

10-10-2013

Flying "A" Ranch v. Lewies Appellant's Reply Brief Dckt. 40987

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IN THE SUPREME COURT OF THE STATE OF IDAHO

FLYING "A" RANCH, INC., an Idaho Corporation, CLEN ATCHLEY, EMMA ATCHLEY, LAURA PICKARD, CLAY PICKARD, GEORGE TY NEDROW, and DAVID TUK NEDROW,

Petitioners,

and

KARL H. LEWIES,

Real Party in Interest-Appellant

vs.

BOARD OF COUNTY COMMISSIONERS FOR FREMONT COUNTY, IDAHO, a political subdivision of the state of Idaho, RONALD "SKIP" HURT, in his official capacity, and LEROY MILLER, in his official capacity,

Respondents.

E.C. GWALTNEY, III and LANA K. VARNEY,

Petitioners,

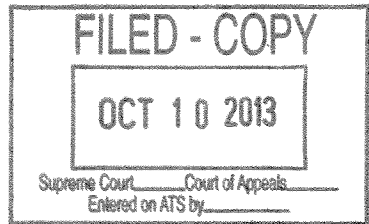
and

KARL H. LEWIES,

Real Party in Interest-Appellant

DOCKET NO. 40987-2013

APPELLANT'S REPLY BRIEF



IN THE SUPREME COURT OF THE STATE OF IDAHO

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 FOR FREMONT COUNTY, IDAHO, a political)
 subdivision of the state of Idaho, RONALD)
 "SKIP" HURT, in his official capacity, and)
 LEROY MILLER, in his official capacity)
)
 Respondents.)
)
)

APPELLANT’S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,
 in and for the County of Fremont

HONORABLE GREGORY W. MOELLER, District Judge, Presiding

Karl H. Lewies, Esq.
 KARL H. LEWIES, PLLC
 343 E. 4th N., Suite 125
 Rexburg, Idaho 83440
 Telephone: (208) 372-1700
 Facsimile: (208) 372-1701
khlewies@gmail.com

Blake G. Hall, Esq.
 HALL, ANGELL & STARNES, LLP
 901 Pier View Drive, Suite 203
 Idaho Falls, Idaho 83402
 Telephone: (208) 522-3003
 Facsimile: (208) 656-7108
bgh@hasattorneys.com

Attorney for Real Party in Interest- Appellant

Attorney for Respondents

W. Lynn Hossner, Esq.
 ATTORNEY AT LAW
 109 N. 2nd West
 St. Anthony, Idaho 83445
 Telephone: (208) 624-3782
 Facsimile: (208) 624-3783

Charles A. Homer, Esq.
 HOLDEN, KIDWELL, HAHN & CRAPO
 P.O. Box 50130
 Idaho Falls, Idaho 83405
 Telephone: (208) 523-0620
 Facsimile: (208) 523-9518

Attorney for Petitioners – Flying A Ranch, *et. al.*

Attorney for Petitioners – Gwaltney, *et. al.*

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The Real Party In Interest – Appellant, Karl H. Lewies (“Lewies”), submits this reply brief in support of his appeal from the final decision of the District Court of the Seventh Judicial District in and for Fremont County (the “Court”).

I. ARGUMENT

A. Scope of Review on Appeal.

Respondents have submitted no argument or authority on this issue. (*Cf.* Appellant’s Brief, pp. 12-14)

B. The Court abused its discretion in imposing I.R.C.P. 11(a)(1) sanctions against Lewies based on extraneous conduct, rather than a violation of Rule 11 signature certification requirements.

Respondents’ main argument on this issue is that Rule 11 allows courts to impose sanctions for “*misguided filings*” and “*litigative misconduct.*” (Respondents’ Brief, p. 6) However, Respondents fail to identify what those terms actually mean. Further, they fail to identify what conduct, if any, Lewies engaged in that fell within the meaning of those terms.

