7-8-2016

# Davis v. Davis Appellant's Reply Brief Dckt. 43852

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

**Docket No. 43852**

CORI LYNN DAVIS,

Plaintiff/Respondent,

v.

ROCKY DEAN DAVIS,

Defendant/Appellant.



# APPELLANT'S REPLY BRIEF

Appeal from the Magistrate Court of the Sixth Judicial District for Bannock County.
Honorable Steven A. Thomsen, Magistrate Judge presiding.
Appeal from the District Court of the Sixth Judicial District for Bannock County
Honorable Stephen S. Dunn, District Court Judge presiding.

Ryan L. Holdaway, ISB #8289
Diane Pitcher, ISB #8340
**PITCHER & HOLDAWAY, PLLC**
40 W. Cache Valley Blvd. Ste., 3B
Logan, UT 84341
Telephone: (435) 787-1200
Facsimile: (855) 787-1200
Email: office@pitcherholdaway.com
Attorneys for Defendant/Appellant

Patrick N. George
**RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD.**
PO Box 1391 Center Plaza
Pocatello, ID 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109
Attorney for Plaintiff/Respondent

Angela Jensen
**Guardian Ad Litem**
150 S. Arthur Ave., Ste. 201
PO Box 1785
Pocatello, ID 83204
Telephone: (208) 241-7241
Facsimile: (208) 233-2421
Attorney for minor child, K.D.

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## ARGUMENT IN REPLY

The Respondent makes three contentions in her responding brief: 1) that the present issue is moot; 2) that the facts support the district court's findings and ruling; and 3) the appeal is frivolous and therefore the Respondent is entitled to attorney's fees and costs. *See generally*, Respondent's Brief (June 9, 2016)(hereinafter "RB"). Issue one and three will be addressed here. As issue two is primarily addressed by the Appellant's Opening Brief, that issue will not be addressed here.

### A. THE ISSUE IS NOT MOOT AS MR. DAVIS IS SUSCEPTIBLE TO THE SAME HARM HAPPENING TO HIM AND RELATING TO THE SAME ISSUE.

The Respondent correctly cites to the general rule of mootness. RB at 19 (citing *Arambarri v. Armstrong*, 152 Idaho 734, 739 (2012)). That general rule being that a "case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Cowan v. Bd. Comm'rs*, 143 Idaho 501, 509 (2006). The Respondent later acknowledges one exception to the general rule, which is tha public interest exception. RB at 21 (citing *Ellibee v. Ellibee*, 121 Idaho 501, 503 (1992)). However, the Respondent stops short of recognizing or discussing any other exceptions to the general rule regarding mootness. *See* RB at 19-23. One such exception being the possibility of the same harm being committed against the same party on a matter evading appeal. *Roe v. Wade*, 410 U.S. 113, 123-25 (1973).

In *Roe* the respondent argued the appeal was moot because the appellant's pregnancy had concluded and hence the issue was moot. *Id.* at 123-24. In so arguing, the respondent in *Roe*, as the Respondent in the present matter, contended that since the harm has passed, under the general rule of mootness the case should not be heard. *Id.* However, the U.S. Supreme Court considered the fact that "[p]regnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us." *Id.* Furthermore, due to the

nature of pregnancy, the life of the pregnancy was not likely to survive the time necessary to appeal. *Id.* Accordingly, the court in *Roe* concluded that the law ought not to be "so rigid" as to effectively deny review to those who are harmed but would normally be denied appellate review under the general rule of mootness. *Id.* Accordingly, it applied an exception to the general rule permitting appeals to move forward, even where technically moot, where the same harm could befall the same party, as the underlying issue evaded review. *Id.*

Similarly in *Moore v. Ogilvie*, the U.S. Supreme Court utilized the same exception where the appellant was challenging election laws. 394 U.S. 814 (1969). Due to the fact that the law in question created a harm that ended with the election, the matter was technically moot by the time it reached review with the U.S. Supreme Court. *Id.* at 816. Nevertheless, the court held again that where a matter presents a problem that is "capable of repetition, yet evading review" the matter will not be dismissed for mootness even though technically moot. *Id.*

