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Flying "A" Ranch v. Lewies Respondent's 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, individually and in his official capacity, and LEROY MILLER, individually and in his official capacity,

Respondents.

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

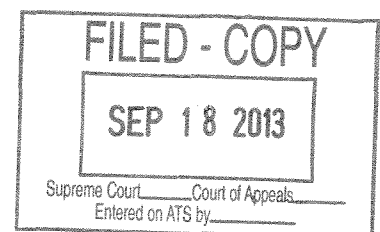
Petitioners,

v

BOARD OF COUNTY COMMISSIONERS FOR FREMONT COUNTY, IDAHO, a political

Supreme Court Docket No. 40987-2013 (41132-2013)

Case No. CV-2012-580
(CV2012-581)



subdivision of the state of Idaho,
RONALD "SKIP" HURT, individually
and in his official capacity, and LEROY
MILLER, individually and in his official
capacity,

Respondents.

RESPONDENT'S BRIEF

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

Gregory W. Moeller, District Judge, Presiding.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

On November 23, 2012, attorney Karl H. Lewies (“Lewies”) filed two separate petitions seeking judicial review of decisions made by the Board of Commissioners for Fremont County (“the Commissioners” or “the County”).¹ (R. 8-14). These petitions were filed on behalf of two separate groups of petitioners (referred to collectively as the “Petitions”):

A. Case No. CV-12-580 was filed on behalf of Flying “A” Ranch, Inc., an Idaho Corporation, Clen Atchley, Emma Atchley, Laura Pickard, Clay Pickard, George Ty Nedrow, and David Tuk Nedrow (collectively referred to as “Flying ‘A’ Ranch”); and

B. Case No. CV-12-581 was filed on behalf of E.C. Gwaltney, III and Lana K. Varney (collectively referred to as “Gwaltney”).

Both Petitions named Fremont County and two of the County Commissioners (Ronald “Skip” Hurt and Leroy Miller) in both their official and individual capacities. Lewies defeated the incumbent Fremont County prosecutor in the primary election on May 15, 2012, and then ran unopposed in the general election. At the time of filing, Lewies was the prosecutor-elect for Fremont County, having

¹ Lewies filed two separate petitions for judicial review: Petition for Judicial Review (November 23, 2012) (CV-12-580); and Petition for Judicial Review (November 23, 2012) (CV-12-581). Only the Petition for Judicial Review for CV-12-580 is included in the record. (See R. 8-14).

been duly elected in the general election held November 6, 2012. Lewies had not yet taken office when he filed the petitions; he was sworn-in on January 14, 2013.

On January 2, 2013, the County, through its then deputy prosecuting attorney, at the insistence of the County Commissioners, set a hearing for a motion to disqualify Lewies from representing the Petitioners and the County in these matters. On January 7, 2013, the County filed a motion to disqualify and requested attorney fees. A motion for partial dismissal was likewise filed seeking to dismiss each of the named County Commissioners in their individual capacities. In response to the motion to disqualify, Lewies filed a motion to withdraw as counsel for Petitioners later that day. Lewies filed an affidavit acknowledging, “a conflict of interest will arise in connection with my continued representation of Petitioners in this case.” (R. 31).² While recognizing the inherent conflict of interest in representing the Petitioners, Lewies did not withdraw his claim to represent the County on these matters.

On January 11, 2013, the County filed a substitution of counsel, advising the district court that the County had retained the law firm of Nelson Hall Parry Tucker, P.A. to defend it in aforementioned Petitioners for Judicial Review given the inherent conflict of interest Lewies had from his prior representation of

² At oral argument Lewies conceded that he had forgotten to withdraw and was reminded of this obligation upon the County’s filing of the motion to disqualify.

Petitioners. On January 14, 2013, Lewies and Lynn Hossner (“Hossner”) stipulated to the substitution of Hossner for Lewies in representing Flying “A” Ranch. (R. 42-43). Hossner continues to represent Flying “A” Ranch in the proceedings.

