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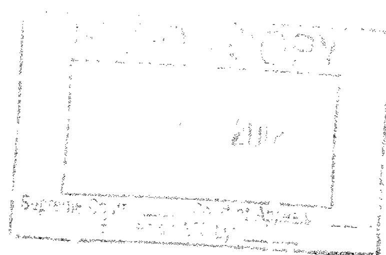
IN THE SUPREME COURT OF THE STATE OF IDAHO

V. LEO CAMPBELL and KATHLEEN CAMPBELL, Plaintiffs, Appellants, and Cross-respondents, vs. JAMES C. KVAMME and DEBRA KVAMME, Defendants, Respondents, and Cross-appellants,	)	Supreme Court Docket No. 39650-2012 *Case No. CV 10-3879, Bonneville County, Idaho*



CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District
in and for Bonneville County, Idaho
Honorable Jon J. Shindurling, District Judge, Presiding

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INTRODUCTION

V. Leo Campbell and Kathleen Campbell are the Plaintiffs/Appellants/Cross-respondents in this case. This brief will hereinafter refer to them as the "Plaintiffs."

James C. Kvamme and Debra Kvamme are the Defendants/Respondents/Cross-appellants in this case. This brief will hereinafter refer to them as the "Defendants."

ISSUE ON APPEAL

> *Did the district court abuse its discretion in disregarding the affidavit of Kevin Thompson and denying the Campbells' motion for reconsideration?*

See APPELLANTS' BRIEF, p. 9.

ARGUMENT

I.

VICTORY BY CONFUSION

The Plaintiffs have carefully, if not craftily, scrambled the oral argument in this case, the OPINION AND ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION, and the standard of I.R.C.P. 11(a)(2)(B), hoping to garner a victory by confusion. The Defendants will not let that happen.

The Plaintiffs open their REPLY BRIEF by attempting to "shorten" the Defendants' "position" in this case to one paragraph:

> Decidedly producing vast amounts of argument in their Respondents' 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."

See APPELLANTS' REPLY BRIEF, p. 1.

The foregoing paragraph is actually the third ***point*** of five separate points, all of which "directly address the issue raised on appeal," notwithstanding the Plaintiffs' assertion to contrary. See RESPONDENTS' BRIEF, pp. 34-40.

Curiously, the Plaintiffs then acknowledge that the third point is "accurate"–that is, that I.R.C.P. 11(a)(2)(B) and I.R.C.P. 60(b)(2) are discretionary, not mandatory.

So why quote it? Why even mention it? The reason–indeed, the ***only*** reason–is to continue to spin their argument that the trial court was somehow confused between I.R.C.P. 11(a)(2)(B) and I.R.C.P. 60(b)(2):

> 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.

See APPELLANTS' REPLY BRIEF, p. 1.

Once again, the following five points are dispositive:

1. As this court recalls, in order to spin their argument that the trial court was somehow confused between I.R.C.P. 11(a)(2)(B) and I.R.C.P. 60(b)(2), the Plaintiffs carefully excised and quoted ***one*** paragraph from the transcript of the oral argument. Of course, the transcript of the oral

argument is 28 pages long. T. pp. 70-98. No one, including Judge Shindurling, was confused about the standard:

> The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court.

Jordan v. Beeks, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

2. The paragraph, which the Plaintiffs so carefully excised and quoted, was actually a question to Mr. Manwaring, who had just stated the following:

> Mr. Manwaring: And it is an abuse of discretion not to consider ***new evidence*** that changes the judgment and reconsider that judgment in light of that evidence. So we would ask the court to grant the motion.
>
> The Court: So, Mr. Manwaring, what authority do you have that it's an abuse of discretion not to consider new evidence when it doesn't comply with 60(b)(2)?

T. p. 89, LL. 11-18 (emphasis added).

In response, Mr. Manwaring confessed and ultimately admitted that the affidavit of Kevin L. Thompson was ***not*** "new evidence"; instead, it was a belated attempt to cure the evidentiary and procedural issues that the Plaintiffs had so steadfastly chosen to ignore:

> We're ***not*** telling the court, by the way, we have a brand new survey that changes everything. It's the same Record of Survey. It's the same item of evidence relied upon by both parties, but the foundation issue that the court addressed as it relates to the Affidavit of Counsel is now satisfied by the affidavit of Kevin Thompson. I think that is appropriate in a motion to reconsider.