In contrast, in *Defunis v. Odegaard*, the U.S. Supreme Court declined to exercise the exception because the appellant could not possibly incur the same harm as originally complained of. 416 U.S. 312 (1974). In that case the appellant was challenging the admission process of a law school. *Id.* at 317-318. By the time the matter had reached the U.S. Supreme Court, not only had the appellant been admitted, but he was in his third year as a law student and all parties agreed he would be able to complete school and receive his degree. *Id.* In other words, he could not possibly suffer the same harm again in the admission process and therefore the result was "definite and concrete." *Id.* Accordingly, the court did not apply the exception and held his matter was moot. *Id.*

Consequently, while *Roe* and *Moore* present cases that are inherently difficult to appeal without issues of mootness arising due to the nature of the harm, the analysis in *Defunis* suggests the focus is primarily on the potential of the harm repeating itself against the same party if the

appeal is not permitted to go forward. This is in line with another exception to the mootness doctrine which is the voluntary relinquishment of a harm.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, the respondent had voluntarily ceased its harmful conduct by the time the matter reached the U.S. Supreme Court. 528 U.S. 167 (2000). The cessation of the harmful conduct rendered the appeal technically moot. *Id.* at 189-90. However, the court held that were it to treat such matters as moot and decline to review, "the courts would be compelled to leave 'the defendant . . . free to return to his old ways." *Id.* This would in turn, leave the appellant to continued exposure to the harm without hope of long term relief from the courts. Indeed, such was the concern of the court that is held it was the burden of the party claiming mootness to prove the harm was not likely to recur in the future. *Id.* Finally, the court recognized the analogous relationship between this exception and the exception set forth in *Roe* as it relied on the principle set forth in *Roe* as a basis for the voluntary cessation exception. *Id.*

Coupled with these rules are the policy and intent behind mootness. The U.S. Supreme Court has explained that policy, insofar as it applies to the federal courts as relating to the preservation of scarce judicial resources. *Id.* at 190-91. However, the court was mindful to note that in some cases, "by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal." *Id.* The exceptions delineated in *Roe* and *Friends of the Earth, Inc.* exist because it is recognized that the issue giving rise to the appeal may very well arise again between the same parties if not resolved now. Consequently, to dismiss the action on mootness does save judicial resources as it simply invites more litigation when the same harm appears in the future to the same parties.

The exceptions discussed above, in addition to the policy reasons behind them, denote

that the salient point of analysis in mootness is whether the same harm can befall the same party if the matter evades review. While some matters are inherently likely to evade review (such as pregnancy related matters), others are less inherent, but expose the party to the same risks and harm nonetheless. It is this exposure to a renewal of the harm that renders the issue nonmoot.

Idaho family law matters present situations where review may be evaded. Idaho Rule of Civil Procedure 81(i)(2) in tandem with Idaho Appellate Rule 13(b)(11) operate to permit judges to continue to modify orders regarding child support and child custody even while the order being modified is being appealed. Such was the case here as the order being appealed was modified following the commencement of the appeal Indeed, the power to modify the order continues to reside with the magistrate judge even as the appeal continues before this Court. It is for this reason that the Respondent has been able to maintain her present Motion to Modify wherein she is seeking the minor child be returned to her as the primary custodial parent. Indeed, the Respondent is at this very moment attempting to recreate the very harm the Appellant complains of. This is precisely the very type of matter the well recognized exceptions have been created to address.

While the Appellant has relied on federal law to explain the exceptions to mootness, Idaho has recognized the exception set out in *Roe. Russell v. Fortney*, 111 Idaho 181, 182-83 (Ct. App. 1986). In doing so, the Idaho Court of Appeals was presumably mindful of the policy reasons behind the exception and found those reasons acceptable for applicability to questions of mootness before Idaho courts. Accordingly, it is appropriate for Mr. Davis to pursue his appeal on the basis that not only is he at risk of the same harm on the same matter, but is threatened by a repetition of that very harm at the present moment.