Oral argument took place on January 22, 2013 on the County’s motion to disqualify and Lewies’ motion to withdraw. A motion for partial dismissal of the two County Commissioners individually named was also taken up at the hearing. The Court dismissed the individually named Commissioners. The district court has previously summarized that hearing as follows:

The Court noted that Mr. Lewies had failed to withdraw voluntarily until the County had filed its motion to disqualify him. It also questioned the wisdom and ethics of filing actions against an entity he had just recently been elected to represent on behalf of clients he could no longer represent. Mr. Lewies attributed the delay to an oversight and argued that no rule of professional conduct was violated. He claimed that his clients were operating under time constraints due to the statute of limitations. He agreed that he should no longer represent his former clients or the County on these matters in the future.

(R. 104-107). Mr. Lewies questioned the authority of Nelson Hall Parry Tucker, P.A. to file any motions or argue on behalf of the County. At the oral argument, counsel for the County noted that he was an acting deputy prosecutor for the County when the motions were filed and that his firm was now acting under a contract with the County Commissioners. The district court took care to

emphasize that Lewies' actions had essentially deprived the County of legal counsel in this matter. Lewies contended, under objection, however, that his newly appointed deputy prosecutor, Billie Siddoway, could take over Lewies' representation of the County on these discrete matters.

At the conclusion of the hearing, the Court barred Lewies from representing either his former clients (Petitioners) or his new client (the County) in the identified matters, thereby effectively granting both the motion to disqualify and the motion to withdraw. The Court further concluded:

. . . the County is entitled to recover its attorney fees incurred in filing the motion to withdraw. Any fees will be awarded against Mr. Lewies personally, but not against his clients, the Petitioners. Mr. Hall may file a request for fees with appropriate supporting documents within 14 days. Mr. Lewies will be allowed to appear for purposes of contesting the attorney fees only.

(R. 106). The Court further permitted Lewies' newly appointed deputy, Billie Siddoway ("Siddoway"), 14 days to file a brief explaining why the Fremont County Prosecutor's Office should be allowed to continue representing the County on these matters, rather than an attorney of the Commissioners' choosing. (R. 106).

Consistent with the district court's order, Siddoway filed a *Notice of Conflict of Interest* on February 6, 2013. (R. 71-73). Siddoway was "terminated" by Lewies four days later for filing the *Notice of Conflict of Interest* against his

wishes, despite Lewies being barred from representation of either Petitioners or the County. (R. 100-103). Lewies then appointed Ryan Dustin (“Dustin”) to serve as his deputy prosecutor on February 11, 2013. Lewies then filed a motion for extension of time, under objection from the County, for briefing the issue of Lewies’ deputy prosecuting attorney being permitted to represent the County. A hearing on the motion was held on February 15, 2013. At the hearing, the district court granted the extension on the express condition that both Lewies and Dustin visit with counsel from the Idaho State Bar (“Bar Counsel”) about the ethical ramifications of Lewies conduct in these matters. Shortly after the hearing, Dustin filed a notice with the district court that his office was withdrawing from representation of the County on the two petitions. (R. 145-149).

The County subsequently filed a timely affidavit of attorney’s fees and Lewies filed an objection. Oral argument took place on February 26, 2013. The district court subsequently issued its *Memorandum Decision re: Sanctions* (“Memorandum Decision”) on March 29, 2013. The district court ruled that Lewies had violated rule 11(a)(1), Idaho Rule of Civil Procedure and that Fremont County was entitled to an attorney fee award in the amount of \$1,185.00 against Lewies personally. The instant appeal was subsequently filed by Lewies.

ARGUMENT

A. Rule 11 Sanctions are Left to the Sound Discretion of the Court

Lewies erroneously suggests that Rule 11 can only be used where a filing violates the signature requirements of Idaho Rule of Civil Procedure 11(a)(1).

However, Lewies' reading of Rule 11(a)(1) is misplaced and fails to consider the Idaho Supreme Court's express language allowing Rule 11 to be awarded as a sanction for "misguided filings" and "litigative misconduct."

