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IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL E. RODGERS,)	Docket No. 46200
)	
Plaintiff/Appellant,)	Ada County Case No. CV01-17-1600
)	
vs.)	
)	
KAREN ELDREDGE, BOISE CITY POLICE)	
RECORDS CUSTODIAN, JAN M. BENNETTS,)	
ADA COUNTY PROSECUTOR, and LYNNE)	
GLICK, OFFICE ADMIN., CUSTODIAN)	
)	
Defendants/Respondents.)	
)	

RESPONDENTS' BRIEF

Appeal from the District Court, Fourth Judicial District,
County of Ada, State of Idaho

HONORABLE RICHARD D. GREENWOOD, PRESIDING DISTRICT JUDGE

Daniel E. Rodgers
28075 ISCC / F-1, 02 B
P.O. Box 70010

Plaintiff/Appellant

JAN M. BENNETTS
Ada County Prosecuting Attorney
Lorna K. Jorgensen, ISB No. 6362
Boise, Idaho 83707
Deputy Prosecuting Attorney
Civil Division
200 West Front Street, Rm. 3191
Boise, Idaho 83702
Telephone: (208) 287-7700
Facsimile: (208) 287-7719
civilpfiles@adaweb.net

Attorney for Defendants/Respondents

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of an award of attorney fees, pursuant to Idaho Code § 74-116, to Jan M. Bennetts, the Ada County Prosecuting Attorney and Lynne Glick, Administrator [hereinafter “Prosecuting Attorney Defendants”]. The Prosecuting Attorney Defendants were granted summary judgment and the District Court found Daniel E. Rodgers’ (“Mr. Rodgers) case was frivolously pursued.

B. Procedural History

Mr. Rodgers filed a *Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner)* on January 26, 2017. R. p. 7. On June 22, 2017, the District Court entered an Order allowing monthly payments of filing fees (R. p. 17) along with a *Petition to Compel Disclosure of Public Record via I.C. § 74-115(1)* (“*Petition*”). R. pp. 19-41. On June 26, 2017, the District Court set the *Petition* (R, pp. 42-44) for hearing, and noticed the Prosecuting Attorney Defendants. R. p. 44. The following day, on June 27, 2017, the Prosecuting Attorney Defendants’ attorney made a special appearance and filed a *Motion to Dismiss for Lack of Personal Jurisdiction, Insufficient Process and Insufficient Service of Process*, and supporting Memorandum. (R. pp. 45-51). Defendant Karen Eldredge, Boise City Police Records Custodian [hereinafter “Defendant Boise City”] filed an Answer on July 11, 2017. R. pp. 54-59.

A Scheduling Conference was held on October 30, 2017. R. p. 3. The Prosecuting Attorney Defendants’ attorney made a special appearance because the Prosecuting Attorney Defendants had not been served. Mot. Dis. Tr. p. 8, LL. 10-13, 20-24. On October 31, 2017, the

Defendant Boise City signed a stipulation with Mr. Rodgers (R. pp. 67-71) and on November 9, 2017 moved to dismiss Mr. Rodgers' claims as to the Defendant Boise City. R. pp. 64-66.

Mr. Rodgers filed a response to the Prosecuting Attorney Defendants' June 27, 2017 Motion to Dismiss on November 14, 2017. R. pp. 72-74. On November 20, 2017, the District Court held a hearing on the Prosecuting Attorney Defendants' Motion to Dismiss for Lack of Jurisdiction. R, p. 3. The District Court signed an Order on November 27, 2017 which provided that Mr. Rodgers had until December 21, 2017 to serve his *Petition* on the Prosecuting Attorney Defendants. R. p. 87. Also, on November 27, 2017, the Prosecuting Attorney Defendants received an Order regarding Motion Practice and an Order Governing Proceedings and Setting Trial. R. pp. 75-86. Trial was set for March 5, 2018, with dispositive motions to be heard 60 days before trial. R. pp. 81, 83. The Prosecuting Attorney Defendants filed their Motion for Summary Judgment and supporting documents on December 6, 2017. R. pp. 89-134. The District Court verbally granted the Prosecuting Attorney Defendants' Motion for Summary Judgment on January 3, 2018 (Sum. Jud. Tr. p. 30, LL. 22-25) and entered its written Order on January 18, 2018. R. p. 140. The Prosecuting Attorney Defendants were awarded attorney fees pursuant to Idaho Code § 12-121 and § 74-116(2). R. p. 140. Judgment was entered on January 18, 2018. R. p. 142. The Prosecuting Attorney Defendants' Memorandum of Costs and Affidavit of Attorney Fees were filed on January 31, 2018. R. pp. 144-150. On February 9, 2018, Mr. Rodgers filed an Objection to the attorney fees. R. pp. 151-157.

