

11-13-2012

# Campbell v. Kvamme Appellant's Reply Brief Dckt. 39650

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Campbell v. Kvamme Appellant's Reply Brief Dckt. 39650" (2012). *Idaho Supreme Court Records & Briefs*. 1466.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/1466](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1466)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law.

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

V. LEO CAMPBELL and KATHLEEN  
CAMPBELL, husband and wife,

Plaintiffs/Appellant/Cross-Respondents,

vs.

JAMES C. KVAMME and DEBRA KVAMME,  
husband and wife; and JOHN DOES I-X,

Defendants/Respondents/Cross-Appellants.

Docket # 39650-2012

Bonneville County Case No.  
CV-2010-3879

---

**APPELLANTS' REPLY BRIEF**

---

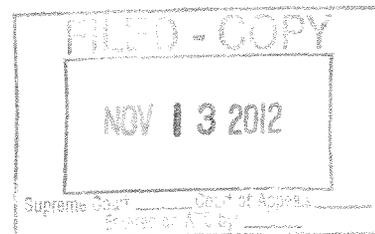
Appeal from the District Court of the Seventh Judicial District  
State of Idaho In and For the County of Bonneville

Honorable Jon J. Shindurling, District Court Judge, Presiding

---

*Attorney for Appellants*  
Kipp L. Manwaring  
Manwaring Law Office, P.A.  
381 Shoup Ave., Ste. 210  
Idaho Falls, Idaho 83402

*Attorney for Respondents*  
Justin R. Seamons  
Attorney at Law  
414 Shoup Avenue  
Idaho Falls, Idaho 83402



**IN THE SUPREME COURT OF THE STATE OF IDAHO**

V. LEO CAMPBELL and KATHLEEN  
CAMPBELL, husband and wife,

Plaintiffs/Appellant/Cross-Respondents,

vs.

JAMES C. KVAMME and DEBRA KVAMME,  
husband and wife; and JOHN DOES I-X,

Defendants/Respondents/Cross-Appellants.

Docket # 39650-2012

Bonneville County Case No.  
CV-2010-3879

---

**APPELLANTS' REPLY BRIEF**

---

Appeal from the District Court of the Seventh Judicial District  
State of Idaho In and For the County of Bonneville

Honorable Jon J. Shindurling, District Court Judge, Presiding

---

*Attorney for Appellants*  
Kipp L. Manwaring  
Manwaring Law Office, P.A.  
381 Shoup Ave., Ste. 210  
Idaho Falls, Idaho 83402

*Attorney for Respondents*  
Justin R. Seamons  
Attorney at Law  
414 Shoup Avenue  
Idaho Falls, Idaho 83402

**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| ARGUMENT .....   | 1           |
| A. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING<br>THE CAMPBELLS’ MOTION FOR RECONSIDERATION..... | 1           |
| B. “RIGHT RESULT – WRONG THEORY” RULE DOES NOT APPLY.....  | 3           |
| Adverse Possession.....  | 5           |
| Boundary by Agreement.....   | 6           |
| C. THE KVAMMES’ REQUEST FOR ATTORNEY FEES<br>ON APPEAL SHOULD BE DENIED.....                             | 7           |
| CONCLUSION .....   | 8           |
| CERTIFICATE OF MAILING.....  | 10          |

**TABLE OF CASES AND AUTHORITIES**

**Cases:**

|   |      |
|---|------|
| <i>Kepler-Fleenor v. Fremont County</i> , 268 P.3d 1159, 152 Idaho 207 (2012).....                      | 1    |
| <i>PHH Mortg. Services Corp. v. Perreira</i> , 146 Idaho 631, 200 P.3d 1180 (2009) .....                | 1    |
| <i>Sammis v. Magnetek, Inc.</i> , 130 Idaho 342, 941 P.2d 314 (1997). .....                             | 2    |
| <i>Anderson &amp; Nafziger v. G. T. Newcomb, Inc.</i> , 100 Idaho 175, 595 P.2d 709 (1979)              | 3    |
| <i>Agrodyne, Inc. v. Beard</i> , 114 Idaho 342, 348, 757 P.2d 205, 211 (Ct. App. 1988)...               | 4    |
| <i>Smith v. State</i> , 146 Idaho 822, 834, 203 P.3d 1221, 1233 (2009).....                             | 5    |
| <i>Eimco Corp. v. Sims</i> , 100 Idaho 390, 598 P.2d 538 (1979).....                                    | 6    |
| <i>Kelso v. Lance</i> , 134 Idaho 373, 3 P.3d 51 (2000) .....   | 6, 7 |
| <i>Giltner, Inc. v. Idaho Dept. of Commerce and Labor</i> , 145 Idaho 415,<br>179 P.3d 1071 (2008)..... | 7    |
| <i>Caldwell v. Cometto</i> , 151 Idaho 34, 41, 253 P.3d 708 (2011).....                                 | 7    |
| <i>Lane Ranch P'ship v. City of Sun Valley</i> , 145 Idaho 87, 175 P.3d 776 (2007).....                 | 8    |
| <i>BHA Investments, Inc. v. State</i> , 138 Idaho 348, 355, 63 P.3d 474, 481 (2003).....                | 8    |

