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IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

MICHAEL D. DAHMER, P.E.,)	
)	
Plaintiff/Appellant,)	Supreme Court Case No. 44917
)	
v.)	Jerome County Case No. CV-2015-358
)	
JONATHAN BLACKBURN, STATE FARM)	
MUTUAL AUTOMOBILE INSURANCE)	
COMPANY, an Illinois Corporation, DAVID)	RESPONDENT JONATHAN
E. BICE, personally and in his capacity as)	BLACKBURN'S BRIEF
Claims Adjuster for Defendant STATE FARM)	
MUTUAL AUTOMOBILE INSURANCE)	
COMPANY, JOHN DOES I through V, JOHN)	
DOE CORPORATIONS I through V,)	
)	
Defendants/Respondents.)	

* * * * *

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
 In and for the County of Jerome, Honorable Jonathan P. Brody, District Judge, Presiding

Anthony M. Valdez
 VALDEZ LAW OFFICE, PLLC
 2217 Addison Avenue East
 Twin Falls, Idaho 83301
 Telephone: (208) 736-7333
 Fax: (208) 736-8333
Attorney for Defendant, Jonathan Blackburn

Jeffrey A. Thomson
 ELAM & BURKS, P.A.
 Post Office Box 1539
 Boise, ID 83701
 Telephone: (208) 343-5454
 Facsimile: (208) 384-5844
*Attorney for Respondents State Farm
 Mutual Automobile Insurance Company and
 David E. Bick*

Michael D. Dahmer, P.E.
 Post Office Box F
 Jerome, IS 83338
 Telephone: (208) 404-9216
Appellant Pro Se

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STATEMENT OF CASE

Nature of the Case

As concerns Appellant Michael D. Dahmer, P.E.'s ("Dahmer") claim against Respondent Jonathan Blackburn ("Blackburn"), Mr. Dahmer filed a Complaint against Mr. Blackburn for personal injuries related to a motor vehicle accident that occurred on June 13, 2013.

Statement of Facts and Course of Proceedings

On June 13, 2013, Mr. Dahmer was traveling southbound on Davis Street in Jerome, Idaho in his 1986 Oldsmobile Toronado. At that same time, Mr. Blackburn was traveling eastbound on East Avenue A in Jerome, Idaho in his 1990 Toyota Camry. The intersection of Davis and East Avenue A is uncontrolled, and as the two vehicles approached, a collision occurred in the intersection. Since the two vehicles approached the intersection at approximately the same time, Mr. Dahmer was required pursuant to Idaho Code Sec. 49-640 to yield to Mr. Blackburn. Notwithstanding the clear language of the statute, Jerome City Police Officer Clint Wagner cited Mr. Blackburn for failing to yield. (Appeal Exhibits, p. 123) Mr. Blackburn requested a court trial on the citation, a court trial was scheduled, and the citation was dismissed by the prosecuting attorney at trial. (Appeal Exhibits, p. 124-127)

Prior to trial, Mr. Blackburn moved in limine to exclude any reference at trial that Mr. Blackburn was cited for failing to yield. A hearing on the motion in limine was held on October 31, 2016, and after argument from the parties, District Judge Jonathan Brody granted Mr. Blackburn's motion. (Tr., 10/31/2016 Hrg., p. 11-20)

A Jury Trial was held in Jerome County District Court on November 30th and December 1, 2016. After the trial, the jury returned a verdict in favor of Mr. Blackburn, finding that he was not negligent. (R. p. 191-192) Mr. Dahmer filed a Motion for Judgment Notwithstanding the Verdict or in the alternative, Motion for New Trial on or about December 22, 2016, and the District Court

considered Mr. Dahmer's post-trial motions at a hearing on January 9, 2017. At the January 9, 2017 hearing, the District Court denied Mr. Dahmer's post-trial motions. (Tr. 1/9/2017 Hrg., p. 186-191) Mr. Dahmer then brought this appeal.

