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IN THE SUPREME COURT OF THE STATE OF IDAHO

JUDY L. CHARNEY,	)
	) Docket No. 42165-2014
Plaintiff/Respondent	) (Ada County Case No. CV DR 11 16046)
	)
vs.	)
	)
DENNIS M. CHARNEY,	)
	)
Defendant/Appellant	)
	)

RESPONDENT'S BRIEF

Appeal from the District Court of the
Fourth Judicial District in and for the County of Ada,
the Honorable Michael McLaughlin, Presiding,
the Honorable Gerald R. Schroeder, succeeding

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Entered on ATS by_____

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III.

STATEMENT OF THE CASE

Appellant's statement of the nature of the case is essentially accurate. However, the second sentence should read that because of several alleged violations of the Property Settlement Agreement, Appellant, Dennis Charney, brought a Motion for four (4) counts of contempt, followed by an Amended Motion adding a fifth (5th) count. R. p. 74, 78.

Appellant's purported "Statement of Facts and Course of Proceedings" is not accurate or complete and the following chronology of relevant facts is provided.

A.

Chronology of Relevant Facts

A Partial Judgment and Decree Resolving Property and Debt issues, to which was attached a Property Settlement Agreement dated October 6, 2011, was entered on October 28, 2011. R. 2. On February 13, 2012, a Partial Judgment and Decree was entered, divorcing the parties, solving custody and child support and personal property. R. 4. A Final Judgment and Decree of Divorce was entered March 21, 2012. R. 6. Within two months, Dennis on May 11, 2012, filed a Verified Motion and Affidavit for Contempt (R. 12, R. 29), which was followed on June 8, 2012 by his Amended Verified Motion for Contempt and Affidavit. R. 74, R. 82. In both Motions, Dennis sought a penalty on each count which was labeled as such.

> " PENALTY
>
> The penalty for this contempt which may be imposed upon the Plaintiff for each occurrence if she is found guilty of contempt includes a fine not exceeding $5,000.00 or imprisonment not exceeding five (5) days or both." (Emphasis in original). R. 16 and 79.

In each Verified Motion, Appellant sought attorney fees against his ex-wife, Judy Charney.

Appellant (hereinafter "Dennis") set an Arraignment for June 26, 2012, and prior thereto on June 22, 2012, Respondent (hereinafter "Judy") filed her Entry of Not Guilty Plea and Acknowledgment of Advisement of Rights, (R. 164) Notice of Affirmative Defenses (R. 157) and the Affidavit (R. 128) and denied each of the counts of contempt. Judy asserted her constitutional rights pertaining to a criminal contempt per paragraphs B, C, E, F, I, J, K, and L of her Not Guilty Plea and Acknowledgment of Rights. R. 164-166.

In paragraph 11 of Judy's Affidavit, and in paragraph 9 of her Affirmative Defense she stated that Dennis' Motion for attorneys fees was frivolous and she requested attorneys fees and costs in responding to his Motions for Contempt, citing I.C., § 7-601 et seq. as well as other applicable law. R. 141, R. 163.

On July 11, 2012, Dennis filed a Motion and supporting Memorandum attempting to strike the Affidavit of Judy Charney. R. 7. A Scheduling Conference was set for October 22, 2012. R. 7. Discovery was conducted in July, August and September 2012. (Notices of Service filed 7/11/12, 8/7/12, 8/9/12, and 9/4/12. R. 7). On October 22, 2012 at the Scheduling Conference, Trial on Dennis' Motions for Contempt was set for April 11, 2013. R. 7.

Despite Judy's constitutional protection, on November 16-20, 2012, Dennis filed an ill-conceived, apparently unresearched Motion, Affidavit and Memorandum for Partial Summary Judgment in a criminal contempt case, driving up Judy's attorneys fees, and he noticed up his Motion to Strike Judy's Affidavit and Motion for Summary Judgment for January 15, 2013. R. 169-196.

Prior thereto, on December 7, 2012, Dennis filed a Supplemental Affidavit for Partial Summary Judgment, R. 198-206, causing Judy on December 28, 2012 to file her Supplemental Affidavit and Brief in Opposition to Summary Judgment. R. 207-220. In paragraph 4 of Judy's Supplemental Affidavit filed December 28, 2012, Judy stated,

> "Defendant's Motion for Contempt and his Motion for Summary Judgment are frivolous and unnecessary and are causing me attorneys fees. I move the court to order that Defendant pay my attorneys fees incurred in this matter pursuant to Idaho Code, Section 7-601 et. seq., as well as other applicable law. In an effort to end the litigation I did not pursue attorneys fees on his last frivolous motion. That graciousness was ignored." R. 211.