Rule 11, Idaho Rule of Civil Procedure, provides in relevant part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and **that it is not interposed for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed

promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed **in violation of this rule**, the court, upon motion or **upon its own initiative**, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

As explained by the Idaho Supreme Court, “[t]he intent of the rule is to grant courts the **power to impose sanctions for discrete pleading abuses or other types of litigative misconduct.**” *Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731, 741 (2005) (emphasis added). Rule 11 is appropriately used as a “management tool to be used by the district court to weed out, punish and deter specific frivolous and **other misguided filings.**” *Lester v. Salvino*, 141 Idaho 937, 940, 120 P.3d 755, 758 (Ct. App. 2005) (citing *Campbell v. Kildew*, 141 Idaho 640, 650, 115 P.3d 731, 741 (2005) (emphasis added). A Rule 11 sanction is appropriately imposed where the district court is considering only the “attorney’s conduct in the filing of pleadings, motions or other papers.” *Riggins v. Smith*, 126 Idaho 1017, 1021, 895 P.2d 1210, 1214 (1995). Thus, Idaho law is clear that Rule 11 is not simply limited to sanction an attorney who signs a frivolous or unmeritorious pleading. Rather, Rule 11 can permissively be used to

sanction an attorney for “litigative misconduct” or for the filing of “misguided filings.”

Initially, Judge Moeller, recognized that the imposition of sanctions was subject to an abuse of discretion standard. (R. 185). Specifically, the district court recognized that it acted within its discretion where it “considers whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason.” *See Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 40, 981 P.2d 1146, 1150 (1999). (R. 185).

Accordingly, where Judge Moeller recognized the issue of Rule 11 sanctions as discretionary, acted within the boundaries of its discretion and reached a decision through the exercise of reason, the Rule 11 sanction against Lewies should be upheld. In this case, it is clear from the plain language of the Memorandum Decision, and discussed more fully below, that Judge Moeller did not abuse his discretion when imposing Rule 11 sanctions.

The Memorandum Decision meticulously addresses the procedural history that precipitated the lower courts decision to impose Rule 11 sanctions. Guiding the lower court’s reasoning behind imposing sanctions on Lewies was the well-

established Idaho law that Rule 11 may be used as a management tool to address litigative misconduct and misguided filings.

Lewies focuses on seven phrases from the Memorandum Decision³, that were taken out of context and fail to consider the court's reasoning *in toto*. A reading of the Memorandum Decision where Lewies pulls his specific quotes was crafted with the "totality of the circumstances" of the litigation in mind. (R. 187). While the Court noted his concerns about Lewies conduct, he unequivocally stated in reference to his comments on the advisability of filing the petitions, "such matters are not questions typically answered by this court." (R. 187). Rather, as the court clearly recognized, its sanctioning authority was reviewed "pursuant to its 'court management' role and act using its inherent discretion to ensure that the adjudication is fair to all sides." (R. 187).

The court further recognized that ethical rules were not a consideration in sanctioning Lewies, and the court viewed Lewies conduct in the broad picture of the "integrity of the judicial process." (R. 188). It was with this consideration that the district court found that the integrity of the judicial process (litigative misconduct) was harmed by Lewies failure to identify the significant conflict issues that would inevitable be created by Lewies' filings:

³ The seven quotes focused on are specifically identified in Appellant's Brief between pages 16 and 19.

The Court finds that regardless of the ethical ramifications, Lewies' filings of the petitions against a known, future client was a significant offense against the integrity of the judicial system. Fremont County voters were entitled to expect that the person they had just elected as County prosecutor would not be filing new legal actions *against* the County on behalf of private individuals. Similarly, the Commissioners had every reason to be concerned when they were sued in both their official *and* personal capacities by the incoming county attorney. By so doing, Lewies initiated a chain of events that any reasonable attorney should have anticipated would create mistrust and animosity from everyone involved—greatly undermining public confidence in the outcome of both cases.

(R. 188 (emphasis in original)).