Issues on Appeal

Mr. Dahmer stated the issues on appeal as against Mr. Blackburn as follows:

4. "Respondent/Defendant's attorney, at trial, breached and violated Respondent/defendant's own 'Motion in Limine' by inquiring on direct examination as to Defendant's driving record.
5. "The trial court erred in refusing to allow plaintiff to further examine on cross as to the opinion of officer as to Respondent/Blackburn's failure to yield and/or the issuance of a citation to defendant Blackburn in the instant case after defense counsel broached the topic."
6. "Records have been tampered with and Officer Wagner was intimidated by Defense attorney Valdez and also conducted ex-parte discovery, in violation of the Idaho Rules of Civil Procedure, with Officer Wagner just prior to Wagner's testimony."
7. "The trial court abused his discretion in preparation of the final jury instructions and allow adequate time for Appellant to review their preparation and allow adequate time for Appellant to review their preparation for presentation despite multiple objections from appellant."

(App. Brief, p. 9-10)

Mr. Blackburn rephrases the issue on appeal as:

1. Did the trial court abuse its discretion in determining the admissibility of evidence at trial and in ruling on Mr. Blackburn's Motion in Limine?
2. Can Mr. Dahmer claim error on appeal relative to Officer Wagner's testimony where such claimed error was not raised at trial?
3. Did the court's instructions to the jury fairly and adequately address the issues presented at trial and correctly state the applicable law?

Additional Issue on Appeal: Attorney's Fees

Mr. Blackburn requests his attorneys fees incurred on appeal pursuant to Idaho Appellate Rule 11.2

ARGUMENT

A. Standard of Review

1. Admissibility of Evidence

In reviewing a district court's order regarding the admissibility of evidence, the standard of review is abuse of discretion. *State v. Gray*, 129 Idaho 784, 791, 932 P.2d 907, 914 (Ct.App.1997).

2. Jury Instructions

The review of the instructions given to the jury is a question of law, and therefore the appellate court can exercise free review of whether the instructions were supported by the evidence presented at trial and the applicable law. *Clark v. Klein*, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002).

3. Claimed Error First Raised on Appeal

A claimed error by an appellant that was not objected to or raised during the trial cannot be considered for the first time on appeal. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982).

B. The Court Did Not Abuse its Discretion in Excluding Evidence that Mr. Blackburn Was Issued a Traffic Citation

In his appellate brief, Mr. Dahmer does not argue that the court erred in granting Mr. Blackburn's motion in limine to exclude evidence or testimony at trial that Mr. Blackburn was cited for failure to yield. However, Mr. Dahmer claims that the court erred in "refusing to allow plaintiff to further examine on cross as to the opinion of officer as to Respondent/Blackburn's

failure to yield and/or the issuance of a citation to defendant Blackburn in the instant case after defense counsel broached the topic.” (App. Brief, p. 22) Trial courts have broad discretion in determining the admissibility of evidence in cases before them and ruling on motions in limine, and a reviewing court will not disturb a trial court's discretion absent a clear showing of abuse. *State v. Gray*, 129 Idaho 784, 791, 932 P.2d 907, 914 (Ct.App.1997). When reviewing an exercise of discretion on appeal, the following is considered: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer bounds of such discretion and consistently with legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Thompson*, 132 Idaho 628, 631, 977 P.2d 890, 893 (1999).

The issue of the admissibility of the citation received by Mr. Blackburn that was ultimately dismissed was extensively addressed by the court in a hearing well before trial on October 31, 2016. In ruling that the citation for failing to yield was not admissible, Judge Brody lawfully exercised his discretion in ruling that the mere fact Mr. Blackburn was cited was unfairly prejudicial, but allowed Mr. Dahmer to present evidence and testimony from the investigating officer regarding his observations and “essentially everything he did except write a ticket.” (Tr. 10/31/2016 Hrg., p. 17-20) It is clear in the court’s explanation and ultimate ruling that the court acted within its discretion; consistently within legal standards; and by an exercise of reason. Mr. Dahmer has failed to show any error by the court regarding this issue.