**Statutes:**

|                          |      |
|--------------------------|------|
| Idaho Code § 12-121..... | 7, 8 |
|--------------------------|------|

**Rules:**

|                            |      |
|----------------------------|------|
| I.R.C.P. 11(a)(2)(B) ..... | 1,   |
| I.R.C.P. 52(b).....        | 2    |
| I.R.C.P. 59(e) .....       | 2    |
| I.R.C.P. 60(b)(2) .....    | 1, 2 |

## ARGUMENT

A. The district court abused its discretion in denying the Campbells' motion for reconsideration.

Decidedly producing vast amounts of argument in their Respondent's Brief, the Kvammes fail to address directly the issue raised on appeal. Shortened to its pertinent point, the Kvammes' position is stated in paragraph 3 on page 36 of their brief, "They [Rules 11(a)(2)(B) and 60(b)(2)] are ***both*** subject to the same standard-that is, ***both*** I.R.C.P. 11(a)(2)(B) ***and*** I.R.C.P. 60(b)(2) are discretionary, not mandatory." (Emphasis original.)

Thus, while accurately identifying that both motions are addressed to the discretion of the district court, the Kvammes overlook the Campbells' argument on the crucial and differing standards the district court must apply when considering motions under those separate rules.

Unquestionably, the Campbells timely filed a motion for reconsideration under Rule 11(a)(2)(B).

The standard applicable to the exercise of the district court's discretion on a motion for reconsideration is as follows. When faced with a motion for reconsideration, the district court must consider additional information in the form of admissible testimony in an affidavit; the district court does not have discretion to ignore such positive testimony. *Kepler-Fleenor v. Fremont County*, 268 P.3d 1159, 152 Idaho 207 (2012); *PHH Mortg. Services Corp. v. Perreira*, 146 Idaho 631, 635-636, 200 P.3d 1180, 1184-1185 (2009).

“Whether or not the district court erred in refusing to consider the new evidence depends upon what the Perreiras wanted the district court to reconsider. The trial court *must consider new evidence that bears on the correctness of an interlocutory order if requested to do so by a timely motion under Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure.*”

*PHH Mortg. Services Corp. v. Perreira*, 146 Idaho at 635, 200 P.3d at 1184 (2009)(emphasis added).

Once the court actually considers any new evidence on a motion for reconsideration, it then applies its discretion to determine whether that evidence would alter or change the judgment entered. If so, the court should exercise its discretion in granting relief. If not, the court may exercise its discretion denying relief.

Based upon the district court’s colloquy at the time of hearing the Campbells’ motion for reconsideration as to its obligation to consider the additional evidence, together with the language in its subsequent order denying the Campbells’ motion, it is clear the court applied the wrong standard. Application of the wrong standard constitutes an abuse of discretion. *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997).

Summary judgment was granted to the Kvammes due to the lack of foundation for a record of survey. The affidavit of Kevin Thompson provided the necessary foundation for admissibility of the record of survey and added further factual information pertinent to the issues on summary judgment. Such evidence would unquestionably alter or change the summary judgment entered in favor of the Kvammes.

Furthermore, the district court in its memorandum decision and order, determined that the affidavit of Thompson would not be considered because “the evidence is not new...” and it “should have been submitted months ago.” (*Clerk’s Record*, Vol. IV, p. 773). Again, that is

not the standard a district court applies to a motion for reconsideration. That is the type of standard applied to the “newly discovered evidence” provision of I.R.C.P. 60(b)(2).

In *PHH v. Perreira*, the Idaho Supreme Court noted the difference in stating, “the trial court cannot consider new evidence when asked to reconsider a final judgment pursuant to a motion to alter or amend the judgment under Rule 59(e), *id.*, or pursuant to a motion to amend findings of fact or conclusions of law under Rule 52(b).” *Id.*

The district court determined the affidavit of Thompson was not “new” in the sense of newly discovered. A fact emphasized by the court where it stated the evidence should have been produced earlier. In short, the new evidence submitted by the Campbells as part of their motion for reconsideration was simply not considered by the district court.

Failure to apply the correct legal standard constitutes an abuse of discretion. The district court erred in denying the Campbells’ motion for reconsideration.