For guidance on what the terms mean, the case of Conley v. Looney, 117 Idaho 627, 630-31, 790 P.2d 920, 923-24 (Ct. App. 1989) proves helpful. In Conley, the court wrote as follows:

“This Court recently decided that I.R.C.P. 11 sanctions should not be applied to make a ‘lump-sum compensatory attorney fee award.’ Kent v. Pence, 116 Idaho 22, 773 P.2d 290 (Ct.App.1989). The Kent court further stated that ‘[i]n our view, Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on *discrete pleading abuses or other types of litigative misconduct* within the

overall course of a lawsuit.’ *Id.* at 23, 773 P.2d at 291. Here, it is impossible to determine from the record whether or not the I.R.C.P. 11 sanction was imposed for particular *litigative misconduct (the filing of frivolous motions)* (or as a broad form of compensation in the form of an award of attorney fees incurred to defend the entire action.” (Emphasis added.)

Additionally, in Kent v. Pence, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct. App. 1989), the court wrote concerning Rule 11 as follows:

“This rule authorizes sanctions (including attorney fees) for pleadings which are not ‘well grounded in fact,’ which are not ‘warranted by existing law or a good faith argument for the extension, modification or reversal of existing law,’ or which are ‘interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.’ In our view, Rule 11(a)(1) is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on *discrete pleading abuses or other types of litigative misconduct* within the overall course of a lawsuit.”

According to the above authorities, litigative misconduct means “filing frivolous motions.”

In the instant case the Court determined that Lewies’ petitions were far from frivolous. As Judge Moeller said, they contained “important issues” and he wanted to “get straight to the merits.” (Appellant’s Brief, pp. 33)

Respondents’ also argue that in imposing Rule 11 sanctions the Court applied a totality of the circumstances test to Lewies’ conduct and “viewed Lewies’ conduct in the broad picture of the ‘integrity of the judicial process;”” and that “the integrity of the judicial process (litigative misconduct) was harmed by Lewies’ failure to identify the significant conflict issues that would inevitable [sic] be created by Lewies’ filings.” (Respondents’ Brief, p. 9) They then cite the Court’s decision language as follows, “Lewies’ filings of the petitions against a known, future client was a significant offense against the integrity of the judicial system.” (*Id.*, p. 10)

Respondents' are contending that Rule 11 sanctions were appropriate because given the totality of the circumstances Lewies failed to identify significant conflict issues (pertaining to a "known, future client") and that such failure harmed the integrity of the judicial process. However, as previously explained in Appellant's Brief at page 16, nothing in Rule 11 prohibits an attorney from filing a well-grounded legal action against a known, future client. Further, the Court cited no authority that prohibits such a filing. Rather, conflicts of interest are matters governed by the Idaho Rules of Professional Conduct – they are ethical concerns. Running afoul of an ethics rule is not tantamount to filing papers for an improper purpose subjecting one to sanctions under Rule 11.¹

Next, the notion that filing well-grounded petitions against a known, future client constituted an improper purpose under Rule 11 because doing so "harmed the integrity of the judicial process" is without merit. The Court clearly believed the petitions contained "important issues"² so the bare fact that they were filed against a known future client cannot support imposition of Rule 11 sanctions. Under Rule 11's analytical framework, since the Court openly acknowledged the importance of the merits of the petitions,³ it could not subsequently find that they had been filed for any improper purpose. As explained by Judge William Schwarzer, "...If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate." Sanctions Under the New Federal Rule 11 – A Closer Look, Shwarzer, William W., 104 F.R.D. 181 (1985).

¹ In the instant case, no ethical violations were found. (R. 188)

² Appellant's Brief, p. 33.

³ See, Appellant's Brief, pp. 32-33.

Imposition of Rule 11 sanctions against Lewies for filing petitions that admittedly contained “important issues” was an abuse of discretion.

Also of substantial significance in determining whether the Court improperly considered extrinsic factors in imposing Rule 11 sanctions was the Court’s opening question put to Lewies, “What were you *thinking* filing these petitions against Fremont County just weeks after you were elected to be Fremont County Prosecuting Attorney?”⁴ The judge improperly delved into Lewies’ subjective intent. As a direct result of the Court’s foray into state of mind, the following harmful consequences warned of by Judge Shwarzer⁵ actually ensued: (1) satellite litigation was spawned (i.e. this appeal); (2) advocacy was chilled (i.e. a private practice attorney, once elected to public office albeit not yet sworn-in, can no longer zealously represent⁶ his private clients); and (3) Lewies was stigmatized by the bad faith finding (i.e. publication of the finding in regional newspapers resulting in damage to Lewies’ professional reputation and community standing).