T. p. 92, LL. 11-18 (emphasis added).

3. The fact that Judge Shindurling and Mr. Manwaring discussed I.R.C.P. 60(b)(2) at oral argument is inapposite. Judge Shindurling took the motion for reconsideration under advisement. T. p. 98, LL. 8-10. He thereafter entered an OPINION AND ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION. R. Vol. IV, p. 771. The OPINION AND ORDER is decisive, ***not*** oral argument.

4. In his OPINION AND ORDER, Judge Shindurling recited the history of the case, he set forth the standard of review, he explained his analysis, and he made a decision:

> In its October 28, 2011, Opinion and Order, this court found that, "[p]ursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the Record of Survey submitted as an exhibit to Plaintiffs' counsel's affidavit lacks a proper foundation and is not properly before the court." Although Plaintiffs request this court to reconsider its opinion in light of the new evidence supplied with their motion, there is no new evidence with their motion. The evidence is the same Record of Survey performed by Kevin Thompson that was not properly before the court in the previous motions. The Plaintiffs have now submitted an Affidavit of Kevin Thompson to lay the proper foundation for the survey, but the evidence is not new. While Plaintiffs are not required to present new evidence in a Rule 11(a)(2)(B) motion for reconsideration, their motion is based on the court now considering the Record of Survey that was not properly before the court on the previous motions. This evidence was known to the Plaintiffs in May of 2011 when they filed for summary judgment and was known to them when the complaint was filed in this case in June of 2010. Based on Rule 56(c) of the Idaho Rules of Civil Procedure and also on the court's Scheduling Order, the affidavit of Kevin Thompson should have been submitted months ago. Therefore, as the decision to grant or deny a motion for reconsideration rests in this court's discretion, this court finds that it is too late to now submit an affidavit that could have, and should have, been submitted months ago. To decide otherwise would essentially allow Plaintiffs to not comply with the rules of civil procedure and the court's Scheduling Order and roll the dice with a motion for summary judgment. If they lose on that motion, under the same rules of civil procedure not complied with

> originally, they would then be allowed to file endless restructured motions on the same subject matter.

R. Vol. IV, pp. 772-73.

Judge Shindurling denied the motion. He "correctly perceived the issue as one of discretion," he "acted within the ***outer*** boundaries of [his] discretion," and he "reached a decision by an exercise of reason." Carnell v. Barker Management, Inc., 137 Idaho at 329, 48 P.3d at 659 (emphasis added).

5. Finally, Judge Shindurling did not apply I.R.C.P. 60(b)(2), he did not use it, and he did not rely on it. In fact, from top to bottom and from front to back, his OPINION AND ORDER does not cite it, refer to it, or even include the words I.R.C.P. 60(b)(2).

II.

BECAUSE I SAID SO

Notwithstanding the foregoing, the Plaintiffs continue to argue that the trial court "***must***" consider the purported new evidence–that is, the affidavit of Mr. Thompson. For good measure, the Plaintiffs even threw the following quote into their REPLY BRIEF:

> 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 Mortgage Services Corp. v. Perreira, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (emphasis added).

The following five points are dispositive:

1. Evidence is ***not*** "new" simply because a party says that it is new. Evidence is new if it was newly or recently discovered, say, since the date of trial or the entry of judgment, and if it could not have been discovered before then by reasonable or due diligence[1]:

> **Newly Discovered Evidence.** Evidence of a new and material fact, or new evidence in relation to a fact in issue, discovered by a party to a cause after the rendition of a verdict or judgment therein. Testimony discovered after trial, not discoverable before trial by exercise of due diligence.

Black's Law Dictionary, p. 543 (5th ed. 1983).

The affidavit of Mr. Thompson was ***not*** new evidence. The Plaintiffs retained the services of Mr. Thompson on September 8, 2009. He completed the RECORD OF SURVEY on October 5, 2009. The evidence was there from the get-go.[2]

2. Moreover, the affidavit of Mr. Thompson was ***not*** new evidence under any definition of the word, legal or otherwise; again, it was a belated attempt to cure the evidentiary and procedural issues that the Plaintiffs had so steadfastly chosen to ignore:

- By way of reminder, Mr. Manwaring attached a copy of the RECORD OF SURVEY to his affidavit. He is a lawyer. He is not a professional land

---

[1] See generally the "Berry" test, I.R.C.P. 60(b)(2), and I.C.R. 34; see also State v. Lankford, 116 Idaho 860, 781 P.2d 197 (1989) and State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976).

