

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'clock ____M
CLERK OF DISTRICT COURT

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**

ORDER ON REMAND

I. PROCEDURAL BACKGROUND.

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 decision in this case. *Akers v. D. L. White Construction, Inc., et al.*, 142 Idaho 293, 127 P.3d 196.

In that opinion, the Idaho Supreme Court affirmed this Court’s findings as to the triangle area to the east. 127 P.3d at 202-03. The Idaho Supreme Court reversed this Court’s findings regarding an implied easement from prior use (127 P.3d at 204-05) and easement by prescription. 127 P.3d at 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. 127 P.3d at 207. This Court was also instructed to revisit the trespass and damages issue after determining easement rights. 127 P.3d at 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. Accordingly, the matter is now at issue.

II. ANALYSIS.

A. IMPLIED EASEMENT FROM PRIOR USE.

The Idaho Supreme Court held: “A *party seeking to establish* an implied easement from prior use ‘*must demonstrate* three essential elements: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.’” 127 P.3d at 204, *citing Davis v. Peacock*, 133 Idaho 637, 642, 991 P.2d 362, 367 (1999). (italics added). The italicized portion shows it is defendants’ burden to establish these three elements. The first element has been met. 127 P.3d at 204. The Idaho Supreme Court held the second element had been met. 127 P.3d at 205. This will be discussed later in this section. The Idaho Supreme Court stated: “The third element requires *the party claiming* an implied easement from prior use to show the easement to be ‘reasonably necessary’ for the proper enjoyment of the dominant estate.” 127 P.3d at 205. (italics added). The italicized portion again shows it is defendants’ burden to establish this element.

“Reasonable necessity” is to be determined not at present (as is the pertinent time period for an easement implied by necessity, and which was the time period this Court errantly focused upon in its initial decision), but at the time the dominant and servient estates were severed. 127 P.3d at 205. The dominant and servient estates were severed back in 1966. The Idaho Supreme Court held: “Because the district court made no findings of fact useful to the resolution of whether in 1966 use of the access road through Parcel B was ‘reasonably necessary’ to the enjoyment of the dominant estate, we remand the question to the district court for additional fact finding.” *Id.* The issue turns on whether the “back way” across defendants’ land (Parcel A as described by the Idaho Supreme Court) existed or did not exist back in 1966. Mr. Mortensen was the person who brought up this issue of the “back way” in his testimony. It is defendants’ burden to prove that this easement across Parcel B (plaintiffs’ land) was “reasonably necessary”. To establish this, defendants must prove this “back way” did not exist back in 1966, or, if it did exist, that the road across Parcel B was still necessary for the proper enjoyment of the dominant estate. Defendants have failed in their burden of proof in both instances.

As noted by this Court: “It is defendants who have the burden of proving easement by necessity, and that must be by clear and convincing proof. *B. J. Development, Inc., v. Parsons*, 126 Idaho 504, 507, 887 P.2d 49 (Ct.App. 1994). January 2, 2003, Findings of Fact, Conclusions of Law, and Order, p. 11, Conclusion of Law ¶7.

First, defendants have failed to prove by a preponderance of the evidence that this “back way” did not exist back in 1966. There is substantial evidence that this “back way” did exist in 1966. There was the testimony of William E. Reynolds, who owned 580 acres south of plaintiffs’ land and east of defendants’ land. Tr. Vol. I, p. 53, L. 17 – p. 55 L. 10. Except for three years in the military, Mr. Reynolds has lived on this land since 1945. Tr. Vol. I, p. 55, Ll. 11-17. Mr. Reynolds did not attach a year to when he first recalled the road into and across Parcel A, but Mr. Reynolds

testified: “It was an old road that come in there, and, uh, Mortensen improved the back end of it so it’s a good, wide road, almost level ground into there from...” Tr. Vol. I, p. 70, Ll. 22-25. Mr.