Rather than venturing into the subjective realm of states of mind to discern *why* Lewies filed the petitions, the Court should have objectively examined Rule 11 sanctions in light of existing

⁴ See, Appellant’s Brief, p. 7.

⁵ “In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney’s subjective intent...If a court were to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy...Finally, a bad faith test would make courts more reluctant to impose sanctions for fear of stigmatizing a lawyer by a bad faith finding.” Sanctions Under the New Federal Rule 11 – A Closer Look, Shwarzer, William W., 104 F.R.D. 181 (1985)

⁶ I.R.P.C. 1.3, comment 1, provides in relevant part, as follows: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” Comment 2 to I.R.P.C. 1.3, provides in relevant part, “A client’s interests often can be adversely affected by the passage of time...; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed.”

federal and state authorities and determined whether Lewies had made a proper investigation upon reasonable inquiry into the factual basis and legal basis for the petitions. Durrant v. Christensen, 117 Idaho 70, 785 P.2d 634 (Idaho 1990). By inquiring into Lewies' state of mind and apparently concluding that he harbored some sort of political grudge against the County Commissioners that served as a bad faith motive for filing petitions against them, the Court ventured far beyond any actual evidence before it, and far beyond Rule 11's objective standard.

Imposition of sanctions without finding a *lack of reasonable inquiry* was not an adequate analysis under Rule 11. Hanf v. Syringa Realty, Inc., 120 Idaho 364, 816 P.2d 320 (1991). Without such a determination, Rule 11 sanctions cannot be sustained. Ibid.

C. The petitions filed by Lewies in case numbers CV-12-580 and CV-12-581 did not violate the signature certification requirements of I.R.C.P. 11(a)(1).

Respondents argue that "Lewies erroneously suggests that Rule 11 can only be used where a filing violates the signature certification requirements of Idaho Rule of Civil Procedure 11(a)(1)." (Respondents' Brief, p. 6) They also argue that "Lewies' reading of Rule 11 is overly simplistic and ignores the explicit requirement that an attorney who signs a pleading, motion, or other paper for an improper purpose." (Ibid., p. 12)

Contrary to Respondents' understanding, the fact is that a Rule 11 violation occurs at the time the offending paper is signed and submitted to the court. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed. 2d 359 (1990). "The certification which results from the attorney's signature of the paper is directed at the three substantive prongs of the rule: its

factual basis, its legal basis, and its legitimate purpose....” (Appellant’s Brief, pp. 20-21, citing Sanctions Under the New Federal Rule 11 – A Closer Look, Shwarzer, William W., 104 F.R.D. 181 (1985)) However, in the instant case, the Court failed to inquire into any of the three prongs. It made no inquiry into the *factual basis* of the petitions, it made no inquiry into the *legal basis* of the petitions, and it made no objective inquiry into the *legitimate purposes* of the petitions.

Accordingly, the Court’s imposition of Rule 11 sanctions cannot be sustained. (See Appellant’s Brief, pp. 20-22)

D. Attorney’s fees as Rule 11 sanctions.

Respondents have submitted no argument or authority to refute Lewies’ contention that Rule 11 is a sanctions statute and not a fee shifting provision. By ordering Lewies to pay attorney’s fees for time Hall spent on motions to disqualify him, but then converting such fee award into Rule 11 sanctions, *sua sponte* (without any motion or argument from Hall), was an abuse of discretion. (See, Appellant’s Brief, pp. 22-23)

E. The Court erred in finding that Lewies “had not withdrawn as counsel for the County” because Lewies never represented the County in either case number CV-12-580 or CV-12-581.

Respondents have submitted no argument or authority to refute Lewies’ contention that he never represented the County in these proceedings, but that from the very outset, Hall did. (See, Appellant’s Brief, pp. 24-25) In fact, Hall still does.

