2-10-2014

Evans v. Burnham Appellant's Reply Brief Dckt. 41254

IN THE SUPREME COURT OF THE STATE OF IDAHO

Laurel Evans

Plaintiff-Appellant

v.

Walter Burnham

Defendant-Respondent

Supreme Court Docket # 41254

Bonner County CV2010-1560

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District for Bonner County.

Honorable District Judge John T. Mitchell presiding.

Laurel Evans, appearing In Propria Persona

Residing at 46700 Highway 200, Suite 303, Hope, near [83836], State of Idaho,

for Appellant

D. Toby Mclaughlin

Residing at 321 South First Avenue; Sandpoint, near [83864], State of Idaho,

for Respondent.

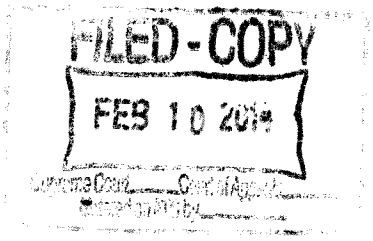

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES:

CONSTITITION:

STATUTES:

COURT RULES:

OTHER

I.

ARGUMENT

1. THE RESPONDENT'S BRIEF DOES NOT COMPLY WITH I.A.R. 35

Preliminarily, Appellant must object to a large portion of the Respondent's reply brief. The Respondent does not offer argument or analysis of its own relating to multiple issues on appeal raised by the Appellant error committed in not adhering to *state decisis*, jurisdiction being asserted in derogation of state law using statutory construction, legislative authority over prescribing appellate proceedings, error in each finding or fact and conclusion of law as decided by the presiding judge of the District Court, and other argument(s). Instead, the Respondent simply incorporates the same arguments used in their response to Appellant's Motion to Vacate Judgment as its argument on appeal. *Brief of Respondent*, and *Response to Motion to Vacate Judgment*, Respondent's filed Amended Response to Appellant's Motion to Vacate Judgment and Award of Attorney Fees and Costs on May 2nd, 2013 R Vol. II pages 388-396; Respondent's original Response there was an Affidavit in Support. See R Vol II, pages 380-384. This does not appear to be a practice consistent with the rules.

Idaho Appellate Rule 35 (b) (6) states:

> Argument. The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

This rule seems to contemplate that the Respondent should be drafting their own arguments with respect to the issues presented on appeal, not simply bringing back the same arguments brought in response to Appellant's Motion to Vacate Judgment. Respondent's brief does not contain *their* contentions in opposition to the issues brought and discussed with authorities at length in Appellant's brief and does not state the reasons therefore why Appellant's argument is incorrect, nor does it cite authorities, statutes, or parts of the transcript which oppose Appellant's argument as required to do, pursuant to IAR Rule 35(b)(6). Not even a scintilla attempt to comply with IAR Rule 35(b)(6) and most of it off-point.

If an Appellant fails to include argument with respect to any issue on appeal, that issue is considered waived by the Supreme Court. *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887, 892-93 (1996); *Haight v Dale's Used Cars, Inc.*, 139 Idaho 853, 87 P.3d 962, n.1 (2003): "Because Haight has provided insufficient argument and no authority to support his contentions, the rule will not be relaxed and these issues will not be considered on appeal."

Of course, in an appeal the burden of proof rests with the Appellant, and a Respondent's failure to argue an issue in its brief does not mandate a reversal of the District Court's decision under the theory of a waiver. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204, 1211 (2000).

Nonetheless, *there is still the rule*, and while the Court in *Idaho Power, id.*, did not find that a violation of the rule on the part of the Respondent warranted a reversal, it did not close the door on *any* possible sanction. In *Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc.*, 139

Idaho 691, 85 P. 3d 667, 674 (2004), the Court found an attorney's compliance with I.A.R. 35 (a) so deficient that it triggered sanctions under I.A.R. 11.1 [now I.A.R. Rule 11.2.] The Court sanctioned the attorney by requiring him to pay attorney fees and costs jointly and severally with his client.

In the immediate appeal, the Court should determine and state on the record whether the Respondent has complied with I.A.R. 35(b), even if such determination has no bearing on the eventual outcome of the Appellant's case.

While the Respondent has no burden of proof to meet in their arguments, the rule is nonetheless mandatory and imposes a duty: "The argument ***shall*** contain the contentions of the respondent with respect to the issues presented on appeal ...." The adversarial system works best when both sides actually compete.