Reynolds testified you could see the road from the back of his property where he had been living for almost 50 years at the time of trial. Tr. Vol. I, p. 71, Ll. 1-7. While Mr. Reynolds did not testify *how* old the road was, it was old enough Mr. Reynolds testified there was a deserted trailer house and an occupied trailer house that is accessed by this old road. Tr. Vol. I, p. 77, Ll. 4-18. The old road goes to defendants’ land and crossed state land, and his knowledge of the state land was as follows:

How do I know? It’s common knowledge since I was six years old so – I’ve had cattle on it. Been all over it. There’s stickers there. The map says it’s state land, so do some of the signs.

Tr. Vol. I, p. 173, L. 25 – p. 174, L. 6. Mr. Reynolds referred to it as a county road called Idaho Road, and that it is 16-18 feet wide. Tr. Vol. I, p. 174, Ll. 6-16. Defense counsel asked Mr. Reynolds if he had an easement to travel that road, to which he responded: “Nobody has ever needed one. I knew the people years ago that lived there, all of them, and you didn’t need anything.” Tr. Vol. I, p. 176, Ll. 13-16. This shows that the back road was in existence for a very long time... “years ago”. The testimony of defendants’ witness William A. Millsap did nothing to discredit Mr. Reynolds’ testimony. William A. Millsap was never asked about the existence of any “back road”, but in response to defense counsel’s questions Mr. Millsap testified as follows:

Q. Throughout your dad’s ownership of the property was there any other access other than that subject access road depicted in Defendants’ Exhibit 44?

A. Uh, no, not that we ever used.

Tr. Vol. I, p. 869, Ll. 13-16. Defendants argue on remand that this portion of Mr. Millsap’s testimony establishes he testified “there was no other access to the other parcels of property.” (Defendants’ Mortensens’) Brief on Remand, p. 3. [Defendants Whites have also filed a “Reply Brief of Defendants White”, but unless noted, all references to “(Defendants’) Brief on Remand”

are to Mortensens' Brief on Remand. Also, since Whites in their brief adopted Mortensens' arguments, unless noted "defendants" refers to all defendants, even though the cited claim is made in Mortensens' brief]. To the contrary, this Court finds this dialogue implies another road that they did *not* use. Since it is defendants' burden to establish this road does not exist, one can only guess there was a deliberate reason for defense counsel to not cover this issue in more detail with their witness, Mr. Millsap. Similarly, defendants argue on remand that "Richard Peplinski testified that the access road was the only means of accessing the 160 acres when his father purchased the property from Millsap in 1967. (Defendants') Brief on Remand, p. 3. Peplinski's testimony must be viewed in context of the question posed by defense counsel:

Q. Other than this access road that was there when you purchased – when your dad purchased the property, was there any other road *you used* to access the 160 acres?

A. No.

Tr. Vol. I, p. 785, Ll. 2-6. Again, since it is defendants' burden to establish this road did not exist in 1966, and to do so by clear and convincing evidence, one can only assume that the question was couched the way it was for a specific reason. In any event, doing so causes defendants to have failed in their burden of proof.

Second, defendants have not met their burden of proving that this "back way" would not have allowed the owner of the property presently owned by the defendants, to have "proper enjoyment" of his property back in 1966, such that an implied easement from prior use would be reasonably necessary across plaintiffs' land, Parcel B. In 1966, the property was being used for agricultural purposes. This "back way" was sufficient for equipment for those agricultural purposes. Thus, as directed by the Idaho Supreme Court (127 P.3d at 205), this Court finds that defendants have failed to prove that back in 1966, the access road through Parcel B was "reasonably necessary."

Mr. Mortensen testified this "back way" existed when he began buying his property back in

1994. January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 12, Findings of Fact ¶ 31. Mortensen's 260 acres bordered or was near a county road to the south from which Mortenson accessed the 260-acre parcel on a "back road." *Id.* Mortensen testified he has an easement from a county road into this 260 acres. *Id.* On direct examination, Mr. Mortensen testified he had a prescriptive easement over the Forest Service property, having been referred by plaintiffs' counsel to the Deposition of Vernon J. Mortensen (taken June 26, 2002), p. 100, L. 14 – p. 110, L. 10. *Id.*

This "back way" is corroborated historically. Exhibit Y shows back roads into the Section 19 and Section 24 area as far back as 1901. Exhibit I shows a road going into a house at the southern portion of Section 19 and near the area of the southern portion of Section 24.