F. The court erred in finding that Lewies' actions "delayed adjudication of the petitions for judicial review."

Respondents argue that "Lewies did not believe the county commissioners had made the necessary findings to hire Nelson Hall Parry & Tucker to represent the County on the petitions." (Respondents' Brief, p. 13) Respondents' further argue that "Lewies' continued instance [sic] on who could properly represent the County caused a delay in this matter....additional briefing was necessary and further hearings were required." (Ibid., p. 13)

Lewies agrees that he did not believe the county commissioners had made the requisite constitutional finding of necessity to hire Hall and that the "necessity issue" required briefing and hearings. However, such *in-court* activity can provide no basis for imposition of Rule 11 sanctions. (Appellant's Brief, p. 15) Indeed, Judge Moeller, himself, found the necessity issue to be a "**very tough question**" and he was relieved the question had been voluntarily withdrawn by the Office of the Prosecuting Attorney so he did not have to decide the question. (Ibid., pp. 28-29)

Because there was a reasonably clear legal justification for raising the constitutional necessity issue, and because it was raised *in-court*, the Court could not find that any *paper* had been filed for any improper purposes that could justify imposition of Rule 11 sanctions.

G. The Court erred by "deeming it appropriate" for the County to have retained private legal counsel, Blake G. Hall, Esq., to represent it in case numbers CV-12-580 and CV-12-581 because the legal question whether the County's hiring of private counsel in violation of the Idaho Constitution's necessity requirement had been voluntarily withdrawn by motion of the Office of the

Prosecuting Attorney, and therefore, was not a question presented to the Court for its decision.

Respondents have misunderstood the argument advanced by Lewies on this issue. In their brief Respondents write that “Lewies continues to argue that the County could not retain private legal counsel.” (Respondents’ Brief, p. 15) That misses the point. Lewies is not arguing whether or not the County could retain private legal counsel. Indeed, Lewies’ deputy prosecuting attorney withdrew that legal question. (Appellant’s Brief, pp. 28-29) Rather, Lewies is arguing that “the Court improperly decided a question that was not before it.” (Ibid., p. 28)

Respondents have submitted no argument or authority on the actual issue presented on appeal.

H. The Court erred in finding that Lewies was unable to “complete” his representation of petitioners.

Respondents argue that any suggestion by Lewies that he completed his representation of petitioners is “devoid of verifiable facts in the record.” (Respondents’ Brief, p. 11) However, Respondents’ have seemingly overlooked Lewies’ undisputed oral representations made to the Court, and his undisputed affidavit contained in the record, showing that his representation of petitioners was *limited*⁷ to drafting and timely filing petitions for judicial review in order to preserve and protect his clients’ legal rights relative to their private roads. (Appellant’s Brief, p. 30)

More to the point, though, Respondents’ have submitted no argument or authority to refute

⁷ I.R.C.P. 1.2(c), provides, “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Comment 6 to the rule, provides in relevant part that, “A limited representation may be appropriate because the client has limited objectives for the representation.”

the issue actually presented on appeal: that “unless and until an *actual case or controversy* was presented to the Court on the question whether Lewies had completed his limited representation of petitioners, the Court should have refrained from issuing an opinion on the matter.” (Ibid., pp. 30-31)

I. Judge Moeller demonstrated bias and/or prejudice against Lewies by engaging in the following actions:

Respondents argue that “Had Lewies legitimately believed Judge Moeller was biased or prejudiced against him, his appropriate remedy was to file a motion for disqualification for cause. Lewies did not pursue this remedy and any claims are now waived.” (Respondents’ Brief, p. 17)

While I.R.C.P. 40(d)(2) allows any party to an action to file a motion to disqualify a judge for cause, failure to file such a motion does not waive a party’s right to claim bias or prejudice on appeal. Indeed, up until the Court issued its Memorandum Decision and Lewies first read the language contained in it and denouncing him personally – *e.g.* “*committing a significant offense against the integrity of the judicial system*”⁸ – Lewies could not possibly have known the full extent of any latent bias or prejudice against him. But, once the Memorandum Decision was issued, published in the regional newspapers, and the general public and members of the Idaho State Bar began commenting on the judge’s disdain for Lewies, actual bias became patently evident.

⁸ Appellant’s Brief, p. 38, R. 182.

a.) Ex parte communication.