The District Court amended its Judgment on July 2, 2018 and awarded attorney fees. R. p. 156. Mr. Rodgers filed a Notice of Appeal on July 30, 2018. R. pp. 160-163.

C. Statement of Facts

On December 9, 2015, the Ada County Prosecuting Attorney's Office received a Request for Public Record from Mr. Rodgers. R. pp. 100-01, 104. Tracie Smith, who performs Lynne Glick's administrative functions when Ms. Glick is not available, searched for documents responsive to Mr. Rodgers' request. R. pp. 132-33. Ms. Glick sent Mr. Rodgers a letter dated December 13, 2016 explaining that the Ada County Prosecuting Attorney's Office did not have any documents responsive to his request. R. pp. 101, 105.

On January 13, 2017, via the United States mail, the Prosecuting Attorney Defendants received a *Petition to Compel Disclosure of Public Records* from Mr. Rodgers. R. pp. 106-129. Almost five months later, on June 26, 2017, the Prosecuting Attorney Defendants received the District Court's Order Setting Hearing on the *Petition*. R. pp. 42-44. The Order mandated that the parties appear in person. R. p. 43. After receiving the Order Setting Hearing, Ms. Glick again searched for documents that might be responsive to Mr. Rodgers' public records request. R, pp. 101-02. In addition, Ms. Glick sent a file clerk to the warehouse on June 27, 2017 to see if any records had been overlooked. R. pp. 102, 131. No records had been overlooked in the warehouse. R. pp. 102, 131.

Since the Prosecuting Attorney Defendants had not been served with Mr. Rodgers' *Petition* (Mot. Dis. Tr. p. 8, LL. 23-24), on June 27, 2017, the day after the District Court issued its Order Setting the Hearing, and noticing the Prosecuting Attorney Defendants, an attorney from the Ada County Prosecuting Attorney's Office Civil Division made a special appearance to contest jurisdiction, and pursuant to I.R.C.P. 4.1(b) filed contemporaneously a motion seeking

dismissal as required by the rule (R. p. 45), with a supporting memorandum. R. pp. 45-51; *see also* Att. Fees Tr. p. 38, LL. 23-25; p. 39, LL. 1-20.

At the Scheduling Conference Hearing on October 30, 2017, the District Court informed Mr. Rodgers that he needed to respond as to why he mailed a petition rather than providing service and why the court had jurisdiction when the Prosecuting Attorney Defendants had not been served. Mot. Dis. Tr. p. 8, L. 25; p. 9, LL. 1-9. The District Court heard the Prosecuting Attorney Defendants' Motion to Dismiss for Lack of Personal Jurisdiction on November 20, 2017 (Mot. Dis. Tr. p. 6, LL. 2, 16-17), and then gave Mr. Rodgers until December 21, 2017 to serve his *Petition* on the Prosecuting Attorney Defendants. R, p. 87. Trial was set for March 5, 2018, (R. p. 81) with dispositive motions to be heard at least 60 days before trial or on or before January 4, 2018. R. pp. 78, 83. In order to meet the hearing date of January 4, for a summary judgment motion, the Prosecuting Attorney Defendants were put in the position of having to file a Motion for Summary Judgment prior to Mr. Rodgers' service deadline of December 21, 2017. Because of the January 4, 2018 dispositive deadline, the Prosecuting Attorney Defendants filed their Motion for Summary Judgment on December 6, 2017. R. pp. 89-91. The Motion was supported by a Memorandum (R. pp. 92-99), a Declaration of Lynne Glick (R, pp. 100-131, and a Declaration of Tracie Smith (R. pp. 132-134). The Memorandum contained a request for attorney fees. R. p. 97.

The Court filed its grant of the Prosecuting Attorney Defendants' Motion for Summary Judgment on January 18, 2018, and also found that Mr. Rodgers had brought and pursued the case frivolously. R. p. 140.

