



set for hearing on remand on May 27, 2010.

On March 30, 2010, defendant Marti Mortensen filed a Motion for Partial Summary Judgment, asking the Court to rule she is not liable for any portion, jointly or severally, of any possible award of punitive damages awarded to plaintiffs against Vernon Mortensen. Marti Mortensen's Motion for Partial Summary Judgment is also set for oral argument on May 27, 2010.

On April 14, 2010, plaintiffs filed their Memorandum in Support of Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment and Notice of Hearing on the Motion to Strike. No Motion to Strike itself was ever filed. Oral argument on plaintiffs' Motion to Strike Marti Mortensen's Motion for Summary Judgment was held on April 28, 2010.

In the plaintiffs' Memorandum in Support of Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment, plaintiffs argue Marti Mortensen's Motion for Summary Judgment is improper because it is not in the scope of the remand. Memorandum in Support of Motion to Strike, p. 2, citing *Mountain view Landowners Co-op Ass'n, v. Cool*, 142 Idaho 861, 205 P.3d 1175 (2006) (*Mountainview II*). Plaintiffs argue the Supreme Court in *Mountainview II*, specifically held a court has the power on remand only to take actions it was directed to take or action subsidiary to those it was directed to take. *Id.*, p. 3. Because Marti Mortensen did not raise the issue of her liability for possible punitive damages in the first appeal, this Court is now without authority to address the matter. *Id.* Plaintiffs argue the question of her liability for punitive damages is not subsidiary to the only issue remaining on remand, the question of the location of the easement. *Id.*, p. 4. Plaintiffs assert:

Further, even though it touches on the issue of punitive damages, [the question of Marti Mortensen's liability for punitive damages] is unrelated to

whether these damages should be *reinstated* following determination of the location of the easement. It is not subsidiary to the question whether the revised location of the prescriptive easement on Parcel B changes the analysis of the *amount* of damages to which Plaintiff may be entitled.

*Id.*, p. 4.

As cited by plaintiffs, *Mountainview II* deals with the Supreme Court remanding for a determination of the scope of the term “swimming.” In *Mountainview I*, the Supreme Court had “signaled” that a strict definition of “swimming”, so as to prevent parents from using the beach area to lifeguard their children, was “illogical.” *Dr. James Cool v. Mountainview Landowners Co-op Ass’n*, 139 Idaho 770, 773, 86 P.3d 484, 487 (2004) (*Mountainview I*). The Cools appealed and in *Mountainview II*, the Supreme Court disagreed with the Cools’ contention that the Supreme Court had not intended to direct the District Court to find “lifeguarding” to be a permissible activity under the use agreement. *Moutnainview II*, 142 Idaho 861, 865, 136 P.3d 332, 336. The District Court had been instructed to define “swimming” in accordance with the Supreme Court’s opinion in *Mountainview I*, and the Court determined in *Mountainview II* that inclusion of “lifeguarding” in the scope of the use agreement was not error and was, in fact, mandated by its opinion in *Mountainview II*. 142 Idaho 861, 865, 136 P.3d 332, 336. In *Mountainview II*, the Cools also argued Association use of their beach to access the adjacent public beach did not involve “swimming” within the meaning of the use agreement; the Association replied this matter was being improperly raised for the first time by Cools on appeal. 142 Idaho 861, 865-66, 136 P.3d 332, 336-37. The Supreme Court then quoted from *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000): “[t]he general rule is that, on remand, a trial court has the authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court.” The Supreme Court held Association use of the Cool’s beach as a

pathway to a public beach did not present a subsidiary question to the definition of “swimming.” *Id.*

Here, the Supreme Court’s decision in *Akers II* included holding the District Court’s findings of fact regarding the scope and location of the prescriptive easement were not supported by substantial and competent evidence. *Akers v. Mortensen*, 147 Idaho 39, 47, 205 P.3d 1175, 1183 (2009) (*Akers II*). In this respect, the Supreme Court found: (1) no error by this Court as to its finding that the location of Appellant’s prescriptive easements across the Akers property was coextensive with the express easement in Government Lot 2; and (2) no error by this Court as to its finding that the scope of the prescriptive easement across the Akers’ property was limited to a width of 12.2 feet. 147 Idaho 39, 47-48, 205 P.3d 1175, 1183-84. However, the Supreme Court held it was error for this Court to find Appellant’s prescriptive easement turned immediately south upon entering Parcel B. *Id.*

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 Appellant’s prescriptive easement on Parcel B. This issue must be remanded to the district court for additional fact finding consistent with this opinion

147 Idaho 39, 47-48, 205 P.3d 1175, 1183-84.

[T]he question of whether and to what degree Appellant’s conduct constituted trespass on the Akers’ property is intertwined with the question of the scope and boundaries of Appellants’ easement rights. Because the district court must determine the location of appellants’ easement in Parcel B on remand, we vacate the district court’s award of damages below based on trespass.