Respondents argue that the “district court did not violate Canon 3(B)(7) because there was no discussion of substantive issues.” However, when Judge Moeller warned Lewies, *and only Lewies*, not to let a “political grudge interfere with his professional judgment,” to “decide what hill he wanted to die on,” and that the conversation “never happened,” he was warning about the *petitions* Lewies had filed against the County Commissioners (i.e. substantive law).⁹ He was not warning Lewies about any aspect of procedural law.¹⁰

By delving into Lewies’ state of mind and concluding that he harbored some sort of political grudge against the County Commissioners that served as his motivation for filing petitions for judicial review against them, Judge Moeller ventured far beyond any *actual evidence* before him. Then, by acting on his own unsupported conclusions about Lewies’ state of mind and initiating an *ex parte* communication to warn Lewies about not letting his political grudge interfere with his professional judgment, Judge Moeller demonstrated actual bias or prejudice.

b.) Converting an award of attorney’s fees into Rule 11 sanctions, sua sponte.

Respondents’ argue that “The district court further explained its rationale in awarding fees as a sanction pursuant to Rule 11...as follows:

⁹ “Substantive law” means “The part of the law that creates, defines, and regulates the rights, duties, and powers of parties. Cf. Procedural law.” Black’s Law Dictionary, 9th Ed. (2009).

¹⁰ “Procedural law” means “The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.” Black’s Law Dictionary, 9th Ed. (2009).

‘At the conclusion of the January 22, 2013 hearing, the Court invited the County to submit an affidavit setting forth the attorney fees *reasonably incurred in seeking Lewies’ disqualification (emphasis added)*. Although much of the oral argument and briefing has since focused on a prevailing party analysis under I.R.C.P. 54(e) and I.C. § 12-121, the Court has concluded that such an effort is misplaced. The Idaho Supreme Court has made clear that ‘the reasons for which attorney fees may be awarded pursuant to I.C. § 12-121 and I.R.C.P. 54(e)(1) are not reasons that will support an award of sanctions pursuant to I.R.C.P. 11(a)(1)...*Instead, the heart of the issue before the Court appears to more closely fall under the provisions of Rule 11...*’

(Respondents’ Brief, pp. 21-22)

Yes, it is true that the Court invited the County to submit an affidavit setting forth attorney fees “reasonably incurred in seeking Lewies’ disqualification.” (Ibid.) But, why did it then *convert* that fee award into Rule 11 sanctions? What went into the Court’s *conversion decision*?

All that is actually known, is that in its Memorandum Decision the Court arbitrarily announced, “Instead, the heart of the issue before the Court appears to more closely fall under the provisions of Rule 11.” Did the Court undertake a Rule 11 analysis? Did it objectively inquire into the three prongs of Rule 11 – the petitions’ factual basis, legal basis, and legitimate purposes? Not at all. So, what caused the Court to convert its award of routine attorney’s fees into Rule 11 sanctions?

Applying a totality of circumstances test to the following facts suggests that the Court’s *sua sponte* conversion may have been the product of bias or prejudice against Lewies. The facts are as follows: (1) the Court’s opening question put to Lewies was, “What were you *thinking* filing these petitions against Fremont County just weeks after you were elected to be Fremont County

Prosecuting Attorney” (Appellant’s Brief, p. 7); (2) the Court delved into Lewies’ subjective state of mind – and found a political grudge; (3) the Court subjectively believed (without any supporting evidence) that Lewies had filed the petitions to “provoke” the County Commissioners (Ibid., p. 32, fn. 26); (4) Judge Moeller initiated an *ex parte* communication and warned Lewies “not to let a political grudge interfere with his professional judgment” (Id., p. 32); (5) the Court warned the parties in open court “that it was going to do what it could to put an end to [the pettiness]” (Id., p. 31, fn. 23); and (6) the Court publically denounced Lewies for, among other things, committing a “significant offense against the integrity of the judicial system” by filing petitions against a known, future client. (Id., p. 38)

Based on these facts, it reasonably appears that as a result of the “political grudge” conclusion reached by the Court after its inquiry into Lewies’ subjective intentions for filing the petitions, the Court was biased or prejudiced against Lewies, and as such, was not and acting fairly and impartially towards him when it converted its earlier award of routine attorney’s fees into Rule 11 sanctions.

c.) Disregarding allegations of Hall’s unethical and improper conduct.