[2] Of course, the Plaintiffs refused to provide a copy of the RECORD OF SURVEY to the Defendants. In fact, the Plaintiffs didn't even attach a copy of the RECORD OF SURVEY to their complaint.

surveyor. He did not prepare the RECORD OF SURVEY, he could not identify it, he could not authenticate it, he could not lay a proper foundation for it, it was not based on his personal knowledge, he was not competent to testify regarding it, and his arguments regarding it were speculative, based on hearsay, and conclusory.

- The Plaintiffs did not answer or respond to the interrogatories and requests for production regarding expert witnesses in accordance with I.R.C.P. 26(b)(4).
- Twice, the Plaintiffs did not disclose Mr. Thompson in accordance with the court's ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL under I.R.C.P. 16.
- The Plaintiffs repeatedly did not supplement their answers and responses in accordance with I.R.C.P. 26(e)(1)(B).
- The Plaintiffs repeatedly did not supplement their answers and responses in accordance with I.R.C.P. 26(e)(3).
- The Plaintiffs did not file an affidavit from Mr. Thompson in support of their motion for summary judgment in accordance with I.R.C.P. 56(e).
- The Plaintiffs did not to file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment in accordance with I.R.C.P. 56(e).

- The Plaintiffs did not file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the evidentiary issues in this case in accordance with I.R.C.P. 56(f).
- Instead, the Plaintiffs knowingly and intentionally forged ahead with full knowledge of the foregoing evidentiary and procedural issues and the requirement upon them to survive the cross-motions for summary judgment.

Thus, only under a tortured definition of the word "new" was the affidavit of Mr. Thompson new evidence.

3. In addition, as previously stated, even Mr. Manwaring confessed and ultimately admitted that the affidavit of Mr. Thompson was ***not*** new evidence:

> We're ***not*** telling the court, by the way, we have a brand new survey that changes everything. It's the same Record of Survey. It's the same item of evidence relied upon by both parties, but the foundation issue that the court addressed as it relates to the Affidavit of Counsel is now satisfied by the affidavit of Kevin Thompson. I think that is appropriate in a motion to reconsider.

T. p. 92, LL. 11-18 (emphasis added).

4. The trial court immediately saw the potential for manipulation and abuse, the proverbial devil in the details:

On the one hand, ***depending on the circumstances***, a motion for reconsideration might be appropriate. For example, in the above-cited case of PHH Mortgage Services Corp. v. Perreira, Mr. Manwaring represented the plaintiff or "PHH." One of the issues in that case was whether PHH was on notice that one of the defendants, Mavis M. Anestos, was deceased. PHH claimed that it did

not know that she was deceased. In support of its motion for summary judgment, PHH filed a copy of the "order dismissing Anestos' bankruptcy." The order specifically and expressly stated that Ms. Anestos was deceased. Notwithstanding the order, the trial court concluded that "there is no evidence that PHH was on notice, either actually or constructively." The reason that the trial court so concluded is especially noteworthy:

> . . . The copy of the order dismissing Anestos' bankruptcy that PHH had placed in the record did ***not*** include the certificate of service showing that PHH had been mailed a copy of the order on September 25, 2005. The new evidence that the Perreiras sought to provide to the court in connection with their motion for reconsideration included a copy of that certificate of service.

PHH Mortgage Services Corp. v. Perreira, 146 Idaho at 635, 200 P.3d at 1184.

On the other hand, ***depending on the circumstances***, a motion for reconsideration might ***not*** be appropriate. As previously stated, a motion for reconsideration is ***not*** a subversive stratagem or clever end run–that is, I.R.C.P. 11(a)(2)(B) is ***not*** a scheme or maneuver to prolong a case, to increase the cost of litigation, to ignore the rules of evidence, to disregard the rules of civil procedure, to violate the rules of discovery, to snub the orders of the court, to manipulate the outcome of a motion for summary judgment, or to engage in endless litigation.