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Without a determination of Appellant’s easement right, it is impossible to determine the scope of Appellants’ trespass. Therefore, we vacate the district court’s award of damages for negligent infliction of emotional distress and remand the issue for further determination after the district

court determined Appellant's easement rights. For the same reason, we vacate the district court's award of punitive damages in favor of Akers.

147 Idaho 39, 48, 20 P.3d 1175, 1184.

The first issue on remand, which this Court clearly has authority to take action upon, is the *location* of the prescriptive easement. The location of that easement is key in determining the "scope of Appellant's trespass", which is a subsidiary issue to the location of the easement, and an issue specifically called out by the Idaho Supreme Court to be addressed on remand by this Court. "[A]fter the district court determine[s] Appellant's easement rights", the district court must determine "damages for negligent infliction of emotional distress", if any. That is another issue subsidiary to the location of the prescriptive easement, but also, an issue specifically called out by the Idaho Supreme Court to be addressed on remand by this Court.

Since the original trial in this matter, Marti Mortensen and Vernon Mortensen have divorced in 2006. Response to Motion to Strike, p. 3. Accordingly, Marti Mortensen argues the issue as to whether punitive damages should apply to her "...was not ripe at the time of the original trial since the facts giving rise had not occurred yet." *Id.* As far as any trespass of plaintiffs' land was concerned, Marti Mortensen claims she had no involvement. Motion for Summary Judgment, p. 2. Marti Mortensen's summary judgment asks this Court to decide as a matter of law whether on remand she can be liable for any portion, jointly or severally, of any possible award of punitive damages awarded to plaintiffs against Vernon Mortensen. *Id.*, pp. 2-7.

As stated in *Hosey*, "[t]he general rule is that, on remand, a trial court has the authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." Subsidiary means: "subordinate; under

another's control." Black's Law Dictionary, 7<sup>th</sup> Ed., p. 1443 (1999). That definition focuses on subsidiary corporations. The more common meaning is: "of secondary importance." Webster's Ninth New Collegiate Dictionary, p. 1176 (1983).

Clearly, a subsidiary issue to the location of the easement on remand would be a determination of any award to attorney fees and costs to the prevailing party, depending on the scope and boundaries of the easement as determined on remand. Whether the issue raised in Marti Mortensen's Motion for Partial Summary Judgment is a subsidiary issue on remand, is not very clear.

This Court appreciates the arguments made by both plaintiffs and by defendant Marti Mortensen. This Court can see reasons why Marti Mortensen's liability (or not) as to punitive damages, may be a subsidiary issue, considering *Hosey* and *Mountainview II*, and why it may not be a subsidiary issue. What is clear is that the Idaho Supreme Court has shown in *Mountainview II*, that it is certainly willing to reverse a trial court were it to consider an issue on remand that in fact was not a subsidiary issue. The present case certainly needs no more appeals. This Court feels its discretion is best used in granting plaintiffs' Motion to Strike.

This is not to say that *after* the Court's decision on the location of the easement, and *after* determination of punitive damages, if any, Marti Mortensen cannot renew her motion for summary judgment or make some other dispositive motion to have this Court consider her argument that she should not be liable for punitive damages, if awarded. It is only fair to allow Marti Mortensen be heard on this legal argument, albeit at a later time.

This makes best use of the Court's resources. If there are no punitive damages awarded on remand, the Marti Mortensen's motion for summary judgment need not be

heard.

This decision is also fair to Marti Mortensen, as she is given her opportunity to defend against punitive damages from a factual standpoint (in the first instance during the issues to be decided on remand), and, if need be, if punitive damages are awarded, she has opportunity at a later point in time to defend against punitive damages from a legal standpoint. As a practical matter, were this Court to consider Marti Mortensen's Motion for Summary Judgment, and grant such at present, Marti Mortensen would still be involved in seeing this case through to the end of the litigation. Marti Mortensen's motion is a Motion for *Partial* Summary Judgment. Counsel for Marti Mortensen recognizes that community property of a spouse is subject to execution for intentional torts of the other spouse." Motion for Partial Summary Judgment, p. 2.

## II. CONCLUSION AND ORDER.

For the reasons set forth above, plaintiff's Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment will be granted.

IT IS HEREBY ORDERED plaintiff's Motion to Strike Marti Mortensen's Motion for [Partial] Summary Judgment is GRANTED. If need be, defendant Marti Mortensen will be allowed to raise the legal arguments contained in her Motion for Partial Summary Judgment at a later time.

Entered this 3<sup>rd</sup> day of May, 2010.

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John T. Mitchell, District Judge

### Certificate of Service

I certify that on the \_\_\_\_\_ day of May, 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> |
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Jeanne Clausen, Deputy Clerk