At trial, Mr. Dahmer argued and has also raised on appeal that Mr. Blackburn’s testimony regarding his habit of not exceeding the speed limit “opened the door” to allow officer Wagner to testify that Mr. Blackburn was cited for failure to yield, and that Mr. Blackburn was traveling over the speed limit. (App. Brief, p. 23-24) The court addressed this at trial, and through an

exercise of discretion, the court maintained its ruling on the inadmissibility of the citation. (Trial Tr. p. 161-162). Mr. Dahmer did present evidence that Mr. Blackburn was exceeding the speed limit through the testimony of his expert witness, Dave Jacovac:

Q: Is there any indication of excessive speed in this report by either party?

A: Yes. We are able to evaluate from crush deformation approximate velocity at impact and based upon the crush deformation that was measured from Mr. Dahmer's car we were able to ascertain that the appropriate speed of Mr. Blackburn was between 27 and 29 miles per hour and the posted speed limit was 25.

(Trial Tr. p.50) Further, the court instructed the jury that they could consider excessive speed, failure to yield, and inattentive driving of *both parties* in the negligence per se instruction. (R., p. 185) Mr. Dahmer has failed to show that the court abused its discretion in excluding evidence of Mr. Blackburn's traffic citation at trial.

C. There is No Evidence in the Record to Support Mr. Dahmer's Claim that Officer Wagner's Testimony was Tainted

Mr. Dahmer asserts on appeal that Officer Wagner's testimony was somehow tainted due to claimed "intimidation" by Mr. Blackburn's counsel and a purported "violation" of discovery rules. (App. Brief, p.24-25) A substantive issue cannot be considered the first time on appeal. *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007). A party may not remain silent as to claimed error during a trial and later assert an objection for the first time on appeal. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). A party's failure to object to action by the trial court precludes a party from challenging that action on appeal. *Mackowiak v. Harris*, 146 Idaho 864, 866, 204 P.3d 504, 506 (2009).

Prior to Officer Wagner's testimony at trial, it was first discovered that both Mr. Blackburn and Mr. Dahmer had prepared written statements regarding the accident that were

contained in Officer Wagner's case file. (Trial Tr. p. 22) The court allowed counsel for Mr. Blackburn and Mr. Dahmer to review the statements prior to Officer Wagner's testimony. (Trial Tr. p. 25-26) After having the opportunity to review the statements, the following exchange took place between the court and Mr. Dahmer:

THE COURT: So what's our status? Where are we at with the statements?

MR. DAHMER: I believe we are ready, Your Honor. There's a statement from each party. There's no – I was listing that they were third-party statements. There are none.

(Trial Tr. p. 27) At no time during the trial, or in any post-trial motion, did Mr. Dahmer raise any issue or suggest that Officer Wagner was "intimidated." Further, Mr. Dahmer made no motion to exclude the written statements or request a sanction for an alleged discovery violation at trial. In fact, Mr. Dahmer introduced as an exhibit at trial the written statement of Mr. Blackburn that he claims for the first time on appeal was the product of some improper "ex-parte" conduct. (Appeal Exhibits, p. 121) Mr. Dahmer's claimed error on appeal regarding Officer Wagner's testimony and the written statements in his case file cannot be considered on appeal because Mr. Dahmer did not raise the issue at trial. Even if Mr. Dahmer had made an objection or claim of error at trial, it would have had no merit and clearly had no effect on the evidence presented or the jury's verdict.

D. The Instructions Given to the Jury Were Proper

"The standard of review for issues concerning jury instructions is limited to a determination of whether the instructions, as a whole, fairly and adequately present the issues and state the law. When the instructions, taken as a whole, do not mislead or prejudice a party, an erroneous instruction does not constitute reversible error. "*Silver Creek Computers v. Petra Inc.*, 136 Idaho at 882, 42 P.3d at 675 (citing *Howell v. Eastern Idaho R.R., Inc.*, 135 Idaho 733, 24