Thus, whether a motion for reconsideration is or is not appropriate depends on the circumstances. That is the reason that a motion for reconsideration is discretionary, not mandatory. The trial court summed it up:

> . . . Although Plaintiffs request this court to reconsider its opinion in light of the new evidence supplied with their motion, there is no new evidence with their motion. The evidence is the same Record of Survey performed by Kevin Thompson that was not

properly before the court in the previous motions. The Plaintiffs have now submitted an Affidavit of Kevin Thompson to lay the proper foundation for the survey, but the evidence is not new. While Plaintiffs are not required to present new evidence in a Rule 11(a)(2)(B) motion for reconsideration, their motion is based on the court now considering the Record of Survey that was not properly before the court on the previous motions. This evidence was known to the Plaintiffs in May of 2011 when they filed for summary judgment and was known to them when the complaint was filed in this case in June of 2010. Based on Rule 56(c) of the Idaho Rules of Civil Procedure and also on the court's Scheduling Order, the affidavit of Kevin Thompson should have been submitted months ago. ***Therefore, as the decision to grant or deny a motion for reconsideration rests in this court's discretion, this court finds that it is too late to now submit an affidavit that could have, and should have, been submitted months ago. To decide otherwise would essentially allow Plaintiffs to not comply with the rules of civil procedure and the court's Scheduling Order and roll the dice with a motion for summary judgment. If they lose on that motion, under the same rules of civil procedure not complied with originally, they would then be allowed to file endless restructured motions on the same subject matter***.

R. Vol. IV, pp. 772-73 (emphasis added).

5. Finally, this court, too, has seen the devil in the details and, when it did, it ***unanimously*** affirmed the trial court's decision to deny the plaintiffs' motion for reconsideration. The following case, which the Defendants cited in their opening brief, is right on point:

> . . . The court found that plaintiffs had failed to disclose Bidstrup as an expert witness in violation of the court's scheduling order.
>
> . . .
>
> . . . Even after the defendants filed motions for summary judgment, arguing that Bidstrup had not been disclosed as an expert witness, and filed motions to strike Bidstrup's second affidavit for lack of qualification and improper rendering of opinions on questions of law, appellants made no effort to remedy the situation. Citing I.R.C.P. 26(b)(4), the district court did not allow Bidstrup's testimony in the form of his second affidavit.

The district court's decision striking Bidstrup's second affidavit is affirmed.

. . . The appellants had ample notice of the hearing and knew what was required of them to survive the summary judgment motions. Appellants did not establish that a genuine issue of material fact existed. The grants of summary judgment are affirmed.

. . .

"The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court." *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

The district court did not abuse its discretion in denying appellants' motion for reconsideration. The court exercised reason in reaching its decision that the appellants had been given numerous opportunities to prepare their case. They were aware of the defendants' motions for summary judgment and motions to strike Bidstrup's second affidavit. They made no effort to request an extension of time before the hearing, nor did they address or correct the deficiencies in the affidavit. Instead, after the court issued its order, they requested a time extension to submit additional affidavits or retain another expert. The court found that the appellants had been given several opportunities to remedy the issues raised by the defendants in their motions. Based on the record before the district court, it did not abuse its discretion in denying appellants' motion for reconsideration.

Carnell v. Barker Management, Inc., 137 Idaho 322, 48 P.3d 651 (2002).

III.

GAME CHANGER

Every year, the Merriam-Webster Dictionary adds new words to its dictionary. This year, it added the word "game changer":

A newly introduced element or factor that changes an existing situation or activity in a significant way.

A motion for reconsideration has its place in the judicial system. No one questions that. Depending on the circumstances, it can be an important and effective tool "to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be." Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

So, if evidence is, in fact, new evidence–that is, newly discovered and could not have been discovered earlier by due diligence, then a motion for reconsideration might be appropriate. Again, it depends on the circumstances.

The Plaintiffs, however, want this court to expand the scope or role of a motion for reconsideration. Indeed, they want this court to not only countenance the use of a motion for reconsideration under the following circumstances, but to make its application mandatory, to state that the trial courts "***must***" apply it:

- As previously stated, the Plaintiffs retained the services of Mr. Thompson on September 8, 2009. He completed the RECORD OF SURVEY on October 5, 2009.
- However, notwithstanding their knowledge of Mr. Thompson and the key importance of the RECORD OF SURVEY in this case, the Plaintiffs simply attached a copy of the RECORD OF SURVEY to the affidavit of Mr. Manwaring. He is a lawyer. He is not a professional land surveyor. He did not prepare the RECORD OF SURVEY, he could not identify it, he could

not authenticate it, he could not lay a proper foundation for it, it was not based on his personal knowledge, he was not competent to testify regarding it, and his arguments regarding it were speculative, based on hearsay, and conclusory.