Ultimately, the district court correctly concluded “Lewies’ decision to sign and file the petitions was clearly misguided and adversely affected the integrity of the judicial process.” (R. 188). The district court again noted that it was its duty to “safeguard the integrity of the judicial process” and was the very “type of litigative misconduct Rule 11 was intended to rectify.” (R. 188). The district court continued, “Lewies should have known at the time of filing the petitions that he would be unable [sic] to see either case through to completion—this is undisputed. Even if the Petitioners were acting under time constraints, that does not justify Lewies acting in an ethically questionable manner.” (R. 188). As such,

the district court appropriately recognized that the filing of the Petitions would instantaneously cause problems for both the Petitioners and the County. The district court was further concerned with Lewies failure to timely file a motion to withdraw that would have allowed the Petitioners to have immediate representation as the matter progressed through the appeals process. Further, any suggestion by Lewies that he completed his representation of Petitioners is devoid of verifiable facts in the record. It is merely supposition and reliance on Lewies representations only that the full representation was limited to filing the Petitions. Rather, the fact that immediate withdrawal was not performed at least causes a question about the actual scope of representation and Lewies ability to appropriately represent the petitioners.

The district court at the January 22, 2013 hearing specifically addressed his concern for the ramifications Lewies conduct would have on the County:

I don't think Mr. Hall should have had to file a Motion in January of 2013 to bring this issue to the Court's attention. I think this should have been brought to the Court's attention earlier by Mr. Lewies himself and even if the Court were to find that the questionable decision to file this after the election wasn't inappropriate, even if I were to agree with Mr. Lewies on that, certainly the Petition should have been followed with an immediate substitution of counsel indicating the new attorneys for the Petitioners were appearing. This puts the County in unfair jeopardy and uncertainty, it put the

Petitioners in a certain level of jeopardy, as well as there was uncertainty about their future representation. Now, granted, this didn't occur during a critical phase of these proceedings because we're still preparing the transcript and the record, but nevertheless, there are strategic decisions that are made in cases like this that require someone to have counsel that can act without conflict and I think Mr. Lewies' actions put everybody in a certain degree of jeopardy. I certainly think Mr. Hall was justified in bringing his Motion when he did in the manner that which you did.

(Tr. 23:13-24:11).

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. The lower court explicitly detailed the improper purpose and appropriately employed its power to manage its docket. The district court's decision and the underlying rationale for imposing Rule 11 sanctions was within the outer boundaries of its discretion and reached through an exercise of reason. As such, this Court should uphold the district courts imposition of sanctions against Lewies.

B. Lewies Disputed Hall's Continued Representation of the County Which Unnecessarily Prolonged This Litigation and the Cost to the County.

Lewies contends that the Court abused its discretion by suggesting that Lewies "initially refused to withdraw as counsel for the County." Lewies'

contention is taken out of context and clearly designed to misstate the district courts understanding of Lewies' representation in the Petitions. In fact, it is clear from the January 22, 2013 hearing transcript 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. Lewies specifically stated on the record that he did not believe Nelson Hall Parry Tucker should represent the County:

Well, Your Honor, I'd like to note for the record that I don't believe Mr. Hall is properly here representing Fremont County because the Idaho Constitution required the County Commissioners make a public finding of necessity before retaining their own private counsel.

I've reviewed the Minutes of the County Commissioners. I've had my Deputy, Billie Siddoway, review the Minutes of the County Commissioners and we find no finding of necessity—

(Tr. 16:13-22 (emphasis added)). At the hearing, Lewies continued to maintain that his office could represent the County and he was involved in crafting this argument.

Moreover, it is undisputed that Lewies' continued instance on who could properly represent the County caused a delay in this matter. As a result of Lewies' position, additional briefing was necessary and further hearings were required.

This procedural argument pursued by Lewies undoubtedly caused a delay in the adjudication of the Petitions. As the court noted at the January 22, 2013 hearing, “Now, granted, this didn’t occur during a critical phase of these proceedings because we’re still preparing the transcript and the record, but nevertheless, there are strategic decisions that are made in cases like this that require someone to have counsel that can act without conflict and I think Mr. Lewies’ actions put everybody in a certain degree of jeopardy.” (Tr. 24:2-9). There were legitimate concerns that invariably caused the district court concern about who would be representing the County and this had a delay on the proceedings—especially because the briefing schedule had to be adjusted. (R. 142-143).