II. STANDARD

Attorney fees may be awarded to the prevailing party pursuant to Idaho Code § 74-116 when the court finds the request to provide records was frivolously pursued. *See Henry v. Taylor*, 152 Idaho 155, 267 P.3d 1270 (2012). Frivolous is defined as “not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.” *Hymas v. Meridian Police Dept.*, 159 Idaho 594, 602, 364 P.3d 295, 303 (2015) (quoting I.C. § 12-123(1)(b)(ii)).

The decision to award attorney fees is discretionary “subject to the abuse of discretion standard of review.” *Contreras v. Rubley*, 142 Idaho 573, 576, 130 P.3d 1111, 1114 (2005). In making the determination of whether the district court abused its discretion, the Court considers “(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.” *Id.* (citing *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 29, 89 P.3d 863, 869 (2004)).

III. ARGUMENT

A. The District Court did not err in awarding attorney fees since the Prosecuting Attorney Defendants had to defend against Mr. Rodgers' frivolous lawsuit that was brought against the Prosecuting Attorney Defendants without foundation.

1. The District Court did not abuse its discretion when it found the Defendant Boise City's production of records did not provide foundation for Mr. Rodgers' claim against the Ada County Defendants.

Mr. Rodgers must demonstrate that the District Court abused its discretion in awarding the Prosecuting Attorney Defendants attorney fees. An award of attorney fees pursuant to Idaho Code § 74-116 requires a "prevailing party." Rather than focusing on the prevailing party, Mr. Rodgers appears to be arguing in Part IB. of his brief that his case was not frivolous or without foundation because a different party, the Defendant Boise City ultimately produced records. Mr. Rodgers' successful resolution of his claim against one party, the Defendant Boise City does not provide foundation for a claim against another party, the Prosecuting Attorney Defendants, and it does not demonstrate that the District Court abused its discretion.

The Defendant Boise City and the Prosecuting Attorney Defendants are different parties. The record before the District Court indicated that Mr. Rodgers recognized that they are different parties because he sent his public records request to "Boise City Police Dept." on November 21, 2016 (R. p. 27) and to the "Ada County Prosecutor" on December 6, 2016. R. p. 25. Mr. Rodgers also acknowledged the difference between the parties when he filed his *Petition* because he named as Respondents: 1. Boise Police Dept., Karen Eldredge, Custodian. 2. Ada County Prosecutor Jan M. Bennets, [sic] Custodian, & Lynne Glick, Office Admin., Custodians(s) et al.,. R. pp. 19-21. The relief sought by Mr. Rodgers was to compel disclosure of the public records

against two separate parties, the Defendant Boise City and the Prosecuting Attorney Defendants.

R. p. 22.

The Defendant Boise City had records that were responsive to Mr. Rodgers' request. R. pp. 31-39. Mr. Rodgers entered into a stipulation with the Defendant Boise City (R. pp. 67-71), and when specifically asked by the District Court at the Motion to Dismiss Hearing on November 20, 2017, whether he was agreeing to dismiss the Defendant Boise City, Mr. Rodgers agreed. Mot. Dis. Tr. p. 7, LL. 3-10. Defendant Boise City was dismissed as a party on December 18, 2017. R. pp. 137-39. The District Court explained the difference to Mr. Rodgers:

You did have an issue with the City of Boise as well, but that's not the same as the Ada County Prosecuting Attorney's Office. And yes, you did receive, apparently, additional copies [from Defendant Boise City]. I am not sure because I wasn't privy to all that went on, obviously, if it didn't happen in the courtroom. But I do note that the Boise City attorney and the Boise City officials are the ones that produced additional documents for you and the legible documents that you got the first time – or copies of which the first time you couldn't read because they were not legible. That's not the same as the Ada County Prosecuting Attorney or Ms. Glick, the person within Ada County, who handles public record requests.

Att. Fees Tr. p. 42, LL. 24-25; p. 43, LL. 1-14.