At a minimum, failure to comply with Rule 35(b)(6) should be considered contemptuous conduct towards the Court's Rules which the Supreme Court saw it fit to adopt into procedural law. A properly researched brief aids the development of arguments and assists the Court in their decision-making process.

If a violation of the rule is found, the articulation of such in the Court's eventual decision should in itself constitute a sanction to be imposed.

Based upon the foregoing the Appellant has filed a Motion for Sanctions and is incorporated herein by its reference, for disposition of these issues, as the Court deems proper and just.

2. NO NEW ISSUES ON APPEAL

Appellant must also object to Respondent attempting to bring new issues before this appellate court not raised in the lower court. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Lenon,* 143 Idaho 415, 417, 146 P.3d 681, 683 (Ct.App. 2005), *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Issues may not be raised for the first time on appeal, *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991); *Monahan v. State*, 145 Idaho 872, 877, 187 P.3d 1247, 1252 (Ct. App. 2008). This standard is traced back to *Smith v. E.C. Sterling*, 1 Idaho 128, Held note #2 (Terr.Idaho 1867).

Respondent is misrepresenting to the Court that it was raised by either side of IRCP Rules 81(k) and 81(l). This is a new issue in Respondent's Brief starting at the bottom of page 11 and continues to page 12, which has never been raised in the lower court. Although this Court can look at anything, generally, this Court has not done so from its territorial days to present. Appellant sees no reason why it should start now.

"'An appellate court can only derive its jurisdiction from the Constitution and statutes of the state.' *Penny v. Nez Perces County*, 4 Idaho 642, 43 P. 570..,." cited from *Athey v. Oregon Short Line R. Co.*, 165 P. 1116, 1118 (Idaho 1917). Looking from the Constitution of the State of Idaho the authority starting from Section 13 of Article V with the Legislature's authority to prescribe modes for appeal, to the legislature prescribing the mode of appeal from the Small Claims Department of the Magistrate's Division to an attorney magistrate in the Magistrate Division of the District Court in statute. "...[T]he right to appeal and procedure on appeal are

provided for in the constitution and fixed by statute, and it is not within discretion of court to hear an appeal or not to hear hear it. Article V, section 13 of the constitution..." *Long v. State Insurance Fund*, 90 P.2d 973 (1939).

In Appellant's initial briefing it was shown that pursuant to the aforementioned chain of authority of substantive law, jurisdictional authority to hear an appeal from the Small Claims Department lies with an attorney magistrate of the Magistrate Division.

Procedural rules are not substantive law; they merely "pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *In re SRBA Case No. 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995).

Appellant has filed a Motion for Sanctions on this issue pursuant to IAR Rule 11.2 and is incorporated herein by its reference. It's content is self-explanatory and the relief sought is simple and just.

3. MISREPRESENTATION BY RESPONDENT IN BRIEF

Appellant must also object to Respondent's deliberate misrepresentation of Appellant's claimed error. Respondent is under the misguided impression that "Appellant contends it was error for the magistrate division to transfer the case." *Respondent's Brief*, page 9. That's Incorrect! In an indirect way, Respondent does admit that the magistrate division was acting in their appellate capacity when the Motions to Amend and Transfer were decided. Appellant is contending that it was error for the magistrate's division to have granted both the amendment and the transfer in derogation to I.C. § 1-2311 and § 1-2312 and *stare decisis* of *Drumright v. Scheer*,

S-CV-1999-1575, decided by the Honorable John T. Mitchell, which is still the leading case in the First Judicial District of the State of Idaho. Judge Mitchell's decisions are on the internet for everybody to have access too. He is the only judge who has the guts to believe in himself that his judgment is righteous and correct. In his Memorandum and Order from the *Drumright v. Scheer*, S-CV-1999-1575. R. Vol. II, page 366, lines 5-8 Judge Mitchell specifically recognized that the District Court lacks jurisdiction to hear a small claims appeal, to wit:

> "The law changed just after *Gilbert* was decided. In, 1985, Idaho Session Law, Chapter 167, § 1, page 443 changed I.C. § 1-2311 and the small claims appeal process. Today the law requires an appeal from the small claims department to be heard as a trial *de novo* before an attorney magistrate. I.C. § 1-2311; I.R.C.P. 81(n); 81(o)(2); 83(b). The rules state that an appeal from small claims department **shall** be conducted as a trial *de novo* before an attorney magistrate. I.R.C.P. 81(n); 81(o)(2); 83(b)."