In Judy's Memorandum in Opposition to Summary Judgment, referring to Dennis' effort to impose a "criminal sanction" and "criminal penalty", she sought in paragraph V attorneys fees pursuant to I.C., § 7-610, §12-121 and Rules 56(c) and 54(e), and Rule 75, I.R.C.P. also applied. R. 213-219. Judy's Memorandum stated that Dennis' "choice of pursuing summary Judgment on two counts and leaving the remaining counts for trial makes this inordinately expensive and is unreasonable, given that the summary judgment motion ignores her constitutional rights." R. 219.

On January 7, 2013, Dennis filed his Reply Brief and Affidavit and attempted to re-characterize for the first time that his summary judgment was for a civil contempt sanction. R. 221-249. At the hearing on January 15, 2013, the Court denied Dennis' Motion for Partial Summary Judgment on Counts 1 and 5 and an Order was entered January 23, 2013, R. 400-401. The Magistrate denied Dennis' Motion to Strike Judy's Affidavit, and the Court dismissed *sua sponte* Count 5, finding that he suffered no loss, as the alleged contempt was de minimis.

> "So, I--at best, this is just an inconsequential issue. If there was ever anything for which the latin phrase *di minimis non curat lex* was devised, this is it. And yet,

> thousands of dollars have clearly gone into litigating this issue, which is beyond my ability to comprehend." Tr., Vol. 1, p. 27, line 20-25.[1]

Judy's attorneys fees were discussed at the hearing on January 15, 2013, as follows:

> "**We have requested attorney's fees**-...-but I guess we have a hearing set in April...I don't know if that's before you today, the attorney fee-...-question. Can we leave it to the end of the case, Judge? **I don't want to get foreclosed.**" Tr., Vol. 1, p. 35, lines 7-8, 11-14, 16-18.

The Judge responded, "...Mr. Charney is willing to go to great lengths chasing his tail...and the attorneys' fees the parties are incurring is just outlandish for claims that, if they are valid...it's a claim totaling $1,600." Tr., Vol. 1, p. 36, lines 10-15. Dennis' counsel was directed to prepare the order and the court stated, "I don't need any findings and conclusions, I've made my findings and conclusions on the record" (Tr., Vol. 1, p. 38, lines 1-4), however the Court had to correct the Order. R., 401.

On March 25, 2013, the Court held a Pre-Trial Conference, as trial was coming up on April 11, 2013. R.8. At the Pre-Trial Conference the Court inquired about Count 1, the J.B. Landscape bill, to attorney Shoufler, representing Dennis, "what are you trying to accomplish by this contempt motion?" Tr., Vol. 1, p. 39, L. 19-22. The Court observed,

> "I have to say, when I look at the contempt motion, its hard for me to see what behavior I'm to find contemptuous of the court's dignity and authority." Tr.. Vol. 1, p. 40, L. 18-21.

---

[1] Tr. **Vol 1** contains three hearings on January 15, 2013, March 23 [sic March 25], 2013, and July 16, 2013. Tr. **Vol. 2** is of a hearing on April 9, 2013, Tr., **Vol. 3** is oral argument on appeal before the District Court on April 10, 2014. **Tr. Vol. 4** is the revised transcript of hearing on Respondent's request for attorneys fees before the District Court on May 29, 2014. **Tr. Vol. 5** is of the hearing before Judge Schroeder, succeeding District Judge, on September 3, 2014.

The Court logically reasoned,

> "This was not a debt incurred in the name of one party alone. It's a debt that, for whatever reason, has only one party's name on it, but it was incurred by both parties. I don't see how I'm going to get to the point where I find that the failure of Ms. Charney to pay that on her own is contempt of court....This isn't a case about who owes it. **This is a case about whether there has been a willful violation of the court's order, such that the court should punish that violation**....The fact that a debt is put in one party's name alone, where it is clearly community debt, incurred by the community, for a community purpose, I don't think that that language is going to control, at least not your interpretation of that language (addressing Mr. Shoufler)." Tr., Vol. 1, p. 41, L. 11-17; p. 42, L. 2-5; and p. 42, L. 20-25.