- The Plaintiffs did not answer or respond to the interrogatories and requests for production regarding expert witnesses in accordance with I.R.C.P. 26(b)(4).
- Twice, the Plaintiffs did not disclose Mr. Thompson in accordance with the court's ORDER SETTING PRE-TRIAL CONFERENCE AND JURY TRIAL under I.R.C.P. 16.
- The Plaintiffs repeatedly did not supplement their answers and responses in accordance with I.R.C.P. 26(e)(1)(B).
- The Plaintiffs repeatedly did not supplement their answers and responses in accordance with I.R.C.P. 26(e)(3).
- The Plaintiffs did not file an affidavit from Mr. Thompson in support of their motion for summary judgment in accordance with I.R.C.P. 56(e).
- The Plaintiffs did not to file an affidavit from Mr. Thompson in opposition to the Defendants' cross-motion for summary judgment in accordance with I.R.C.P. 56(e).

- The Plaintiffs did not file a motion for a "continuance to permit affidavits to be obtained" or to cure or otherwise remedy the evidentiary issues in this case in accordance with I.R.C.P. 56(f).
- Instead, the Plaintiffs knowingly and intentionally forged ahead with full knowledge of the foregoing evidentiary and procedural issues and the requirement upon them to survive the cross-motions for summary judgment.

The mandatory application of a motion for reconsideration under the foregoing circumstances is not merely an expansion of I.R.C.P. 11(a)(2)(B), it is a distention of I.R.C.P. 11(a)(2)(B). In short, it's a game changer.

For the sake of all current and future parties to litigation in the state of Idaho, as well as all current and future members of the bar and judiciary of the state of Idaho, this court needs to state the following in plain and simple terms: (a) Whether they must honor and comply with the rules of evidence, the rules of civil procedure, the rules of discovery, and the orders of the court; or (b) whether they can violate and ignore them because I.R.C.P. 11(a)(2)(B) swallows them whole.

Again, the Plaintiffs' position is a game changer. The trial court rejected it. So, too, should this court:

> . . . ***To decide otherwise would essentially allow Plaintiffs to not comply with the rules of civil procedure and the court's Scheduling Order and roll the dice with a motion for summary judgment. If they lose on that motion, under the same rules***

of civil procedure not complied with originally, they would then be allowed to file endless restructured motions on the same subject matter.

R. Vol. IV, p. 773 (emphasis added).

Nonetheless, if a game changer is now afoot in the state of Idaho, the following ***hypothetical*** opinion[3] would be sufficient to announce it:

> The Idaho Supreme Court hereby rules that motions for reconsideration under I.R.C.P. 11(a)(2)(B) are mandatory, not discretionary. Thus, any and all trial courts of the state of Idaho must hereafter consider motions for reconsideration; they no longer have the discretion to do so, no matter the circumstances. In addition, any and all parties to litigation, as well as their attorneys of record, are now free to do the following: (a) They are free to ignore the rules of evidence; (b) they are free to disregard the rules of civil procedure; (c) they are free to violate the rules of discovery, including, without limitation, the rules of discovery that relate or otherwise pertain to the disclosure of expert witnesses; and (d) they are free to snub the orders of the court, including, without limitation, orders under I.R.C.P. 16. Any party who receives an adverse interlocutory order, opinion, or judgment from any trial court may then use such adverse interlocutory order, opinion, or judgment as a legal map to restructure such party's case, position, evidence, or argument and thereupon file a motion for reconsideration, or motions for reconsideration. To this end, the Idaho Supreme Court hereby rules that I.R.C.P. 11(a)(2)(B) subsumes and supercedes any and all rules and orders of the trial court. In addition, the Idaho Supreme Court hereby acknowledges and agrees that this ruling will prolong litigation, increase the cost of litigation, and result in endless litigation. Thus, the Idaho Supreme Court hereby amends and modifies I.R.C.P. 1(a)-specifically, the Idaho Supreme Court hereby strikes any and all language therein that states that the rules of civil procedure shall be construed to secure the just, speedy, and inexpensive determination of every action. Finally, the Idaho Supreme Court hereby overrules its decision in Carnell v. Barker Management, Inc., 137 Idaho 322, 48 P.3d 651 (2002), if and to the extent that anything therein conflicts with this ruling.