B. “Right result, wrong theory” rule does not apply.

On cross-appeal, the Kvammes contend the district court made the correct decision to grant summary judgment in their favor albeit on a wrong theory. However, the record on appeal discloses the unmistakable fact that the district court did not make any factual determinations concerning the competing theories; rather, the court simply reached a conclusion that the Campbells had failed to provide the foundation necessary to render a record of survey admissible for purposes of summary judgment. Consequently, there is

nothing in the record on appeal giving the appellate court the required factual determinations to allow it to act as a trial court and decide whether the Kvammes' theories can be supported.

This Court has generally held that where an order of a lower court is correct but is based upon an erroneous theory, the order will be affirmed upon the correct theory. We therefore review the theories advanced by seller in order to determine if they provide a basis for upholding the trial court's granting of partial summary judgment. *The trial court, however, made no finding on whether the order form was intended as a fully integrated agreement. The trial court is the appropriate forum for such a determination and as such the trial court should be given the opportunity on remand to make such a determination.*

*Anderson & Nafziger v. G. T. Newcomb, Inc.*, 100 Idaho 175, 180, 595 P.2d 709, 714 (1979)(emphasis added).

The district court's judgment arose from cross-motions for summary judgment. The Campbells filed their motion supported by affidavit and deposition testimony. Then, the Kvammes presented affidavits challenging the Campbells' motion and on their own moved for summary judgment on their claims. The record before the district court contained volumes of affidavits, deposition testimony, and counter affidavits all containing various disputes of fact. Viewed dispassionately, the evidence presented on summary judgment shows genuine issues of fact pertaining to the fence line in question and its history of use. The district court made no determinations of those disputed facts. Rather, the district court simply did not address the substance of either party's motion when it ruled that the record of survey lacked foundation.

Moreover, the doctrine of "right result-wrong theory" does not apply to the issue of abuse of discretion as raised by the Campbells.

The petitioners' alternative argument, that we should uphold the court's order under Rule 41(b), misapplies the "right result—wrong theory" doctrine. This

doctrine does not apply to issues of discretion. It applies only to issues where an alternative rule of law can be applied to a given body of facts, yielding the same legally correct answer. Where an issue is one of discretion, there is no single, legally “correct” answer. Standards of Appellate Review § 3.4, IDAHO APPELLATE HANDBOOK (Idaho Law Foundation, 1985). The proper appellate response, when an exercise of discretion is tainted by legal error, is not to usurp such discretion ourselves but to set aside the lower court’s ruling and to remand the case. *Id.*

*Agrodyne, Inc. v. Beard*, 114 Idaho 342, 348, 757 P.2d 205, 211 (Ct. App. 1988).

The Campbells appealed from the denial of their motion for reconsideration and the court’s preceding summary judgment. As in *Agrodyne*, the issue on appeal in this matter is whether the district abused its discretion. Consequently, the rule of right result-wrong theory has no application.

### ***Adverse Possession***

The strength of the Kvammes’ position on their claim for adverse possession rests entirely on the as yet unmade judicial determination of whether Thompson’s record of survey was performed in accordance with survey standards. The Kvammes have not presented any other survey to the district court on which they base their claims. In short, the Kvammes contend that they have paid taxes on all land extending north of the disputed fence line. Their contention is grounded upon their theory that the north half of the section is, in fact, the fence line. That contention is refuted by Thompson’s survey and his affidavit.

As shown by the transcript of the hearing on the cross-motions for summary judgment, the Kvammes hotly challenged the district court’s observation from the bench that the Kvammes’ theory about a “nominal section” measurement did not square with the court’s

understanding of standard survey practice of identifying corners and measuring the quarter sections. (*Transcript*, pages 38-54).

If Thompson's record of survey is judicially determined to comply with survey standards, the Campbells and not the Kvammes would be entitled to summary judgment on the claim for adverse possession. If there are genuine issues of material fact concerning Thompson's record of survey, then summary judgment must be denied and the action proceed to trial. Finally, the evidence shows the Kvammes rented the Campbells' property for a period of time prior to the filing of this action. As renters, the Kvammes recognized the Campbells' title and accepted that title without dispute.

Consequently, the record on appeal does not contain sufficient evidence to permit the appellate court to make the necessary factual determinations needed to sustain the Kvammes' theories. See *Smith v. State*, 146 Idaho 822, 834, 203 P.3d 1221, 1233 (2009)(the record on appeal is sufficient to determine whether claims have merit); *Eimco Corp. v. Sims*, 100 Idaho 390, 598 P.2d 538 (1979).

As noted in the Appellants' Brief, the record of survey performed by Kevin Thompson is the only record of survey before the district court. If that record of survey is admissible through the foundation of Kevin Thompson, then the arguments raised by the Kvammes based on their theory of measurement of a "nominal section" all fail.