As found by the Court in 2003, Mortensen testified that he owned a large tract that pretty much came out to the county road (the "back way"), but that he doesn't own it now, and that he had a prescriptive easement over the Forest Service property (between his property he used to own and the county road). January 2, 2003, Findings of Fact, Conclusions of Law and Order, pp. 22-23, Conclusion of Law, ¶ 7. The fact that Mortensen has since sold some of this property does not help him, as he cannot create the necessity upon which he relies. *Cordwell v. Smith*, 105 Idaho 71, 80, 665 P.2d 1081, 1090 (Ct.App. 1983).

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['] 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 Millsaps 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, Peplinkis' (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.

A review of all the evidence submitted to the Court shows that defendants have failed in their burden of proving "reasonable necessity" for an easement across Akers' land existed back in 1966. Defendants have failed to prove such by clear and convincing proof as is required. *B. J. Development, Inc., v. Parsons*, 126 Idaho 504, 507, 887 P.2d 49 (Ct.App. 1994).

B. EASEMENT BY PRESCRIPTION.

The Idaho Supreme Court charged the district court to determine whether the use of the access road by the Peplinskis, the defendants' predecessors in interest, was adverse or only with the permission of the Akers' predecessors in interest, the Wilhelms and Turks, the Wignens, and the Bakers. 127 P.3d at 206. The Idaho Supreme Court clearly placed the burden of that proof upon the Akers: "It is the Akers' burden, as the owners of the servient tenement, to overcome that presumption [of adverse use]." *Id.* The relevant time period was from 1966 to 1980, the latter date being when the Akers acquired their property. *Id.* None of those predecessors (Wilhelms, Turks, Wignens or Bakers) testified. Mere inaction and passive acquiescence is not a sufficient basis for proving that the use of the claimed right was with the permission of the owner of the servient tenement." *Id., citing West v. Smith*, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973). That would seem to be the best the Akers can do, and such is not sufficient. Because Akers have failed on their burden of proof, defendants Whites and Mortensens have an easement by prescription.

The Akers concede (to an extent) the issue of an easement by prescription. “Plaintiffs are conceding a short, prescriptive easement 12.2 feet wide west of Government Lot 2 on Parcel ‘B’.” Plaintiffs’ Brief on Remand, p. 2. This is because the Akers acknowledge that they did not and cannot put on proof through their predecessors. *Id.* p. 5. As discussed below, that concession is certainly not controlling.

This Court has already found that the location of that road back in the period from about 1966 to 1980, was located further to the east than where defendants have excavated their land and the Akers’ land. This is perhaps best demonstrated by viewing Exhibit 46 and Exhibit 49, which shows the road traveled more immediately south before defendants intervened. This Court viewed the area, and finds such excavation to have occurred further to the west of where the road immediately went into what would be the exact northeast corner of what is now defendants’ land. There is also corresponding fill dumped by defendants over to the north of the road constructed on Akers’ Parcel B. Exhibit 55. As stated above, this Court made the following findings on January 2, 2003:

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[’] land west of the western boundary of Government Lot 2. Thus, in 1966, it is unclear whether one could access the Millsaps’ [sic] 160 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.

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 of Fact ¶ 26.

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. The extension to the west was done with Akers' permission, and thus, is not part of the prescriptive easement. The defendants damaged Akers' land and excavated their own land in the area where Peplinski had his permissive use from Akers, and possibly even further to the west than that permissive use, as opposed to the area in the immediate northeast corner of defendants' property, immediately to the south of the intersection between Akers' Government Lot 2 and Parcel B.