---

[3]The font for the hypothetical opinion is Comic Sans. It just seems right.

ADDITIONAL ISSUES ON APPEAL

1. Based on the doctrine of right result-wrong theory, is the doctrine of adverse possession a sufficient and proper basis for the disposition of this case?

2. Based on the doctrine of right result-wrong theory, is the doctrine of boundary by agreement or acquiescence a sufficient and proper basis for the disposition of this case?

See CROSS-APPELLANTS' BRIEF, p. 12.

ARGUMENT

I.

DEJA VU

In their REPLY BRIEF, the Plaintiffs attempt to state–really, re-characterize–the Defendants' "position" in this case:

> On cross-appeal, the Kvammes contend the district court made the correct decision to grant summary judgment in their favor ***albeit on the wrong theory***.

See APPELLANTS' REPLY BRIEF, p. 3 (emphasis added).

That is ***not*** the Defendants' position in this case. The Defendants do ***not*** "contend" or otherwise argue that the trial court "made the correct decision" but on the "wrong theory."

Once again, the Plaintiffs have carefully, if not craftily, scrambled the issues in this case. Once again, the Plaintiffs are hoping to garner a victory by confusion. Once again, the Defendants will not let that happen.

So that there is no confusion about the Defendants' position in this case: The trial court "made the correct decision" and it did so on the ***right*** "theory."

According to the Plaintiffs, the fence in this case does not sit on the boundary between the parties' respective parcels of real property; instead, it sits on their parcel of real property and is off by 15 feet. ***The Plaintiffs bore the burden of proof on this issue***.

In an attempt to carry their burden of proof, the Plaintiffs simply attached a copy of the RECORD OF SURVEY to the affidavit of Mr. Manwaring. Again, Mr. Manwaring is a lawyer. He is not a professional land surveyor. He did not prepare the RECORD OF SURVEY, he could not identify it, he could not authenticate it, he could not lay a proper foundation for it, it was not based on his personal knowledge, he was not competent to testify regarding it, and his arguments regarding it were speculative, based on hearsay, and conclusory.

Thus, the RECORD OF SURVEY was not admissible.

The Defendants disagreed with the Plaintiffs; however, rather than merely argue with them, the Defendants filed the AFFIDAVIT OF KIM LEAVITT, dated June 7, 2011.

Mr. Leavitt is a professional land surveyor. He has the education, knowledge, skill, experience, and training to determine the true and correct boundaries of real property, including, without limitation, the true and correct location of fences and other improvements thereon.

Unlike Mr. Manwaring, Mr. Leavitt was competent to testify regarding the true and correct location of the fence in this case. See I.R.E. 702.

The AFFIDAVIT OF KIM LEAVITT duly evidenced that the fence does ***not*** sit on the Plaintiffs' parcel of real property and it is ***not*** off by 15 feet; instead, it sits on the boundary between

the Plaintiffs' parcel of real property and the Defendants' parcel of real property and it marks the boundary between them.

Thus, the Plaintiffs did ***not*** carry their burden of proof on this issue; allegations in pleadings and arguments of counsel are ***not*** sufficient:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment . . . shall be entered against him.

See I.R.C.P. 56(e).

The trial court agreed:

> Pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the RECORD OF SURVEY, submitted as an exhibit to Plaintiffs' counsel's affidavit, lacks a proper foundation and is not properly before the court. Therefore, ***the Plaintiffs have failed to "set forth specific facts showing that there is a genuine issue for trial." As such, and based on the evidence properly before the court, it appears that the fence is the boundary line between the parcels owned by Plaintiffs and Defendants***.

R. Vol. III, p. 606 (emphasis added).

II.

LEFT HANGING

The cross-motions for summary judgment in this case addressed the following three issues:

1. The true and correct location of the fence;
2. The doctrine of adverse possession;
3. The doctrine of boundary by agreement or acquiescence.

The trial court duly and properly disposed of the first issue; again, it "made the correct decision" and it did so on the ***right*** "theory."