To suggest that the district court did not understand Lewies’ role in representing the County is a liberal restatement of the procedural history in this matter. Moreover, as discussed more fully above, the district court clearly understood Lewies’ role and the significant difficulties imposed both on the respondents and the County. It is clear from the record that the district court understood Lewies’ role and there was no abuse of his discretion in its findings.

C. Lewies Has Waived Any Argument Challenging the County Retaining Private Legal Counsel.

Lewies continues to argue that the County could not retain private legal counsel. Lewies does not have standing to pursue this issue and further, the Fremont County Deputy Prosecutors Siddoway and Dustin both confirmed that there was no continued challenge by their office of the County's retaining Nelson Hall Parry Tucker as private legal counsel in defending against the Petitions.

It is unclear what Lewies is attempting to argue because his own office has previously conceded that they would be withdrawing this issue. Once directed by the district court to provide information on whether Lewies' office could represent the County given the circumstances of the Petitions, Siddoway filed a *Notice of Conflict of Interest* on February 6, 2013, stating:

I respectfully submit this notice in response to the Court's request for briefing of January 22, 2013. A conflict of interest under Rule 1.7 of the Idaho Rules of Professional Conduct prevents me from taking a position adverse to the decision of the Fremont County Commission to retain outside counsel in this matter. I have provided legal advice to the Fremont County Commission on the matter of retaining outside counsel and, while I do not represent the County in this matter, I consider the County to be a "current client" as that term is used in Rule 1.7.

(R. 72). Subsequently, following a motion to extend the briefing schedule filed by Lewies' office, on February 19, 2013, Lewies' office filed a *Notice of Withdrawal of Motion to Represent Fremont County*. (R. 145-149). The Fremont County Prosecutor's office unequivocally stated with regard to representation of the County as follows: "Upon further review of all aspects of the unique facts peculiar to this particular situation and for the considerations states, the Fremont County Prosecutor's Office withdraws its motion to represent Fremont County in these petitions for judicial review." (R. 149).

Lewies has waived any argument that outside legal counsel's continued representation of the County is inappropriate. In fact, the Court's comment that "deem[ed] it appropriate" for the County to have retained private legal counsel is consistent with the filings by the Fremont County Prosecutor's Office. Finally, the Memorandum Decision was filed well after Lewies' office conceded it could not represent the County on the Petitions. Accordingly, any argument on outside legal counsel's continued representation is irrelevant, moot, and has been waived by Lewies.

D. There Is No Evidence Of Bias Or Prejudice By Judge Moeller.

1. Lewies Has Waived Any Argument of Bias By Failing to File a Motion to Disqualify.

Lewies' suggestion that Judge Moeller was biased and/or prejudiced against Lewies has been waived because Lewies did not file a motion to disqualify Judge Moeller pursuant to Rule 40(d)(2), Idaho Rule of Civil Procedure. Specifically, Rule 40(d)(2)(A) states that "any party to an action may disqualify a judge or magistrate for cause from presiding in any action upon any of the following grounds: . . . 4. **That the judge or magistrate is biased or prejudiced** for or against any party or the case in the action." (Emphasis added). 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.

2. The *Ex Parte* Communication was Appropriate and Does Not Exhibit Bias or Prejudice.

Lewies alleges Judge Moeller was biased and/or prejudiced against him for two reasons (1) there was an *ex parte* communication, and (2) the award of Rule 11 sanctions was awarded *sua sponte*. However, neither argument is

supported by competent evidence in the record to support Lewies' claim of bias or prejudice.

Lewies argues that the Idaho Code of Judicial Conduct, Cannon 3(B)(7) was violated by Judge Moeller when an *ex parte* communication occurred in chambers following the January 22, 2013 hearing.⁴ Cannon 3(B)(7) states in relevant part as follows:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties **concerning a pending or impending proceeding** except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that **do not deal with substantive matters or issues on the merits are authorized; provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.**

I.C.J.C, Cannon 3(B)(7)(a) (emphasis added).

⁴ Of note, the County was unaware that there was ever any *ex parte* communication until a passing comment was made at the February 26, 2013 hearing. The district court further addressed the communication in his written Memorandum Decision.

