectively carry the burden on the location of the easement, plaintiffs carry the burden of demonstrating any claimed damages. Order Regarding Burdens of Proof and Order Establishing Briefing Schedule on Easement Location, p. 2.

More importantly, for purposes of Marti’s Motion to Order Transfer or Release of Bond, the Idaho Supreme Court also “vacated” the district court’s “...award of damages...” 2009 Opinion No. 6, Substitute Opinion, (January 22, 2009), pp. 12. Again, the pertinent portion of I.A.R. 13(b)(15) reads: “If the appellate court has vacated any money judgment and remanded only for a determination of the amount of the judgment, the district court may continue or modify the amount of any cash deposit or supersedeas bond posted in connection with the appeal.” While the first portion of that sentence (If the appellate court has vacated any money judgment...) has occurred, the second portion of that sentence (...*and* remanded only for a determination of the amount of the judgment...), has not occurred. I.A.R. 13(b)(15). (emphasis added) The italicized “and” shows that both are necessary. Both: 1) vacation of any money judgment by the appellate court *and* 2) a remand by the appellate court only for a

determination of the amount of that money judgment, are necessary, in order for the district court to exercise its discretion to "...continue...the amount of any cash deposit...posted in connection with the appeal." I.A.R. 13(b)(15). The remand in this case was for more than the determination of the amount of the money judgment, because the money judgment was vacated, the matter was remanded for this Court to determine the location of the easement, and upon determining the location of the easement, the issue of damages must be revisited. In that redetermination it could be there are no money damages, less money damages than previously awarded or more money damages than previously awarded. But at the present time, the money damage award by this Court is *vacated*. That award ceases to exist. From that standpoint alone, logically, there is no reason for the appeal bond to remain. From the standpoint of construction of I.A.R. 13(b)(15), because the remand was for more than the determination of the amount of that money judgment, this court lacks the discretion to continue the cash deposit posted. Arguably, this Court has no discretion to do anything other than return the cash deposit.

Having found the cash appeal bond must be released, the next question is: "To whom?"

B. The Cash Appeal Bond is to be Interplead in Boundary County Case No. CV 2006 224.

Marti argues if the cash appeal bond is released, it should be released to her. Memorandum Supporting Motion to Transfer or Release Bond, pp. 4-5. Alternatively, Marti argues the cash appeal bond should be interplead into the Boundary County Case No. CV 2006 224. Memorandum Supporting Motion to Transfer or Release Bond, pp. 3-4.

Supporting her claim that the cash appeal bond should be released directly to

her, Marti argues the funds for that cash appeal bond are traceable to her.

Memorandum Supporting Motion to Transfer or Release Bond, pp. 4-5. By affidavit,

Marti states she has been divorced from Vernon, and

“...an interlocutory decree [Exhibit 1] awarded certain property to me, including property known as Twin Rivers Ranch, still subject to mortgages.

That land was quite-claimed by VERNON MORTENSEN to me as my sole and separate property. [Exhibit 2]

I then sold that property and instructed the escrow company at closing to pay the amount of \$317,248.97 to the Kootenai County Clerk for an appeal bond. [Exhibit 3].

Affidavit of Marti Mortensen Re: Bond, p. 2. The attached exhibits bear out Marti’s claims. Vernon fails to provide any proof to contradict those claims. However, Vernon claims the Boundary County divorce action remains pending due to a remand by District Judge Steve Verby on appeal from Magistrate Judge Justin Julian’s decision. Brief Opposing Releasing Mortensen Bond Money From the Court, pp. 1-8. While Vernon’s argument is unsupported by law, there are two difficulties that prevent this Court at this time from returning this cash appeal bond directly to Marti. First, there is *at least* uncertainty as to the *present* status of that Boundary County divorce action. No direct evidence as to the current status of that case has been presented to the Court, only a December 22, 2006 “Order Re: Stipulated Motion to Approve Community Property Settlement Agreement” has been presented. Affidavit of Marti Mortensen Re: Bond, p. 2, Exhibit 1. Second, Vernon’s Brief Opposing Releasing Mortensen Bond Money From the Court makes several claims regarding the genesis of those funds and the current status of those funds vis-a-vis the divorce. Brief Opposing Releasing Mortensen Bond Money From the Court, pp. 1-8. That brief is supported by Vernon’s Affidavit. Affidavit of Vernon J Mortensen Opposing Releasing Mortensen Bond Money From This Court. Thus, there may be a dispute of fact that is more appropriately resolved by the court

handling the divorce.

That being the finding of this Court, Marti then alternatively argues I.C. § 8-701 is applicable. That statute reads:

When it is admitted by the pleading, or shown upon examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in the court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

The bond amount at issue here is already deposited with the Court. The bond amount may well be a part of the subject of litigation in the Boundary County divorce proceeding between Marti and Vernon Mortensen. What is clear is the bond amount, at the present time, is no longer “due to another party”, in this case the Akers.

III. ORDER.

IT IS HEREBY ORDERED defendant Marti Mortensen’s Motion to Order Transfer or Release of Bond is GRANTED.

IT IS FURTHER ORDERED that defendant Marti Mortensen’s request to have those funds directly returned to her, is DENIED.

IT IS FURTHER ORDERED that defendant Marti Mortensen’s request to have those funds interplead into the Boundary County divorce action between her and defendant Vernon J. Mortensen, is GRANTED. This Court orders the cash appeal bond posted in the present case, Kootenai County Case No. CV 2002 222, be interplead into Boundary County Case No. CV 2006 224.

Entered this 8th day of January, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Party Pro Se</u>
Susan P. Weeks	208 664-1684	Vernon J. Mortensen
Dustin Deissner	509 326-6978	P. O. Box 330
Robert E. Covington	208 762-4546	Naples, ID 83847

Jeanne Clausen, Deputy Clerk