However, the trial court did not dispose of the second and third issues–namely, the doctrine of adverse possession and the doctrine of boundary by agreement or acquiescence:

> . . . ***The remaining issues argued by counsel regarding adverse possession and boundary by acquiescence do not need to be addressed***.

R. Vol. III, p. 606 (emphasis added).

III.

RIGHT RESULT-WRONG THEORY

Thus, the Defendants' position in this case is simple and straightforward: If this court decides to reverse the trial court on the first issue, then the second and third issues are perfect issues for application of the appellate doctrine of right result-wrong theory:

> . . . [The doctrine of right result-wrong theory] applies to issues where an alternative rule of law can be applied to a given body of facts, yielding the same legally correct answer.

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

Stated otherwise, if this court decides that the trial court "made the ***wrong*** decision" on the first issue, the doctrine of adverse possession and the doctrine of boundary by agreement or acquiescense still yield the same result–that is, the ***right*** result.

IV.

YOU CAN'T DO THAT

In light of the fact that the trial court did not dispose of the second and third issues, the Plaintiffs claim that this court cannot do so on appeal, citing Anderson & Nafziger v. G. T. Newcomb, Inc., 100 Idaho 175, 180, 595 P.2d 709, 714 (1979):

> 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 the 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.

See APPELLANTS' REPLY BRIEF, p. 4.

With all due respect, the Plaintiffs are wrong. The above-cited case is different than this case. There, the trial court had not made a particular finding that was required for the other theory–namely, "whether the order form was intended as a fully integrated agreement."

In this case, that is ***not*** a problem. The CROSS-APPELLANTS' BRIEF sets forth, in painstaking detail, the ***undisputed*** facts in support of each and element regarding the second and third issues. See CROSS-APPELLANTS' BRIEF, pp. 12-44.

The Plaintiffs rant and rave about the "record before the district court" and the "volumes of affidavits, deposition testimony, and counter affidavits" in this case. See APPELLANTS' REPLY

BRIEF, p. 4. However, the Plaintiffs did ***not*** and do ***not*** set forth one single fact "showing that there is a genuine issue for trial." See I.R.C.P. 56(e).

Two examples will suffice:

1. The Plaintiffs note that the Defendants "have not presented any other survey to the district court on which they base their claims." See APPELLANTS' REPLY BRIEF, p. 5.

True, but only in part: The Defendants readily acknowledge that they did not "present any other survey to the district court"; however, their "claims" are ***not*** based on a survey. Their "claims" do ***not*** require a survey. In fact, their "claims"–that is, the doctrine of adverse possession and the doctrine of boundary by agreement or acquiescence– are applicable, whether or not there is a survey, or despite a survey.

Thus, even if the Plaintiffs had carried their burden of proof on the first issue–that is, even if the Plaintiffs had shown that Mr. Thompson's RECORD OF SURVEY was admissible, that the fence does not sit on the boundary between the parties' respective parcels of real property, that the fence sits on their parcel of real property, and that the fence is off by 15 feet–the second and third issues were nonetheless dispositive: The Defendants have adversely possessed the 15 feet of farm ground that lies north of the fence and, in addition, the fence has become the boundary in this case by agreement or acquiescence. Again, the second and third issues in this case, or either of them, are sufficient and proper bases for the disposition of this case, with or without a survey.

2. According to the Plaintiffs, the Defendants have not paid the taxes on the 15 feet of farm ground that lies north of the fence:

> . . . The Kvammes contend that they have paid the 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.

See APPELLANTS' REPLY BRIEF, p. 5.

True, but again, only in part: The Defendants readily acknowledge that they "contend" that they have paid the taxes on the 15 feet of farm ground that lies north of the fence; however, their "contention" is "grounded" in the law, duly enunciated by this court, and the affidavit of Mr. Thompson makes absolutely ***no*** difference, one way or the other:

> In the case of boundary disputes between contiguous landowners, where one landowner can establish continuous open, notorious and hostile possession of an adjoining strip of his neighbor's land, ***and taxes are assessed by lot number or by government survey designation***, rather than by metes and bounds description, ***payment of taxes on the lot within which the disputed tract is enclosed satisfies the tax payment requirement of the statute***.

Standall v. Teater, 96 Idaho 152, 156, 525 P.2d 347, 351 (1974); see also Scott v. Gubler, 95 Idaho 441, 511 P.2d 258 (1973) (emphasis added).