P.3d 50 (2001). Mr. Dahmer failed to identify any jury instruction in his appellate brief that was erroneous. Further, Mr. Dahmer has not claimed on appeal that the instructions given to the jury at trial did not fairly and adequately address the evidence presented at trial or that the instructions incorrectly stated the law. In his appellate brief, Mr. Dahmer claimed that he was unable to “review and collate the instructions in the allocated time.” (App. Brief p. 32) The sole objection made by Mr. Dahmer was to jury instruction number 18, which was the IDJI pattern instruction on the duty to mitigate damages. However, when the court inquired of Mr. Dahmer on this issue, the following exchange took place:

THE COURT: Yeah. I mean, there’s not – there’s not much of an evidentiary issue here, if at all, but it’s not a high standard. Is there anything in the exhibits that could even touch on that a little bit? Doesn’t take much.

MR. DAHMER: Yeah. No, Your Honor I don’t believe there are in the exhibits. There’s no call for a determination of mitigation that I know of.

THE COURT: Mr. Valdez?

MR. VALDEZ: I don’t, Your Honor. There may be some suggestion relative to this somewhat proposed lost income claim possibly, but –

THE COURT: That was discussion. It’s not real explicit, and I don’t know what you’re going to say in closing, if anything, but I don’t see that it’s a big issue. But there could be something in there under any view of the evidence. And it is the stock instruction, so it’s not a huge issue, but I’m going to leave it in. It could come up. I understand, yeah, it’s not the central issue in the case. I understand your objection, Mr. Dahmer. Overruled. Anything further on the instructions?

MR. DAHMER: No, Your Honor

(Trial Tr., p. 170) Again, while Mr. Dahmer is claiming on appeal that he had insufficient time to review the court’s proposed instructions, he made no such claim at trial and therefore his claimed error, such as it is, cannot be considered on appeal. Further, Mr. Dahmer has not claimed on

appeal that the one objection he made to a proposed instruction would require a reversal of the verdict or judgment. Lastly, Mr. Dahmer has not claimed that the jury instructions as a whole failed to fairly address the evidence presented at trial or that the jury instructions incorrectly stated the applicable law.

E. Mr. Blackburn is Entitled to his Attorneys Fees on Appeal

An award of attorney fees on appeal is appropriate when the appellate court has an “abiding belief” that the appeal was brought or defended frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979) Attorney fees on appeal are proper where the appeal is not well-grounded in fact or law, and raises issues which were not raised in the trial court. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34, (2004). Mr. Dahmer’s appeal as against Mr. Blackburn, as discussed above, was primarily based upon issues that were not raised at trial. Further, the claims on appeal that were addressed in the trial court were not well-grounded in fact or law and only demonstrate Mr. Dahmer’s dissatisfaction with the outcome without any legal basis for appealing the result.

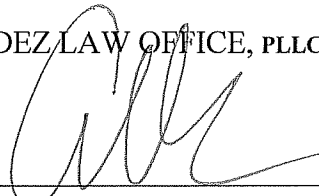
CONCLUSION

The verdict and judgment in favor of Mr. Blackburn should be affirmed. Mr. Dahmer’s appeal was brought frivolously, unreasonably, and without foundation. Therefore, Mr. Blackburn should be awarded its fees and costs on appeal.

DATED This 17th of November, 2017.

VALDEZ LAW OFFICE, PLLC

By _____



Anthony M. Valdez

Attorney for Respondent, Jonathan Blackburn

CERTIFICATE OF SERVICE

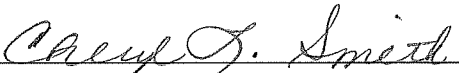
Cheryl L. Smith for Valdez Law Office, PLLC, with offices at 2217 Addison Avenue East, Twin Falls, Idaho, certifies that on the 17th day of November, 2017, she caused a true and correct copy of the **RESPONDENT JONATHAN BLACKBURN'S BRIEF** to be forwarded with all required charges prepared, by the method(s) indicated below, to the following:

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Jeffrey A. Thomson
ELAM & BURKE, P.A.
Post Office Box 1539
Boise, ID 83701
**Attorneys for State Farm and
David E. Bice**

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Cheryl L. Smith