C. WIDTH OF THE EASEMENT.

As mentioned above, 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 easement implied from prior use, leaving that issue to be resolved by this Court on remand. 127 P.3d at 207. January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 19, Conclusion of Law ¶ 1. Without properly citing, defendants correctly note that the Idaho Supreme Court stated that any concurrently existing easement may have different boundaries than the express easement. (Defendants') Brief on Remand, p. 6. That portion of the Idaho Supreme Court's decision is found at 127 P.3d at 207, n. 4.

The issue of the width of the easement has been examined on more than one occasion. First, the issue was tried to the Court, and findings were initially made on January 2, 2003. January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 19, Conclusion of Law ¶ 1. Defendants

Mortensens then asked the Court to reconsider the issue in their motion filed November 5, 2003. On April 1, 2004, this Court issued its “Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order”, and ruled against defendants Mortensens on their motion to reconsider, explaining further why a view of the premises following its January 2, 2003, decision only bolstered this Court’s decision filed January 2, 2003, and pointing out that an express grant which is indefinite as to width and location “must impose no greater burden than is necessary.

Coulsen v. Aberdeen-Springfield Canal Co., 47 Idaho 619, 628, 277 P. 542, 545 (1929).

Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order, p. 4.

Defendants now argue the easement by prescription should be 25 feet wide. (Defendants’) Brief on Remand, pp. 5-9. Defendants argue W. L. Millsap’s testimony and Richard Peplinski’s testimony at trial supports this conclusion. *Id.*, pp. 6-7. However, both Millsap and Peplinski were not as credible as William Reynolds. Millsap’s trial testimony was contradicted by his affidavit, as noted by this Court in its 2003 findings of fact.

19. In 1966 the “roadway right of way” referenced in the reservation language contained in Plaintiffs’ Exhibit 3, 175, Warranty Deed between W. L. Millsaps [sic] and Akers had the following characteristics:

c) The easement was approximately 12’-16’ in width.

20. On April 13, 1984, in an affidavit admitted into evidence, W. L. Millsaps [sic] explained that in 1966 when they sold to Bakers, his intent was to reserve an access easement over the roadway right of way as the same then existed for ingress and egress for “farming equipment” which consisted of “trucks”, and “various types of field equipment such as combines.” Defendants’ Exhibit D5.

* * *

As to the qualities of this “road”, W. L. Millsap[’]s affidavit is consistent with the testimony of William Reynolds, who testified in 1966 the “road” consisted of a two tire track trail, used by Millsaps [sic] about six times a year for haying and some logging, never used in the winter, impassable in the spring except with a dozer. Reynolds testified Peplinskis’ use of the “road” when they owned it was the same. That “road” connected to his driveway at approximately a 90 degree angle. William Reynolds owns 580 acres directly south of plaintiffs’ land, and who, except for three years while in the service, lived there since 1945.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, pp. 6-7, Findings of Fact ¶¶ 19-20.

Defendants argue that since the traveled portion of the roadway was found by the Court to be 12.2 feet, not including ditches and shoulders, the easement should be 25 feet including ditches and shoulders. (Defendants') Brief on Remand, pp. 7-8. However, the Court has taken a view of the property back at the time of trial. The view and the exhibits show that not all of the length of the roadway has ditches on either or both sides, nor did the view show any consistent "shoulders" to speak of. Exhibit 304, 305. Where this easement traversed from Akers' land to Parcel B, and turned south toward defendants' land, is on a hilltop. Thus, historically, there was no need for drainage ditches or shoulders to continue this two-track historical road on to defendants' property.