The legal description of the Defendants' parcel of real property is the N1/2 of the NE1/4. R. Vol. II, p. 252.

The legal description of their parcel of real property is ***not*** a legal description based on metes and bounds–that is, a legal description based on specific calls of directions and distances from a stated point of beginning; instead, it is a legal description based on a standard section of land under

the U.S. Public Land Survey System, which nominally contains 640 acres. R. Vol. I, p. 190, ¶ 78; see also R. Vol. II, p. 301, ¶ 12 (pp. 297-306, inclusive); and see also R. Vol. II, pp. 307-13.

Thus, "payment of taxes on the lot within which the disputed tract is enclosed satisfies the tax payment requirement of the statute." See Standall v. Teater, 96 Idaho 152, 156, 525 P.2d 347, 351 (1974). Of course, the "***disputed tract***" in this case is enclosed"***within***" the real property that lies north of the fence, ***which is the Defendants' parcel of real property***.

In sum, the Plaintiffs' claim that this court cannot dispose of the second and third issues is wrong. This court can dispose of them and the following case provides direct precedent for it:

> It is unnecessary to determine whether the Mussells are liable based upon a breach of their duty under Idaho Code Section 55-310 to provide lateral support because they are liable for unreasonably interfering with the Irrigation District's easement. Where the lower court reaches the correct result by an erroneous theory, this court will affirm the order on the correct theory. *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001). Even if the theory adopted by the district court was erroneous, the Mussells are liable based upon the theory, ***alleged by the Irrigation District in its amended complaint***, that the Mussells unreasonably interfered with the Irrigation District's easement.

Nampa & Meridian Irrigation District v. Mussell, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003) (emphasis added).

V.

NO CALL

If this court decides to reverse the trial court on the first issue and, in addition, if this court does not want to dispose of the second and third issues, then this court should remand the second and third issues to the trial court ***before*** it enters its opinion herein in accordance with I.A.R. 13.3(a);

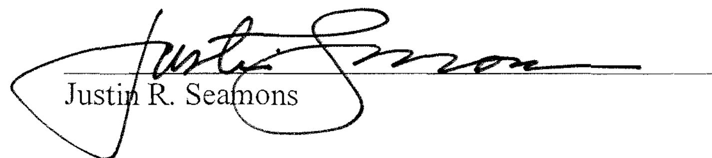
otherwise, a second appeal of this case is literally right around the corner. Of course, if this court decides to affirm the trial court on the first issue, then the second and third issues become moot and this court does not need to remand to them to the trial court.

CONCLUSION

The trial court duly and properly denied the Plaintiffs' motion for reconsideration. It "correctly perceived the issue as one of discretion," it "acted within the outer boundaries of its discretion," and it "reached a decision by an exercise of reason." Carnell v. Barker Management, Inc., 137 Idaho at 329, 48 P.3d at 659.

The Defendants are entitled to an award of attorney's fees on appeal. The trial court did ***not*** "apply the wrong legal standard" to the Plaintiffs' motion for reconsideration. The Plaintiffs' ***argument***, based on ***one*** paragraph from oral argument, that the trial court "incorrectly" applied I.R.C.P. 60(b)(2) and "glossed over" I.R.C.P. 11(a)(2)(B) is spin. It is also frivolous, unreasonable, and without foundation. Again, the trial court did not apply I.R.C.P. 60(b)(2), it did not use it. and it did not rely on it. Again, from top to bottom and from front to back, the OPINION AND ORDER does not cite it, refer to it, or even include the words I.R.C.P. 60(b)(2).

Dated November 30, 2012.

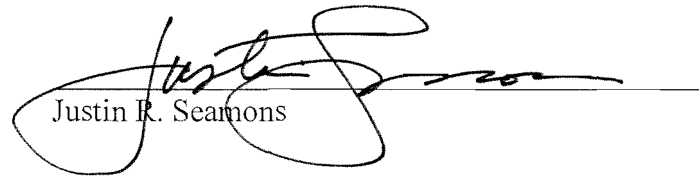


Justin R. Seamons

CERTIFICATE OF SERVICE

I served two copies of the foregoing RESPONDENTS' REPLY BRIEF on the following people on November 30, 2012:

Just Law Office
Attn: Charles C. Just and Kipp L. Manwaring
381 Shoup Avenue
Idaho Falls, ID 83402



Justin R. Seamons