**B. THE APPEAL IS NOT FRIVOLOUS OR BROUGHT IN BAD FAITH AS IT IS PRESENTS AN EXCEPTION TO THE MOOTNESS DOCTRINE AND PROPERLY ASKS THIS COURT TO CONSIDER WHETHER A JUDGE ABUSED HIS DISCRETION.**

The Respondent contends she is entitled to her attorney's fees and costs on two grounds. The first is that the issue is moot and therefore frivolously pursued. The second is that the Appellant is allegedly merely asking this Court to "second-guess a finder of fact on conflicting evidence." RB at 32-33. The issue of mootness has been discussed in the previous section and will not be readdressed here.

The Appellant does not merely ask this Court to re-evaluate evidence, nor does it ask this Court to weigh and determine which conflicting evidence the magistrate should have believed. Indeed, when the Respondent states in her brief that "[Mr. Davis] does not dispute the evidence the court considered relating to him," she is acknowledging that Mr. Davis is not asking this Court to weigh in on conflicting evidence.

Mr. Davis is very direct on what legal grounds he is asserting as a basis for error in the magistrate's findings and rulings. Appellant's Opening Brief, 7 (May 9, 2016). Each of the stated grounds were set forth by either the Idaho Court of Appeals or this Court as appropriate grounds for reversal. This includes conclusions not supported by sufficient evidence (*Nelson v. Nelson*, 144 Idaho 710 (2007)), findings not made on substantial and competent evidence (*id.*), overemphasizing one of the best interest factors (*Schultz v. Schultz*, 145 Idaho 859, 863 (2008)), or relying on stale evidence (*Roeh v. Roeh*, 113 Idaho 557 (Ct. App. 1987)). Each of those grounds may result in reversal and each one necessarily requires this Court to consider the facts as they relate to the ultimate findings and conclusions of the magistrate. Therefore, Mr. Davis's

review of the facts is not done purely to invite this Court to second-guess the magistrate's findings and conclusions as they relate to those facts, but rather to determine if the magistrate's findings and conclusions remained within the limits of its discretionary powers.

While Mr. Davis believes the magistrate court abused its discretion, he is cognizant that this Court may ultimately disagree with him and conclude the magistrate remained within its discretionary limits. However, the test of whether a matter was brought frivolously is not determined by who loses or who wins. Otherwise, should Mr. Davis prevail one could argue Ms. Davis defended the appeal frivolously.

The basis of attorney's fees for an alleged frivolous appeal requires that the appeal was brought "without a reasonable ground in fact or law." *Hernandez v. Phillips*, 141 Idaho 779, 783 (2005). In stating that rule, this Court acknowledged that where a party does nothing more than ask this Court to "reconsider the evidence and side with him" then attorney's fees are appropriate. *Id.* Inversely, where the appealing party goes beyond the mere re-hashing of the evidence then it was not frivolous. Of course, the issue becomes a sensitive one when one considers that questions of abuse of discretion inherently necessitate a review of the facts and magistrate's determinations around and based on those facts. Consequently, the fact that Mr. Davis asks this Court to consider the facts at issue is a necessary component of the appeal. It is perhaps for this reason that this Court has noted that even where the appellant raises legitimate issues, even if "not with the strongest hoist," then attorney's fees are not appropriate. *Id.*

## CONCLUSION

Mr. Davis stands to suffer the same harm over the same issues and involving the same parties. To that end he falls within well recognized and well established exceptions to the mootness doctrine. Additionally, Mr. Davis has brought his appeal in good faith and is seeking not just a judicial second-guessing of facts, but a review of the magistrates exercise of discretion

as they relate to those facts. Accordingly, Mr. Davis respectfully requests this Court review his matter and, based on the arguments set forth in his Opening Brief, find the magistrate court abused its discretion.

DATED this 5th day of July 2016.

Ryan L. Holdaway
Attorney for Respondent

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July 2016, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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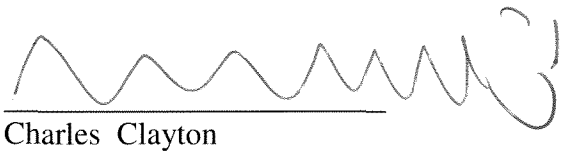

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