Defendants have dug down the road bed significantly at this point to attempt to reduce the overall gradient of the road, but this was done wrongfully in recent times by defendants. What existed prior to defendants' wrongdoings is what is relevant. Additionally, historically, where this easement traversed from Akers' land, to Parcel B and turned south on to defendants' land, the roadway "disappeared". This is evident from a variety of exhibits: Exhibit E, H, H1, I, I1, J1, K, K1, L, W, D42, D43, D44. In more recent times the roadway is wider and more clearly defined, and travels in a more westerly direction across Akers' Parcel B (best shown by comparing Exhibit 46 and 49). However, that change was at the hands of defendants acting wrongfully. Defendants' argument that the easement should be 25 feet wide is simply unsupported by the record and a view of the premises.

As noted by plaintiffs:

It is the long established rule in this jurisdiction [Idaho] that any right gained by prescription is confined to the right as exercised during the prescriptive period. "It is limited by the purpose for which it is acquired and the use to which it is put."

Plaintiffs' Brief on Remand, p. 5, *citing 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). “[P]rescription acts as a penalty against a landowner and thus the rights obtained by prescription should be closely scrutinized and limited by the courts. *Id.*, citing *Gibbens v. Weisshaupt*, 98 Idaho 633, 570 P.2d 870 (1977). The character and extent of a prescriptive easement generally is fixed and determined by the use under which it was acquired. No different or materially greater use can be made of such an easement, except by further adverse use for the prescriptive period. 25 Am.Jur.2d Easements and Licenses § 81.

For the above legal and factual reasons, this Court finds the easement by prescription to be 12.2 feet wide through its duration, across the southern boundary of Akers’ land (Government Lot 2) as it heads west and makes its way into Parcel B and turns south on to defendants’ land. Thus, there is no expansion of the express easement across the southern boundary of Akers’ land in Government Lot 2, and the 12.2 foot wide easement continues by prescription (not by express easement), into Parcel B and turns south on to defendants’ land. Once defendants purchased their parcels, any expansion of that easement in width was done initially with permission of the Akers, and then at their protest, thus, this litigation. Prior to defendants purchasing their parcels, there is no evidence to show that there was any prescriptive use that was wider than the historical use of the express easement already in existence.

D. DAMAGES.

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 Improvement 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.

E. ATTORNEY FEES.

This Court agrees with Akers' arguments regarding attorney fees from a factual standpoint. Plaintiffs' Brief on Remand, pp. 18-22. This Court also agrees with Akers' statement that from a legal standpoint, defendants did not preserve the apportionment of attorney fees issue on appeal. Plaintiffs' Reply Brief on Remand, pp. 12-13. The Idaho Supreme Court has spoken on this issue:

The Appellants contest this award of attorney fees, arguing the district court erred in failing to apportion fees. The Appellants argue the district court should at most have awarded attorney fees under I.C. § 6-202 for the Akers' trespass claims, not its other claims, such as for quiet title. In response, the Akers contend the Appellants failed to raise this issue below. The Appellants' reply briefs do not contest the Akers' assertion. This Court will not consider issues raised for the first time on appeal. *McCray v. Rosenkrance*, 135 Idaho 509, 516, 20 P.3d 693, 700 (2001). Accordingly, we will not consider the issue of apportionment of attorney fees under I.C. § 6-202 as it was not raised below.

127 P.3d at 207-08. However, that does not end the analysis, as the Idaho Supreme Court also vacated the district court's award of attorney fees and costs to the Akers "[f]or the same reasons that we vacate the district court's damage awards". 127 P.3d at 208. This Court has already engaged in a prevailing party analysis. January 2, 2003, Findings of Fact, Conclusions of Law and Order, p, 27, Conclusion of Law ¶ 28. The only item that has changed since the appeal is defendants have prevailed on their claim of an easement by prescription. But even that easement is not located where defendants have damaged Akers' land in Parcel B. Historically that easement was located by prior use much closer to Reynold's property. Defendants have gained no more width to the express easement. Defendants have failed to prevail on any of their counterclaims, indeed failed to put on any proof of their counterclaims. Defendants have failed to prevail on their defense of trespass and trespass damages. Defendants have failed to prevail on their claim of implied easement by necessity. The express easement was not contested by Akers, so defendants cannot be heard to claim that they prevailed on that claim.