Drumright v. Scheer, S-CV-1999-1575. R. Vol. II, page 366, lines 5-8. With no other higher Court having a decision which contradicts its judgment, it is the law under the doctrine of *stare decisis*.

Two questions are apparent. First - Why did Judge Mitchell dishonor himself in not abiding by his created *stare decisis* of *Drumright v. Scheer*, S-CV-1999-1575 in derogation of Section 18, of Article I of the Constitution of the State of Idaho, by denying Appellant's Motion to Vacate Judgment? I can't answer this, but it happens **ALL the time**, in Northern Idaho. Somebody ought to do something about it, don't ya think? And Second - Why didn't the Respondent offer **ANY** argument or analysis of its own on such a pivotal question of law before this Court on appeal? It is because *stare decisis* of *Drumright v. Scheer*, S-CV-1999-1575, decided by the Honorable John T. Mitchell, is absolutely correct, on every point of law.

I recognize that this Court should not consider overruling controlling precedent if the Court can dispose of the appeal on other grounds. *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990).

> "[T]he rule of stare decisis dictates that we follow [controlling precedent] unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice."

Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990) cited from *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000). "Stare decisis dictates that we follow controlling precedent, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overturning it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *State v. Grant*, 154 Idaho 281, 287, 297 P.3d 244, 250 (2013); *State v. Dana*, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002). *Stare decisis* is not a confining phenomenon but rather a principle of law. *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000). And in this case the *stare decisis* of *Drumright v. Scheer*, S-CV-1999-1575 should be upheld and expounded upon by this Court as law from this appeal.

Appellant has filed a Motion for Sanctions on this issue pursuant to IAR Rule 11.2 and is incorporated herein by its reference. It's content is self-explanatory and the relief sought is simple and just.

4. STANDARD OF REVIEW

Where grounds for a motion are non-discretionary, such as in Rule 60(b)(4) motions, however, the motion is reviewed under the *de novo (free review)* standard. *Reinwald v. Eveland,* 119 Idaho 111, 112, 803 P.2d 1017, 1018 (Ct.App. 1991). Citing, *Knight Ins., Inc. v. Knight,* 109 Idaho 56, 704 P.2d 960 (Ct.App. 1985) in which the Justices stated in that appeal that appellate review for non-discretionary relief under a Rule 60(b)(4) motion and that the standard of review is one upon law which they exercise a *de novo*/free review over it, to wit:

> "In turn, Rule 60(b) enunciates a variety of grounds upon which relief from a judgment may be obtained. Some grounds — such as mistake, inadvertence, surprise or excusable neglect under subsection (b)(1) — allow discretionary relief. Others, such as the voidness of a judgment under subsection (b)(4), create a nondiscretionary entitlement to relief. This distinction is critical for appellate review. Where discretionary grounds are invoked, the standard of review is abuse of discretion. Where nondiscretionary grounds are asserted, the question presented is one of law upon which the appellate court exercises free review."

Knight Ins., Inc. v. Knight, 109 Idaho 56, 59-60, 704 P.2d 960, 963-64 (Ct.App. 1985). See also *Dragotoiu v. Dragotoiu*, 133 Idaho 644, 647, 991 P.2d 369, 371 (Ct.App.1998). Similarly, whether a dismissal for lack of jurisdiction pursuant to I.R.C.P. 12(b) was properly granted is a question of law over which this Court exercises free review. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005).

Appellant's Motion to Vacate Judgment was brought pursuant to a non-discretionary standard within Rule 60(b) of Rule 60(b)(4). Therefore the appellate court exercises free review *"de novo"* and is not under the abuse of discretion standard of appellate review. *Knight Ins., Inc.*

v. Knight, 109 Idaho 56, 59-60, 704 P.2d 960, 963-64 (Ct.App. 1985).

When a Motion under this Rule is brought under discretionary grounds, equitable remedies can be employed to correct errors in the common law. It is also axiomatic that parties to an action acting in equity require that the court follow its maxims which include the maxim of "equity follows the law." *Allen v. Ketchen*, 100 P. 1052 (1909); *Appellant's Brief,* pages 18-20. In the case of *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) the Justices stated in their decision "As this Court has long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to. . . give effect to the policy of the legislature.' *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 203, 10 L. Ed. 123."