On March 28, 2013, Dennis filed his Motion to Dismiss without citing authority. R. 250. The Motion did not state whether the dismissal was to be with, or without, prejudice, but requested oral argument. On April 1, 2013, ten (10) days before trial, Dennis filed a Motion to Shorten Time so that he could have his Motion to Dismiss heard before trial set for April 11th. R. 8. A hearing was held on April 9, 2013, and an Order to Dismiss was entered on April 10, 2013. R. 252, and the trial scheduled for the next day was vacated. R., 9; Tr., Vol. 2, p.6, L. 15. The Order, prepared by Dennis' lawyer, does not state whether the dismissal was with, or without, prejudice. R. 252. At the hearing, attorney Shoufler representing Dennis stated on the record that he didn't know whether it was a dismissal with or without prejudice and he would have to ask his client. Tr., Vol. 2, p. 5, L. 19-20. Pursuant to Rule 41(a)(2), I.R.C.P., "unless otherwise specified in the Order, a dismissal under [that] paragraph is without prejudice".

On April 17, 2013, Judy timely filed her Motion for Attorneys Fees and Memorandum and Affidavit of Attorneys Fees and Costs. R. 254-261. On April 29, 2013, Dennis filed his Objection and Motion to Disallow Costs and Attorneys Fees and Memorandum. R. 296. On April 30, 2013, Dennis filed a Supplemental Memorandum in Opposition and Objection to Award of Costs and

Attorneys Fees. R. 302. The hearing on Plaintiff's Motion for Attorneys Fees and Costs occurred on July 16, 2013, at 1:30 P.M. R. 349. As before, **in order to be made whole**, Judy requested her attorneys fees before the Magistrate and subsequently on appeal to the District Court pursuant to I.C., § 7-610, I.C., § 12-121, I.C. § 12-123(b)(ii) and I.R.C.P., Rule 54(e)(1).

On July 17, 2013, the Magistrate entered a Judgment in favor of Judy against Dennis which states, "[t]he Court specifically awards attorneys fees included in said total of $8,976.10 to the Plaintiff for defense of Defendant's Contempt and Amended Motion for Contempt pursuant to I.C., Section 7-610". R. 349.

In August of 2013 Dennis appealed to the District Court. Respondent's Brief was filed on January 13, 2014, and stated in the conclusion:

> "Since this appeal is from an award of attorneys fees and there was no abuse of discretion, **attorneys fees should now be awarded on appeal** for the same reasons granted below, **I.C., § 7-610**, I.C., § 123(b)(ii), and now including I.C., § 12-121 in conjunction with Rule 54(e)(1), I.R.C.P." R. 455-456.

The District Court's Memorandum Decision and Order was entered on April 14, 2014. R. 484. The District Court correctly cited the standard of review and addressed the four issues raised by Appellant as follows in affirming the Magistrate's attorney fee award:

1. "Judge Day found that, apart from Count 5, the **Respondent was the prevailing party** in relation to the contempt motions filed by the appellant, which were subsequently dismissed. The Court finds that **Judge Day did not abuse his discretion** by so finding. The dismissal of the contempt motions meant that...no order remained to be entered to adjudicate the claims in those motions and that the **Respondent received all of the relief which was available to her.**" R. 490.

2. "Whether a dismissal is with or without prejudice does not affect its finality, and it is well settled that **a formal order dismissing the action is a final judgment**...(citing Eby and Castle v. Hayes, 131 Idaho 373, 374, 957 P.2d 351, 352 (1998)". R. 491

3. "The Appellant contends Judge Day erred in his dismissal of his contempt count 5. See Appellant's Opening Brief, at 31-32. The order that the Appellant seeks to contest here was filed on January 23, 2013. His notice of Appeal was filed on August 5, 2013, after Judge Day entered his Judgment concerning the award of attorney fees and costs. It appears that issues concerning the merits of that [January 23, 2013] order cannot be asserted in this appeal." R. 492-493.

4. "The Appellant argues that Judge Day "abused his discretion when weighing Rule 54(d) factors", asserting 'the Magistrate's seeming disdain for [him]'....The court can discern no "disdain...". (This claim is now abandoned on this appeal).

At hearing on May 29, 2014, before the District Court on Judy's Motion for Attorneys fees and costs on appeal, and Dennis' objection thereto, it was argued by your undersigned that "**Judy seeks to be made whole** having to defend contempt motions on which she's a prevailing party". Tr., Vol. 4, p. 9, L. 1-3. Judy's counsel further argued,

> "But [I.C., §] 7-610 is a proper basis on appeal to award attorney's fees for successfully defending their appeal, otherwise the award below would be meaningless as appellant continues to ramble on and, I think, chasing his tail yet again." Tr., Vol. 4, p. 12, L. 18-23.