After the settlement and dismissal of the Defendant Boise City, the remaining party was the Prosecuting Attorney Defendants. Mr. Rodgers' settlement with the Defendant Boise City is irrelevant as to his claim against the Prosecuting Attorney Defendants. Pursuant to Mr. Rodgers' December 9, 2016 public records request (R. pp. 100-01, 104), the Prosecuting Attorney searched its records and responded on December 13, 2016 that it did not have records responsive to Mr. Rodgers' request. R. pp. 101, 105. "[A] particular agency cannot be required to produce

records that it has not . . . retained.” *Taylor*, 152 Idaho at 162, 267 P.3d at 1277. Even though the Prosecuting Attorney’s Office responded that it did not have records, Mr. Rodgers continued to pursue the Prosecuting Attorney Defendants without any evidence whatsoever that the Prosecuting Attorney Defendants were withholding documents. The District Court granted summary judgment and noted that the Prosecuting Attorney Defendants cannot produce records they do not have.

The remaining party after December 18, 2017 dismissal of the Boise City Defendant was the Prosecuting Attorney Defendants. Mr. Rodgers was not successful in his claim against the Prosecuting Attorney Defendants because summary judgment was granted in favor of the Prosecuting Attorney Defendants. R. pp. 140-141. The District Court did not abuse its discretion in determining that the Prosecuting Attorney Defendants did not have any records to produce and then awarding attorney fees.

2. The District Court did not rely on outside evidence in determining that the Prosecuting Attorney Defendants were the prevailing party.

It appears that Mr. Rodgers is arguing that the District Court relied on outside evidence in determining the prevailing party. App’l Br. 7. Mr. Rodgers cites to the transcript of the Motion to Dismiss for Lack of Jurisdiction Hearing held on November 20, 2017 as support for his argument. *See* App’l. Br. 7. The comments that the Honorable Richard Greenwood made at the Motion to Dismiss Hearing were an attempt to explain to Mr. Rodgers that he was required to personally serve a summons and complaint. Mot. Dis. Tr. p. 14, LL. 11-25; p. 15; p. 16, LL. 1-11. Because the District Court was not making a prevailing party determination at the November

20, 2017 Motion to Dismiss Hearing, Mr. Rodgers' argument that the District Court utilized outside evidence in making a prevailing party determination is without merit.

3. The Ada County Prosecuting Attorney was the Prevailing Party so the District Court did not abuse its discretion in awarding attorney fees.

“A determination on prevailing parties is committed to the discretion of the trial court” and is reviewed under an abuse of discretion standard. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005) (citing *Burns v. Baldwin*, 138 Idaho 480, 486-87, 65 P.3d, 502, 508-09 (2003)). Here the District Court was guided in his determination that Prosecuting Attorney Defendants were the prevailing parties by referring to Idaho Rule of Civil Procedure 54(d). The rule provides that the trial court “consider the final judgment or result of the action in relation to the relief sought by the respective parties.” Idaho R. Civ. P. 54(d)(1)(B).

The Prosecuting Attorney Defendants moved for summary judgment, asking the District Court to find that the Prosecuting Attorney Defendants could not produce records that the office did not have and also asked for attorney fees for having to defend against Mr. Rodgers' claim of denial. R. pp. 22, 97. The Court granted the Motion in full. Mot. Sum Jud. Tr. p. 30, LL. 22-25.

At the hearing, the District Court stated:

So there are no disputed facts here. There is a belief, apparently, on Mr. Rodgers' part that the County is not cooperating or is declining to cooperate. But the records that I have does not show that. The record that I have says that the County made every effort to locate records regard – that were responsive to Mr. Rodgers' request, that they have no such records.

I cannot order them to produce records they don't have. Mr. Rodgers has not put into the record any evidence that I can see to raise an issue of material fact on that

regard. Ada County is simply no longer – if they ever had any records that would have corresponded or responded or had been pertinent to this request, they don't have them anymore.

Mot. Sum Jud. Tr. p. 29, LL. 16-25; p. 30, LL. 1-7.

In section III of his Brief, Mr. Rodgers argues that he was the prevailing party rather than the Prosecuting Attorney Defendants because “he successfully obtained disclosure of public records.” App'l. Br. 8. Mr. Rodgers did not successfully obtain any public records from the Prosecuting Attorney Defendants because the Prosecuting Attorney Defendants did not have any records to disclose. Mr. Rodgers obtained his records from the Defendant Boise City not the Prosecuting Attorney Defendants.