Lewies summarizes his recollection of the communication that occurred on January 22, 2013 following the hearing. However, it is clear from the record and Lewies' affidavit that the *ex parte* communication did not involve any substantive issues. Lewies suggests, despite no evidence to support this statement, that Judge Moeller stated that Lewies had "to decide what hill you want to die on." (Appellant's Brief, p. 32). However, the affidavit of Lewies describes the interaction quite differently, "following the court hearing on these matters held January 22, 2013, District Judge Gregory Moeller, invited me into his chambers and told me he was aware of the ongoing bitter personal disputes among my predecessor-in-office, Joette Lookabaugh and her deputy prosecutor, Blake Hall, and myself. Judge Moeller advised me that everyone would be better off if the disputes ended." (R. 65-66).

In the Memorandum Decision, Judge Moeller took exception to Lewies' description of the communication:

The Court disagrees with Lewies' account of the conversation that took place after the hearing on January 22, 2013, because he appears to imply the Court was critical of the County Commissioners and Hall. While the Court acknowledges that it briefly met with Lewies in chambers following the January 22, 2013 hearing, the Court **merely advised him to avoid allowing a political grudge to interfere with his professional judgment. The merits of the cases were not discussed. The Court initiated**

this conversation after consulting *Idaho Code of Judicial Conduct*, Canon 3(D), which provides, in part: “Judges are encouraged to bring instances of unprofessional conduct by judges or lawyers to their attention in order to provide them opportunities to correct their errors without disciplinary proceedings; . . .”

(R. 189, fn. 14 (emphasis added)). The district court did not violate Canon 3(B)(7) because there was no discussion of substantive issues. Furthermore, the communication was specifically initiated for a proper purpose, to highlight potential unprofessional conduct and allow Lewies to correct his errors. Additionally, as noted by Judge Moeller, the conversation did not address substantive issues of the Petitions, and in fact, substitute counsel was involved by that time representing the petitioners interests. Thus, the merits of the cases are being dually considered by the district court without consideration of Lewies’ involvement in the adjudication of the Petitions. In sum, the conversation was appropriate and covered an issue that was appropriate, within the bounds of a judge’s role, and had no bearing on the adjudication of the Petitions. Accordingly, there was no bias or prejudice exhibited by the *ex parte* communication on January 22, 2013.

3. The District Court's Rule 11 Sanction Did Not Demonstrate

Bias or Prejudice.

Lewies suggests that Judge Moeller exhibited bias or prejudice because the court *sua sponte* awarded fees pursuant to Rule 11, Idaho Rules of Civil Procedure. Rule 11 specifically permits a *sua sponte* award under the Rule: “[i]f a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or **upon its own initiative**, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . .” I.R.C.P. 11(a)(1) (emphasis added). Thus, a *sua sponte* award is not inappropriate.

The district court further explained its rationale in awarding fees as a sanction pursuant to Rule 11 in the Memorandum Decision. The district court explained it's reasoning as follows:

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. 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 “[t]he 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).” *Sun Valley Shopping Ctr., Inc. v. Idaho*

Power Co., 119 Idaho 87, 96, 803 P.2d 993, 1002 (1991).

Instead, the heart of the issue before the Court appears to more closely fall under the provisions of Rule 11 of the Idaho Rules of Civil Procedure.

(R. 186). The Court did state in a footnote, however, that “[i]n the event I.R.C.P. 54(e) and I.C. § 12-121 were controlling, the Court notes that the record would support findings that the County was the prevailing party and that both petitions were brought and pursued unreasonably.” (R. 186, fn. 11). The district court clearly articulated the rationale for awarding fees pursuant to Rule 11, also noting that an analysis under Rule 54(e) and § 12-121 would also lead to the same result.

Ultimately, Lewies’ argument of bias and/or prejudice is premised entirely on supposition and a very liberal account of the procedural history of this matter. Lewies takes numerous statements out of context in an effort to argue bias. This tactic is improper and ignores the factual record before this Court. There is no evidence that the award of Rule 11 sanctions *sua sponte* was improper or the result of bias or prejudice. The district court acted appropriately and within its discretion.