In the instant case an appeal was filed by Respondent from the Small Claims Department of the Magistrate Division to the Magistrate Division. This State's Legislature mandated under authority of Section 13 of Article V of the Constitution of the State of Idaho mandated that an appeal from Small Claims Department of the Magistrate Division must be brought and heard by an attorney magistrate of the Magistrate's Division. A non-discretionary Motion to Vacate Judgment was timely filed by Appellant challenging the District Court taking jurisdiction in its appellate capacity over the Small Claims appeal to be tried as a trial de novo. The question of jurisdiction is strictly a question of law and not equity. The State of Idaho Legislature mandated policy that a Small Claims appeal shall be conducted only by an attorney magistrate of the Magistrate's Division, which was not done in this case, in error.

If this Court allows a district court judge to try a Small Claims appeal as a trial de novo would create not only a violation of the policies of this State, but an inequity of justice. If this Court upholds the district court's denial on the Motion to Vacate judgment challenging jurisdiction of the District Court to hear a Small Claims appeal would create not only a violation of the policies of this State, but an inequity of justice. As for example, if this Court does not uphold that a judgment is void when a "court's action amounts to a plain usurpation of power constituting a violation of due process." *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir.1995); accord *Dike v. Dike*, 75 Wash.2d 1, 448 P.2d 490, 494 (1968); 11 charles A. Wright et al., wright Miller & Kane, Federal Practice & Procedure § 2862, at 326-29 (2d ed.1995). Citing *Dragotoiu v. Dragotoiu*, 133 Idaho 644, 647, 991 P.2d 369, 371 (Ct.App.1998).

If this Court does not hold that final judgments and determinations held in the district court are not binding as *stare decisis* on other district court judges or lower court magistrates it would create not only a violation of the law, but an inequity of justice.

"In simple English," Rule 60(b) vests power in courts "adequate to enable them to vacate judgments *whenever such action is appropriate to accomplish justice*." *Klaprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390 (1949)(emphasis supplied). The Rule is "simply the recitation of pre-existing judicial power" to set aside judgments which are unfair. *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 234-235 (1995). "Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work

inequity." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 233-234, quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

However, a motion brought under this rule is under non-discretionary grounds, as in this case, the law must be followed and was not by the Magistrate who heard the Motion to Amend the Complaint and Motion to Transfer in derogation of *stare decisis* of the *Drumwright v. Scheer* decision issued by the Honorable John T., Mitchell. The District Court Judge heard the *trial de novo* without jurisdiction also failed to *sua sponte* correct its lack of jurisdiction. Then, another Judge denied the Motion to Vacate Judgment improperly under equitable grounds brought by the Respondent. "The courts must be kept open to guard against injustice through judicial error." *Darr v. Burford*, 339 U.S. 200, 214-215, 70 S.Ct. 587, 596 (1950). Therefore the standard of review should be the standard of free review by this Court.

In the exercise of free review by this Court and based upon Appellant's first brief further buttressed by this brief, along with Appellant's Motion to Vacate Judgment its briefs and affidavits in support, all orders and judgments to grant the Motion to Amend Complaint and Motion to Transfer Transfer, orders and judgments from District Court should be rendered void by this Court and the Judgment denying the Motion to Vacate Judgment to be found vacated with necessary orders to have Appellant's $10,000 for attorney fees and costs should be returned to the Appellant from the jurisdictionally defective appeal tried by the District Court as a trial *de novo* Ordered the Appellant to pay the Respondent $11,885.00 in attorney fees and costs on an appellate process which requires only costs to be paid by the loser of $50.00.

It is also worth noting that "The interpretation of a statute is a question of law subject to free review." *Grease Spot, Inc. v. Harnes*, 148 Idaho 582, 584, 226 P.3d 524, 526 (2010) citing *Doe v. Boy Scouts of America*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009); *Harrison v. Binnion*, 147 Idaho 645, 649, 214 P.3d 631, 635 (2009).

Appellant has filed a Motion for Sanctions on this issue pursuant to IAR Rule 11.2 and is incorporated herein by its reference. It's content is self-explanatory and the relief sought is simple and just.

5. DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION

Appellant clearly and meticulously demonstrated that the more recent statute of I.C. §§ 1-2311 and 1-2312 has precedence over the older statute of I.C. § 1-705 based upon the rules of statutory construction. Respondent had no rebuttal to this position or any other, ignoring every aspect of the law unfavorable to him as argued in Appellant's brief, but decided instead rather than act in some sort of good faith to concede a position that he was unable to support in law.