The District Court issued its Order entered June 11, 2014, as follows:

> "I.C., § 7-610 permits the court in a proceeding related to a contempt, to award attorney fees and costs to the prevailing party. Such an award is based upon the court's discretion. The court will award , in its discretion, Ms. Charney attorneys fees on appeal, in the sum requested of $9,297.50, on the basis that the majority of the claims asserted by Mr. Charney in this appeal were clearly without basis." R. 530.

Judy requests her attorneys fees and costs on Dennis' appeal to the Supreme Court after his unsuccessful appeal to the District Court, as is more particularly stated in Section IV of this brief. Rule 35(b)(5), and Rule 41(a), I.A.R.

B. Standard of Review.

When the Supreme Court reviews the decision of the district court sitting in its capacity as an appellate court, the standard of review is as follows:

> "The Supreme Court reviews the trial court (magistrate) record to determine whether there is a substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure." Pelayo v. Pelayo, 154 Idaho 855, 858 (2013).

Here, the District Court affirmed the Magistrate. R. 484-495. After Losser v. Bradstreet, 145 Idaho 670, 672 (2008), the Supreme Court does not directly review a magistrate's decision, rather, it is bound to affirm or reverse the district court's decision. Pelayo, supra at 859. However, if the issues raised on appeal are primarily based on factual determinations made by the magistrate court, the Supreme Court will still review the magistrate record to determine whether substantially competent evidence supports a challenged factual determination. Pelayo, Id.

When the Supreme Court reviews the decision of the district court sitting in its capacity as an appellate court, the standard of review is as follows. Findings of fact made by the trial court will not be set aside unless they are clearly erroneous. Rohr v. Rohr, 118 Idaho 689 (1990). Such findings will not be disturbed on appeal if supported by substantial and competent evidence, even though such evidence is conflicting. Quiring v. Quiring, 130 Idaho 560 (1997). The Appellate Court will review freely, conclusions of law reached, by stating legal rules or principles and applying them to facts found. Liebelt v. Liebelt, 118 Idaho 845 (Ct.App. 1990); Matter of Estate of Wagner, 126 Idaho 848 (1995). If the law has been properly applied to the facts as found, the judgment will be upheld on appeal. Stonecipher v. Stonecipher, 131 Idaho 731 (1998).

The discretionary decisions of the trial court will not be overturned on appeal unless the trial court abused its discretion. A review for abuse of discretion means "...(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." Walborn v. Walborn, 120 Idaho 494 (1991); Sun Valley Shopping Center, Inc. v. Idaho Power Co., 119 Idaho 87 (1991).

IV.

ATTORNEYS FEES ARE CLAIMED BY RESPONDENT IN THIS APPEAL

Pursuant to Rule 35(b)(5), I.A.R., Respondent requests her attorneys fees and costs on appeal pursuant to I.C., § 7-610, Rule 35(b)(5), I.A.R., Rule 41, I.A.R., Rule 40(a), I.A.R., and Rule 54(d)(1), I.R.C.P. In order to be made whole, Judy requests her attorneys fees on appeal pursuant to I.C., §7-610. The arguments here, under I.C., §7-610 were previously raised and addressed at the hearing on Partial Summary Judgment, at the Pre-Trial Conference, and at the hearing on Judy's Motion for Attorneys Fees. The issues were thoroughly briefed and argued before the District Court, and reconsidered by the District Court (Tr., Vol. 5, p. 9, L. 14-18) and are brought before this court yet again. At each stage, Judy incurs attorneys fees that undermine her divorce settlement. Tr, Vol. 5, p. 20, L. 6-8. A mere second-guessing of the trial court entitles Judy to attorneys fees, particularly in light of the application of the abuse of discretion standard to the issues in this appeal. Normally, the trial court's award of attorneys fees is accorded a great degree of deference as being within the trial court's unique expertise and discretion. Lunn v. Lunn, 125 Idaho 193 (Ct. App. 1994). Judy's

award of attorneys fees to defend under I.C. § 7-610 and to be made whole, are just as appropriate in this appeal.

V.

ARGUMENT

A.

THE DISTRICT COURT CORRECTLY AFFIRMED THE MAGISTRATE WHO DID NOT ABUSE HIS DISCRETION IN DETERMINING THAT RESPONDENT WAS THE PREVAILING PARTY

The Magistrate ruled that Judy was the prevailing party and Dennis was not a prevailing party.