E. There Was No Unethical Or Improper Conduct By Mr. Hall

Lewies inappropriately suggests that Mr. Hall somehow engaged in improper or unethical conduct by not reaching out to Lewies before filing the

motion for disqualification. This tactic appears to be a continued attempt by Lewies to impugn Mr. Hall and further distract the Court from Lewies improper conduct that warranted sanctions. Lewies improperly suggests there were three violations by Hall regarding his representation of the County: (1) failure to contact Lewies prior to filing the Motion for Disqualification; (2) improperly discussing continued representation of the County on the Petitions; and (3) claiming an hourly rate of \$225 per hour for work. Each of these allegations is baseless and unsupported by the record before the Court.

1. There Was No Requirement to Notify Lewies of the Motion For Disqualification Prior to Filing.

Lewies erroneously suggests that Rule 11 requires a telephone call to opposing counsel prior to filing a motion. Absent in Rule 11 is any language suggesting that an attorney is required to contact another attorney before filing a motion. Rather, the plain language of Rule 11 states “that to the best of the signer’s knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law . . .” I.R.C.P. 11(a)(1). The only requirement is that the motion be grounded in fact and that the signing attorney has made an inquiry that the facts support the motion. In this case, the facts unequivocally support the filing of the Motion for Disqualification. (R. 18-

22). This fact is evidenced both by the filing by Lewies seeking withdrawal from the case (R. 30-33) and the district courts position that the County had acted appropriately. Specifically, the district court stated at the January 22, 2013 hearing, “I don’t think Mr. Hall should have had to file a Motion in January of 2013 to bring this issue to the Court’s attention. . . . I certainly think Mr. Hall was justified in bringing his Motion when he did in the manner that which you did.” (Tr. 23:13-24:11). In its written Memorandum Decision, the district court specifically stated “the Idaho Rules of Civil Procedure did not require the County to remind him [Lewies] of his legal and ethical duties before filing the motion for disqualification. There is no requirement in Rule 11 to contact opposing counsel prior to filing and the Court implicitly found that the filing was appropriate and in all likelihood “may have actually prevented Lewies from suffering the ethical consequences of failing to withdraw sooner.” (R. 189).

2. The County Appropriately Hired Nelson Hall Parry Tucker.

Lewies argues that Hall was precluded from continuing to work for the County once the County recognized Lewies would inevitably have a conflict of interest in further representation of the County on the Petitions. Lewies argues that Rule 1.11(d)(2)(ii), Idaho Rules of Professional Conduct, was somehow

violated by the County requesting that Hall continue to represent the County in defending against the Petition. Rule 1.11(d) states as follows:

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

I.R.P.C. 1.11(d). Rule 1.11(d) is specifically designed to ensure that a lawyer does not seek employment where from a party where confidential or other information may be obtained. This is specifically noted from the importance placed on Rules 1.7 (Conflicts of Interest: Current Clients) and 1.9 (Duties to Former Clients). A lawyer owes both current and former clients certain obligations of confidentiality and Rule 1.11 is intended to ensure a lawyer does

not abuse those obligations. The comments to Rule 1.11 further reiterate the intent of Rule 1.11:

The Rule represents a balancing of interests. ON one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government.

I.R.P.C. 1.11, Cmt. 4. It is clear that there was nothing improper with the County, recognizing the inherent conflict of interest with Lewies, would seek alternative representation of Hall. The County recognized that Hall had knowledge of the proceedings and was in the best position to advocate for their interests. Rule 1.11 does not address a current governmental employee continuing representation of the governmental entity in a private capacity. It is simply a continued representation of the governmental on the same matters and no special benefits or advantages would be provided to the County. To suggest that there was any violation of Rule 1.11 is patently false and inconsistent with the clear intent of Rule 1.11.

3. There Were No False Statements Made To The District Court.

Lewies erroneously suggests that the rate of \$225 was inappropriate.