Briefly and once again, reciting the two statutory construction maxims employed in Appellant's initial brief: First, "Where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general." *Athay v. Stacey*, 146 Idaho 407, 196 P.3d 325, *rehearing denied*, (2008); *Estate of Collins v. Giest*, 143 Idaho 821, 153 P.3d 1167 (2007); *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 104 P.3d 946 (2004). And the Second, "It is also clear that where two statutes conflict the latest expression of the legislative will must prevail. *Employment Security Agency v. Joint Class "A" School District No. 151*, 88

Idaho 384, 400 P.2d 377 (1965)." *State Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974).

The 1969 Session Laws, had I.C. § 1-705 being the latest expression of the legislature, but had I.C. §§ 1-2311 and 1-2312 were the more specific statutes to control over the more general one of I.C. § 1-705. There was not any third way to break the tie if statutory construction was necessary in a case. In 1985 the legislature by amending I.C. §§ 1-2311 and 1-2312 gave both maxims of construction of statute of latest expression of the legislature and more specific statutes to control over the more general to I.C. §§ 1-2311 and 1-2312. This then has left I.C. §§ 1-2311 and 1-2312 to have complete precedence over I.C. § 1-705 on both counts of statutory construction. Coincidentally, the legislature did this just after this Court decided *Gilbert v. Moore*, 108 Idaho 165, 697 P.2d 1179. Since *Gilbert,* there really has not been any other case dealing with questions of appellate jurisdiction over a small claims appeal, which has somewhat changed due to the amendment after *Gilbert,* as is at least to the issues raised in this case.

Additional proof can be seen emanating from the justices of the Supreme Court who adopted IRCP Rule 38(b) in which its language clearly and undeniably recognizes only an attorney magistrate can hear an appeal from the Small Claims Department of the Magistrate Division.

Respondent on page 9 states the following, "Appellant assumes that the district court was acting in an appellate capacity."Appellant does not assume that the district court was acting in an appellate capacity! It was acting in excess of any capacity from I.C. § 1-705. There are three (3)

jurisdictions. Let's go through them one-by-one. ONE - General Jurisdiction, which the Small Claims Department entered judgment in favor of the Appellant, disposing general jurisdiction or original jurisdiction due to the case originating in the Small Claims Department. TWO - Issuance of writs, nobody in this case was seeking a writ, so it is inapplicable here. And THREE - Limited Appellate Jurisdiction, which Appellant has already shown not to exist in my briefing. The ONLY way the district court could have had jurisdiction is, if there is an invisible number 4 in I.C. § 1-705 and that in order to see it you needed a special pair of glasses, like in the movie "They Live" starring Rowdy Roddy Pipper to see it. But, then how does that give Notice to me under the due process clause?

Respondent's several assumptions are obviously incorrect, but shows outrageous conduct of untrue accusations and innuendo to place words in the mouth of somebody else just to sway the Court. Respondent knows that Appellant has clearly articulated the opposite position.

That is why Appellant has filed a Motion for Sanctions on this issue pursuant to IAR Rule 11.2 and is incorporated herein by its reference. It's content is self-explanatory and the relief sought is simple and just.

6. MORE ON EQUITY

Respondent asserts on page 14 another dead issue of judicial estoppel. Appellant re-asserts that the district court was acting without jurisdiction, and all orders, rulings, judgments are void. Appellant's Brief, page 22; and the district Court's actions being void amounted to a plain usurpation of power constituting a violation of due process." *Hoult v. Hoult*, 57 F.3d 1, 6

(1st Cir.1995); accord *Dike v. Dike*, 75 Wash.2d 1, 448 P.2d 490, 494 (1968); 11 charles A. Wright et al., wright Miller & Kane, Federal Practice & Procedure § 2862, at 326-29 (2d ed.1995). Citing *Dragotoiu v. Dragotoiu*, 133 Idaho 644, 647, 991 P.2d 369, 371 (Ct.App.1998). But also, "It is well understood that equitable principles cannot supersede the positive enactments of the legislature." *Davis v. Idaho Dept. of Health & Welfare*, 130 Idaho 469, 471, 943 P.2d 59, 61 (Ct.App. 1997) cited from *Spencer v. Jameson*, 147 Idaho 497, 500, 211 P.3d 106, 115 (2009).