The District Court did not err in its sound discretion of looking at the evidence before the Court in granting attorney fees. The District Court granted summary judgment to the Prosecuting Attorney Defendants because there was absolutely no evidence that the Prosecuting Attorney Defendants were anything but cooperative and diligent in their attempts to locate requested records. Mr. Rodgers was told in December of 2016 that the Ada County Prosecuting Attorney did not have responsive records yet Mr. Rodgers refused to believe the response, without any evidence to suggest otherwise. Even after the Boise City Defendant was dismissed, Mr. Rodgers continued in his lawsuit against the Prosecuting Attorney Defendants without any foundation. The Prosecuting Attorney Defendants were the prevailing parties on summary judgment. The District Court did not abuse its discretion in awarding attorney fees when it found:

And, frankly, this lawsuit appears to me to have been frivolous. The fact that

someone thinks that they – that there are records that don't exist, and the State has – or not the State – the County has, in fact, responded as required by the statute, they should not have been require to come in and defend themselves on this case.

Sum. Jud. Tr. p. 30, LL. 14-21. Further,

So the issue here is not whether or not you had a proper request or whether or not some other agency, such as the City of Boise, didn't properly respond. The issue here is the lawsuit against the Ada County officials, two of them, the prosecutor and the office administrator. And it was the basis that there was no showing, after the filing of the lawsuit in response to the summary judgment, that the County was in any way hiding any documents or not properly responding to the document request. And it was on that basis that I found and continue to hold that the filing of the lawsuit in this case was unreasonable and without foundation.

Att. Fees Tr. p. 44, LL. 1-14.

B. Request for Attorney Fees on Appeal

Idaho Appellate Rule 41 requires “[a]ny party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party.” This response brief is the first brief filed by the Prosecuting Attorney Defendants. Idaho Appellate Rule 41 also cites to Rule 35(b)(5) which requires a basis for the claim. Idaho Code § 74-116(2) provides that “the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued.”

The Prosecuting Attorney Defendants were the prevailing party because they were granted summary judgment. The District Court found:

So there are no disputed facts here. There is a belief, apparently, on Mr. Rodgers' part that the County is not cooperating or is declining to cooperate. But the records that I have does not show that. The record that I have says that the County made every effort to locate records regard – that were responsive to Mr. Rodgers' request, that they have no such records.

Mot. Sum Jud. Tr. p. 29 LL. 16-25; p. 30 LL. 1-7. Even though the District Court found that the Prosecuting Attorney Defendants did not have any records to produce, and awarded attorney fees, Mr. Rodgers continued his pursuit of this lawsuit to this Court. Frivolous is defined as “not supported in fact”. *Hymas*, 159 Idaho at 602, 364 P.3d at 303 (quoting I.C. § 12-123(1)(b)(ii)). Because Mr. Rodgers has never produced any evidence or demonstrated that his claims against the Prosecuting Attorney Defendants had merit, it is a frivolous suit. Attorney fees were awarded by the District Court and Mr. Rodgers chose to appeal. This Court should award attorney fees as well.

IV. CONCLUSION

The Ada County Prosecuting Attorney’s Office searched for responsive records to Mr. Rodgers’ request and responded that the Office did not have such records yet Mr. Rodgers, without any evidence to the contrary pursued a claim against the Prosecuting Attorney Defendants. This pursuit required the Prosecuting Attorney Defendants to defend against Mr. Rodgers’ claims and incur attorney fees. It was within the District Court’s discretion to determine who was the prevailing party, whether the suit was frivolous and to award attorney fees. Based on the record before the District Court, the District Court did not abuse its discretion in finding that the award of attorney fees was proper pursuant to Idaho Code § 74-116(2).

RESPECTFULLY SUBMITTED this 4th day of April, 2019.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: /s/Lorna K. Jorgensen
Lorna K. Jorgensen
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April 2019, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF to the following person by the following method:

Daniel E. Rodgers
28075 ISCC, F-1, 02 B
PO Box 70010
Boise, Idaho 83707

Hand Delivery
 U.S. Mail
 Certified Mail
 Facsimile

/s/Candace McCall
Candace McCall, Legal Assistant

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, except two hard copies were sent to Daniel E. Rodgers due to his incarceration:

Daniel E. Rodgers
28075 ISCC, F-1, 02 B
P.O. Box 70010
Boise, Idaho 83707

Dated and certified this 4th day of April, 2019.

/s/ Candace McCall
Candace McCall, Legal Assistant