Lewies claims that the affidavit states that Hall's hourly rate was \$225 per hour was somehow false because Hall agreed to represent the County at \$150 per hour for his work as private legal counsel. These accusations are patently false and fails to recognize that Hall was a salaried employee at the time the motion for disqualification was made. Further, Hall specifically stated his position on the sanction of Lewies:

. . . quite frankly, I don't have any skin in this fight. If you award attorney's fees, it doesn't go to Blake Hall, it goes to the County. The reason I say I don't have any skin in this fight is I get paid either way. It's the County—I have not been harmed, it is the County that has been harmed by the circumstances that we're dealing with and so I just don't want anyone to come across or feel that there's something personal in this fashion on this issue, because certainly from my vantage point there never been anything personal and I just don't take the practice personally.

(Tr. 45:10-21). Hall clearly articulated that he had no personal animosity towards Lewies and that any attorney fee award would go directly to the County.

When the affidavit of costs and fees was prepared, the law requires that a reasonable attorney fee be used. Mr. Hall's normal and customary hourly rate at the time was \$225 per hour for private work. This is an accurate and truthful statement of Hall's hourly rate and were "reasonable and similar to, or less than,

those charged by attorneys with comparable experience and expertise in the vicinity of Fremont County, Idaho.” (R. 52). Lewies reference to the \$150 per hour billable rate was an unrelated contractual agreement between the County and Nelson Hall Parry Tucker, P.A. for legal work to be performed once Lewies took office. At the time the motion for disqualification was prepared, Mr. Hall was still a salaried employee of the County and was not operating under the agreement for \$150 per hour. As is customary, an attorney is entitled to agree to a lesser hourly rate than his customary hourly rate. It is important to note, however, that the district court did lower the rate from \$225 to \$150 per hour in calculating the final attorney fee award. However, in this case, the work performed related to the preparation and filing of the Motion for Disqualification was accurate reflection of Hall’s billing rate. The contracted rate really had not bearing on the rate for which work was performed while employed by the County. Thus, there is not evidence of any false statements being made by Hall.

Ultimately, Lewies has frivolously and improperly raised these issues regarding Mr. Hall in an effort to assail Mr. Hall’s character. This issue has never been raised by Lewies in any pleading and no hearing was ever held on this matter either. The County has never really had the ability to address Lewies erroneous

statements. Lewies conduct is inappropriate and should not be condoned by this Court.

F. The County Is Entitled To Attorneys' Fees on Appeal

Pursuant to Idaho Appellate Rule 41, the County seeks an award of attorney fees in accordance with Idaho Code Section 12-117. Section 12-117 provides for a municipality to recover attorney fees when “the party against whom the judgment is rendered acted without a reasonable basis in fact or law.” Under the statutes, the County is entitled to an award of attorney fees on appeal inasmuch the appeal has been brought frivolously, in bad faith, and without foundation.

Case law has held that an appeal is deemed frivolous when a party fails to make a legitimate showing that the trial court misapplied the law. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999). In this case, there is no legitimate argument that the trial court misapplied the law. Lewies simply takes numerous statements out of context to suggest that the Rule 11 sanction was inappropriate. Lewies' arguments fail to consider the plain standard of abuse of discretion and the totality of the Memorandum Decision that clearly articulates the basis for the Rule 11 sanction. As a result of Lewies frivolous and unwarranted filing, the County has been forced to expend significant costs and fees in

defendant against Lewies questionable conduct. Accordingly, the County requests an award of attorney fees on appeal.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Idaho Supreme Court find that the district court appropriately acted within the bounds of its discretion and exercised reason when it sanctioned Mr. Lewies. The Respondents respectfully request that this Court find that the sanction in the amount of \$1,185.00 against Lewies personally was appropriate and that Lewies be required to pay said amount. These Respondents further request an award of costs and fees incurred in filing and arguing this appeal before this Honorable court.

Dated this 17 day of September, 2013.


Blake G. Hall

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 17 day of September, 2013, by the method indicated below:

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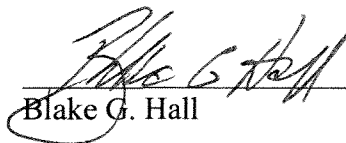
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