Therefore, all the other equitable claims for the district court to act on the appeal from the Small Claims Department and conduct the appellate process of a trial de novo as required by an attorney magistrate of the magistrate division, it too must fail on jurisdictional grounds.

Appellant has filed a Motion for Sanctions on this issue pursuant to IAR Rule 11.2 and is incorporated herein by its reference. It's content is self-explanatory and the relief sought is simple and just.

7. MOOT ISSUE FOR APPEAL DUE TO SATISFACTION

Respondent asserts on pages 15 and 16 the issue of that the appeal is moot due to satisfaction. Once again Respondent fails to comply with IAR Rule 35(b)(6) in not being responsive to the argument briefed in Appellant's appeal.

"Satisfaction of a judgment by execution is involuntary, and does not cut off the judgment debtor's right to appeal. E.g. *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928); *Power County v, Evans Bros. Land & Livestock Co.*, 43 Idaho 158, 252 P. 182 (1926); *Falls Creek Timber Co. v. Day*, 39 Idaho 495, 228 P. 313 (1924). In *Falls Creek*, the court stated, '[t]he

involuntary payment .... [in] satisfaction of a judgment .... does not affect the right of appeal.' *Id.* at 497, 228 P. at 313 (quoting 3 C.J. 675, § 549).'" cited from *Intern. Business Mach. Corp. v. Lawhorn*, 106 Idaho 194, 197, 677 P.2d 507, 510, (Idaho.App. 1984). "In other words, a judgment paid, in full or in part, under legal coercion remains ripe for judicial review. *Twenty-Seventh Street, Inc. v. Johnson*, 716 P.2d 210 (Mont.1986); *Matter of Marriage of Sellers*, 39 Or.App. 647, 593 P.2d 1191 (1979)." cited from *Whittle v. Seehusan*, 113 Idaho 852, 748 P.2d 1382 (Idaho.App. 1987). See also *Glancy v. Williams*, 49 Idaho 594, 290 P. 1054 (1930)(Mere payment of costs, unlike acceptance of amount of judgment, does not waive error in proceedings, or right of appeal.).

In Appellant's First Brief on page 23, Appellant showed through exhibits that she was definitely under coercion and duress when she paid the court costs to Respondent's attorneys. See R. Vol. II, pages 399-400 &406-407. Respondent once again has made no comment about these most damaging interactions of misconduct on the part of an attorney. Undoubtedly, Appellant's acts and actions were certainly involuntary, in the protection of not having her home threatened for payment of costs of attorneys fees illegally adjudicated by a district court judge who acted in excess and without jurisdiction or justification.

Pursuant to the above points and authorities cited by Appellant, inclusive of *Glancy* the mere payment of costs does not waive error in proceedings, or right of appeal, irrespective whether it was voluntary or involuntary.

Therefore, the issue of mootness is moot, just as every other issue, defense or argument Respondent has brought without authority or proper explanation.

But what about those persons who have robbed the Appellant under color of law and authority. Do they get off Scott free? I always thought the Supreme Court of the State of Idaho has inherent power to control its department and the people who are in it. Aren't District Court Judges Benjamin Simpson and John T. Mitchell, Magistrate Debra A. Heise, attorneys Toby McLaughlin and Stephen Snedden under your purview and control? They are all officers of the Court and part of your roster.

Appellant has filed a Motion for Sanctions on this issue pursuant to IAR Rule 11.2 and is incorporated herein by its reference. It's content is self-explanatory and the relief sought should be granted to at least begin to have the Appellant partially brought whole from the damages done, if the Court wishes to observe its Mission Statement of having a justice system based on integrity and proper administration of justice.

Here are some quotes from http://www.sos.idaho.gov/elect/bluebook/2004/05_judicial.pdf

> "**The Supreme Court, as supervisor of the entire court system**, establishes statewide rules and policies for the operation of its functions and that of the district courts."
>
> "**The Supreme Court is responsible for the administration and supervision of the trial courts**, as well as the operations of the staff of the Courts, ..."
>
> and my favorite ...
>
> "**Appeals from small claims decisions are taken to a lawyer magistrate judge**." [Emphasis Ours] *Judicial Branch - Idaho Bluebook on the Internet.*

II

COSTS

Respondent requests an award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 20 P.3d 702 (2001) When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings*, 135 Idaho 518, 20 P.3d 702 (2001); *McGrew v. McGrew*, 139 Idaho 551, 82 P.3d 833 (2003). "Attorney fees can be awarded on appeal under [§ 12-121] only if the appeal was brought or defended frivolously, unreasonably, or without foundation." *Downey v. Vavold,* 144 Idaho 592, 596, 166 P.3d 382, 386 (2007). See also *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009) ("An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation.")

Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Nampa & Meridian Irrigation Dist. v. Washington Fed.*

Savings, 135 Idaho 518, 20 P.3d 702 (2001). An appeal may also be deemed frivolous, and attorney fees awarded, for failure to properly comply with I.A.R. 35(b)(6). *Sprinkler Irrigation Co. v. John Deere Ins. Co.,* 139 Idaho 691, 697, 85 P.3d 667, 673 (2004). Although an award of attorney fees under the statute is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 41 P.3d 220 (2002).

It is obvious that Appellant brought this appeal without the intent to be "pursued, or defended frivolously, unreasonably, or without foundation." But, you cannot say the same for the Respondent. Most of his argument was defended frivolously and unreasonably without foundation or any substantial on-point authority whatsoever. Respondent has unnecessarily placed Appellant under extreme duress and financial hardship, more than just Walter's welching out on a promissory note of considerable value.

Now, they have stolen $10,000 for costs on appeal under color of law that would have only had a maximum limit of $75.00 on an appeal from Small Claims Department as prescribed in I.C. 1-2311 and IRCP Rule 81(q) - attorneys fees of $25.00 and maximum costs of $50.00 as per. IRCP Rule 81(p) by and through a district Court judge acting without jurisdiction or authority, is shocking conduct of an outrageous manner. Even more outrageous was being placed under threat, duress and coercion by Respondent that if I didn't pay the $10,000, I could lose my home.

This is the main reason for bringing this appeal is to get back my $10,000 and costs on appeal. All that was taught to Walter was that he can make agreements and not keep them without any repercussions to him. That is how real criminals are made. No discipline and morals taught at youth and now none as an adult. And the victim is left defending herself, not to be even more of a victim.

Idaho Code Section 12-120(3) provides in part: "In any civil action to recover in a commercial transaction unless otherwise provided by law, the prevailing party shall be allowed reasonable attorney fees to be set by the court." The language of I.C. § 12-120(3) is mandatory and requires a trial court to award attorney fees to the prevailing party. *Inland Title Co. v. Comstock*, 116 Idaho 701, 779 P.2d 15 (1989); *Torix v. Allred*, 100 Idaho 905, 911, 606 P.2d 1334, 1340 (1980). A commercial transaction is defined "to mean all transactions except transactions for personal or household purposes." I.C. § 12-120(3). Attorney fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 784, 792 P.2d 345, 349 (1990); See *Sun Valley Hot Springs Ranch v. Kelsey*, 131 Idaho 657, 962 P.2d 1041 (1998).

Respondent's general assertion to an award of attorney fees under Idaho Code section 12-120(3) is insufficient to request attorney fees on appeal, where the specific portion of the statute relied upon is not identified and, if necessary, supported by argument as to why it is applicable. *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 529-30, 248 P.3d 1256, 1264-65 (2011);

Appel v. LePage, 135 Idaho 133, 139, 15 P.3d 1141, 1147 (2000). Second, that statute only provides for the award of attorney fees to the prevailing party, *Storey Constr., Inc. v. Hanks*, 148 Idaho 401, 411, 224 P.3d 468, 478 (2009).

This Court has previously refused to award fees where the appellants had raised novel, legitimate issues of law related to the adoption statutes. *Roe Family Servs. v. Doe*, 139 Idaho 930, 939, 88 P.3d 749, 758 (2004).

I request the Court to award Costs of expenses as requested in Appellant's initial Brief. and the Respondent be awarded nothing new in this case. I also request the Court to grant my Motion for Sanctions with justice in mind.

Dated this 3rd day of February, 2014.

Laurel Evans

Laurel Evans, Appellant
Appearing In Propria Persona

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2014, I caused to be served and delivered the original and Six (6) true and correct copies of the Appellant's Reply Brief on Appeal and One (1) unbound, unstapled copy to the Supreme Court and Two (2) true and correct copies of the Appellant's Brief on Appeal to each party; and Certificate of Service; by the method as indicated below, and addressed to the following:

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By: Errol Owen
Errol Owen