Contrary to Respondents’ arguments that there was no unethical or improper conduct by Hall (Respondents’ Brief, pp. 22-29), the actual issue on appeal is *not* whether Hall committed the alleged acts of unethical or improper conduct, but whether the Court demonstrated bias or prejudice against Lewies by choosing not to mention in its Memorandum Decision – *not one word* – any of the allegations he made against Hall, but going to great lengths to denounce Lewies.

During the course of the proceedings, Lewies alleged three instances of unethical or improper conduct engaged in by Hall. First, that Hall should have conducted a reasonable inquiry under Rule 11 into the facts prior to filing motions to disqualify Lewies. (Transcript p. 61, lines 15-25) (Transcript p. 64, lines 13-25; and p. 65, lines 1-18) Second, that Hall violated I.R.P.C. 1.11 prohibiting attorneys who are currently serving as public employees from...negotiating for private employment with any person who is involved as a party in a matter in which the lawyer is participating ... (Transcript p. 69, lines 24-25; and p. 70, lines 1-18) Third, that Hall violated I.R.P.C. 3.3 prohibiting lawyers from making false statements of fact to a tribunal, as follows: “He says he's billing \$225, that's not the case, he got a contract for \$150.” (Transcript p. 70, lines 19-25; and p. 71, lines 1-10)

Yet, the Court mentioned nothing at all about any of Lewies’ allegations against Hall in its Memorandum Decision. Why not? Why not at least mention the allegations, and if deemed unfounded, then say so. By completely ignoring the allegations against Hall, in their entirety, it reasonably appears that the Court was biased or prejudiced against Lewies, and as such, was not and acting fairly and impartially towards him.

d.) Issuing a publically available Memorandum Decision denouncing Lewies.

Respondents’ have submitted no argument or authority on this issue. (*Cf.*, Appellant’s Brief, pp. 38-39)

J. Attorney's fees should not be awarded to the County.

Respondents' argue that they are entitled to attorney's fees under Idaho Code § 12-117, because Lewies' appeal was brought "without a reasonable basis in fact or law." However, as has been shown in the preceding pages, there is clearly a reasonable basis in both fact and law for appealing imposition of Rule 11 sanctions against petitions that contained important issues; and there is clearly a reasonable basis in both fact and law for appealing whether the Court demonstrated bias or prejudice against Lewies.

Under I.A.R. 41(a), Lewies respectfully requests the Supreme Court to permit his later claim for attorney's fees on the grounds that Respondents' have acted without a reasonable basis in fact or law in this matter.

II. CONCLUSION

For the foregoing reasons, the Idaho Supreme Court should find that the lower Court failed to conduct an adequate analysis under Rule 11 before imposing sanctions on Lewies, and therefore, such sanctions cannot be sustained. Further, the Idaho Supreme Court should find that the petitions filed by Lewies did not violate Rule 11 signature certification requirements; that the lower Court's imposition of attorney's fees as a Rule 11 sanction was improper and cannot be sustained; that the lower Court erred in finding that Lewies (a) had not withdrawn as counsel for the county; (b) delayed adjudication of the petitions for judicial review; (c) deeming it appropriate for the Commissioners to have retained Hall as private counsel; (d) finding that Lewies was unable to complete his representation of petitioners; and that presiding Judge

Moeller demonstrated bias and/or prejudice against Lewies.

Submitted this 9th day of October, 2013

A handwritten signature in cursive script, appearing to read "Karl H. Lewies".

Karl H. Lewies, Esq.
Real Party in Interest – Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a two true and correct copies of the foregoing REAL PARTY IN INTEREST – APPELLANT’S REPLY BRIEF has this 9th day of October, 2013, been served upon the individuals listed below by depositing the same in the U.S. Mail, with proper postage thereon, and addressed as follows:

Hon. Gregory W. Moeller
FREMONT COUNTY COURT HOUSE
151 W. 1st N.
St. Anthony, Idaho 83445

Blake G. Hall, Esq.
HALL, ANGELL, STARNES, LLP
901 Pier View Drive, Suite 203
Idaho Falls, ID 83402

W. Lynn Hossner, Esq.
ATTORNEY AT LAW
109 N. 2nd West
St. Anthony, Idaho 83445

Charles A. Homer, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO
P.O. Box 50130
Idaho Falls, Idaho 83405



Karl H. Lewies