To that end, it bears restating the applicable rule. If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a motion for summary judgment must be denied. *Kelso v. Lance*, 134 Idaho 373, 3 P.3d 51 (2000).

***Boundary by Agreement***

For similar reasons as set forth above, the Kvammes' claim of boundary by agreement likewise cannot be sustained on appeal.

First, the district court did not examine the facts pertaining to the claim of boundary by agreement to determine whether there were genuine issues of material fact. On appeal, the appellate court has insufficient record before it to demonstrate conclusively that the Kvammes have sustained all elements of their claim for boundary by agreement.

Second, the affidavits of Margy Spradling and Jo Le Campbell filed in support of the Campbells' motion for summary judgment are contested by affidavits filed in support of the Kvammes' motion. Such contests of facts prevent any court from granting summary judgment.

Third, the evidence before the district court on summary judgment when viewed most favorably for the Campbells shows the Campbells and their predecessors in interest knew the fence line was fifteen feet south of what they knew to be the deeded boundary and they never agreed that the fence line would be treated as the boundary.

Again, if reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a motion for summary judgment must be denied. *Kelso v. Lance*, 134 Idaho 373, 3 P.3d 51 (2000).

On appeal, the Kvammes' invitation for the appellate court to become the trial court should be declined.

Accordingly, the Kvammes' cross-appeal on the rule of right result-wrong theory should be denied.

The Kvammes have presented argument or authority for any of the other issues on appeal they noted in their notice of cross-appeal. Consequently, those issues need not be considered by the Court on appeal. *Giltner, Inc. v. Idaho Dept. of Commerce and Labor*, 145 Idaho 415, 179 P.3d 1071 (2008).

C. The Kvammes' request for attorney fees on appeal should be denied.

On appeal, as in the district court, the Kvammes request an award of attorney fees in accordance with I.C. § 12-121.

In the event the Court vacates or reverses the district court's denial of the Campbells' motion for reconsideration and grant of summary judgment, then the Kavammes would not be the prevailing party and it would not necessary to discuss whether the appeal was brought or defended unreasonably under I.C. § 12-121. *Caldwell v. Cometto*, 151 Idaho 34, 41, 253 P.3d 708 (2011).

On appeal, the Campbells presented a legitimate issue for the court to consider. The district court's determination not to consider the affidavit of Kevin Thompson filed as part of the Campbells' timely motion for reconsideration raised a genuine issue of abuse of discretion. Where the district court held the record of survey lacked foundation and, thus, the Campbells did not sustain their burden, an affidavit that supplies the missing foundation should be considered in order to reach a fair and just result. Therefore, no fees are available

against a party that presents a legitimate question for the Court to address. *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007).

Furthermore, an award under 12-121 is appropriate when the Court “has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation.” *BHA Investments, Inc. v. State*, 138 Idaho 348, 355, 63 P.3d 474, 481 (2003). Despite the accusations lodged by the Kvammes against the Campbells and their counsel, the Campbells have a solid basis for appeal. They have a survey. It shows they are the owners of the property in question. The record on appeal shows the Campbells properly posted security to preserve the award of costs made to the Kvammes while the appeal is pending. Contrary to assertions made, the Campbells genuinely believe their position has merit and they have not appealed for the purpose of delaying justice or harassing the Kvammes.

The Kvammes’ request for an award of fees on appeal should be denied.

## **CONCLUSION**

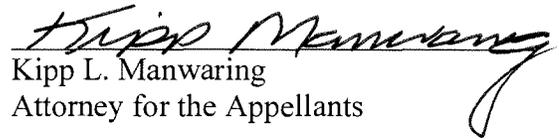
The district court abused its discretion in denying the Campbells’ motion for reconsideration.

The record on appeal does not permit the Court to uphold on disputed and non-determined facts summary judgment for the Kvammes’ on their claims of adverse possession or boundary by agreement.

The district court’s order denying the Campbells’ motion for reconsideration and its Memorandum Decision and Order on Summary Judgment should be vacated together with

the subsequent Judgment based on the district court's order. The case should be remanded to the district court with directions to review the Affidavit of Kevin Thompson and reconsider the cross motions for summary judgment.

Dated this 7 day of November 2012.

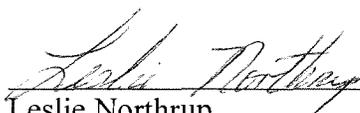
  
Kipp L. Manwaring  
Attorney for the Appellants

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that on the 9<sup>th</sup> day of November 2012, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Justin R. Seamons  
Attorney at Law  
414 Shoup Avenue  
Idaho Falls, Idaho 83402

- Hand Delivered
- U.S. Mail, Postage Prepaid
- Facsimile
- Other \_\_\_\_\_

  
\_\_\_\_\_  
Leslie Northrup  
Paralegal