Defendants claim that: "As stated by the Idaho Supreme Court, defendants are the prevailing party in this litigation and in the subsequent appeal, thus attorney's fees are not appropriate to be awarded to Akers." (Defendants') Brief on Remand, p. 41. This Court has read every word of the Idaho Supreme Court opinion, and nowhere is such language found. The Idaho Supreme Court never stated that Akers were not the prevailing party in this litigation. The Idaho Supreme Court noted the Akers did not prevail on the appeal, and thus declined appropriately to

award Akers their attorney fees on appeal. The Idaho Supreme Court did not award defendants attorney fees on appeal. The Idaho Supreme Court held:

The Akers are not the prevailing party on appeal, and therefore no award of attorney fees under I.C. § 12-121 is warranted.

Idaho Code § 6-202 does not expressly provide for attorney fees on appeal, but the Akers argue that where a lower court's award of statutory attorney fees is upheld on appeal, attorney fees on appeal should be awarded as well. We decline to award attorney fees on appeal to the Akers because in this instance the Appellants have raised valid issues necessitating remand to the district court.

127 P.3d at 208. This Court finds that, on remand, Akers are entitled to their award of attorney fees under Idaho Code § 6-202 for their trespass claim.

As to the issue of apportionment of attorney fees between the Akers' claims of trespass and Akers' other claims and defenses, this Court finds that Akers are entitled to all their attorney fees in the underlying litigation, and upon remand, but not on appeal. The reason for this is as follows:

First of all, the reason this lawsuit was brought was due to the defendants' conduct that resulted in trespass damages. Had this been a lawsuit brought by either Akers or the defendants to simply quiet title to land or determine easement rights, we would have an entirely different scenario. But it is the reprehensible conduct of defendants, previously detailed by this Court, and reinstated upon remand, that resulted in this lawsuit. It is the continued reprehensible conduct of the defendants that occurred after the filing of the lawsuit that perpetuated this litigation. The express easement was never denied by the Akers. The implied easements that were tried, Akers prevailed on implied easement by necessity and failed to prevail upon easement by prescription. But as to the easement by prescription theory, defendants failed to prove the easement by prescription was located where they did damage to Akers' Parcel B. This whole litigation was cause by defendants' conduct. Defendants knew they had bought a dispute that would need judicial determination to have any right other than this "back way". It has been

proven to this Court beyond any doubt that defendants knew they were buying property with questionable access. The fact they knew is proven by: 1) the price they paid; 2) statements defendants made; 3) defendants' requests to Reynolds to have him sell them an easement across his land; 4) inquiries made by defendants' title company to Mrs. Akers, and 5) by Mortensen's prior similar conduct as testified by Scott Rasor. These are the same facts that prove that defendants' trespass was intentional rather than simply negligent, and dispels the notion that they "believed they owned" this property, as claimed in (Defendants') Brief on Remand, p. 10. *Bumgarner v. Bumgarner*, 124 Idaho 629, 639, 862 P.2d 321, 331 (Ct.App. 1993). Rather than get a judicial determination that they might have something more than what they bought (better access), defendants chose to act like bullies. That conduct justified imposition of punitive damages.

Bumgarner, 124 Idaho at 644, 862 P.2d at 336, requires the Court to consider the claims upon which the parties prevailed and apportion attorney fees accordingly. The Court of Appeals noted that legal work on other claims can "overlap" the claims for trespass, and the party still be entitled to fees under the trespass statute, Idaho Code § 6-202. 124 Idaho at 644-45, 862 P.2d at 336-37. This Court finds the work Akers' attorney performed on issues such as emotional distress and implied easements were so intertwined with the trespass claims (ie., overlapping) as to be incapable of rational separation.

III. ORDER.

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.

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 Remittitur will be determined at a later hearing.

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

Entered this 6th day of October, 2006.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2006, 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
208 667-1684

Robert Covington
208 762-4546

Terri Yost
208 331-1529

Deputy Clerk