> "There is no question in my mind that Ms. Charney is the sole prevailing party in this matter." Tr., Vol. 1, p. 75, L. 4-5. (July 6, 2013).
>
> ...
>
> "When a case is concluded and its conclusion is that every part of the case is dismissed as to the Plaintiff, the Plaintiff is clearly a prevailing party." Tr., Vol. 1, p. 75, L. 9-12.
>
> "So, it is, my view, a final conclusion of the dispute as to these contempt matters, and Mrs. Charney is the only party who [won]. **Mr. Charney didn't win a single one of his contempt motions**. Ms. Charney is the prevailing party." (Emphasis added). Tr., Vol. 1, p. 75, L. 18-22.

The Judgment entered on July 17, 2013, states on page 2, "[t]he Court finds that Plaintiff is the prevailing party in the above-entitled action and that Defendant did not prevail on any of his claims". R. 349; R. 486-487. The District Court stated in affirming Judge Day,

> "Judge Day found that apart from Count 5, the Respondent was the prevailing party in relation to the contempt motions filed by the Appellant, which were subsequently dismissed. The court finds that Judge Day did not abuse his discretion by so finding. The dismissal of the contempt motions meant that...no order remained to be entered

> to adjudicate the claims in those motions and that the Respondent received all of the relief which was available to her." R. 490.

The District Court cited Judge Day's finding that "Ms. Charney is the only party who [won]", as regards the conclusion of the dispute as to Dennis' contempt motions. R. 490 at footnote 6.

The determination of whether a party is a prevailing party is committed to the discretion of the trial court and that determination is reviewed for abuse of discretion. Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 718-719, (2001); Goodspeed v. Shippen, 154 Idaho 866, 869 (2013). Appellant has not demonstrated an abuse of discretion in the trial court's finding that Judy was the prevailing party.[2] The trial court correctly perceived the issue as one of discretion, acted well within the outer boundaries of its discretion consistent with the applicable legal standards, and reached its decision by an exercise of reason. Walborn v. Walborn, 120 Idaho 494 (1991); Straub v. Smith, 145 Idaho 65, 71 (2007).

Dennis in his appeal of the trial court's award of attorney fees has the burden of demonstrating a clear abuse of discretion. U.S. Bank National Association v. Kuenzli, 134 Idaho 222 (2000). There was no clear abuse of discretion in the trial court's finding that Judy was the prevailing party which entitled her to attorney fees.

In Dennis' brief at page 31 before the District Court in his appeal, he contended that there was "no basis in law" for the Magistrate to dismiss a claim that was de minimis. That argument below was not well researched given Idaho precedent in Martin v. Spaulding, supra. That contention

---

[2] Count 5 added by Dennis in his Verified Amended Motion re: Contempt (R. 74) was dismissed sua sponte by the magistrate because it was de minimis, which meant it lacked merit given its triviality. Martin v. Spaulding, 133 Idaho 469 (Ct.App. 1998).

is now finally abandoned in this appeal together with other arguments made below and also abandoned by Dennis in this appeal.

Judy was awarded fees in the trial court's discretion pursuant to the contempt statute, I.C., § 7-610 for the entire action. Tr., Vol. 1, p. 81, L. 12-13.

> "The Court in its discretion, may award attorneys fees and costs to the prevailing party." I.C., § 7-610.

Judy was not awarded attorneys fees under I.C., § 12-121, but was awarded fees under I.C., § 12-123(b)(ii) as regards Dennis' ill-conceived "frivolous conduct" through a Motion for Summary Judgment. Tr., Vol. 1, p. 79, L.6-7; Tr., Vol. 1, p. 81, L. 9-12. The Court did not abuse its discretion in awarding attorneys fees and costs to Judy to defend Dennis' expensive quest to punish her on each count by sending her to jail for 25 days and impose a $25,000 fine or both. The abuse of discretion standard obviously applies to contempt under I.C., § 7-610 since the standard is contained within the statute. Smith v. Smith, 136 Idaho 120 (Ct.App. 2001).

In Chadderdon v. King, 104 Idaho 406 (Ct. App. 1983), the Court stated,

> "In reaching the decision as to whether a party 'prevailed,' Rule 54(d)(1)(B) requires the court to consider three areas of inquiry: (a) **the final judgment or result obtained in the action in relation to the relief sought by the respective parties**; (b) whether there were multiple claims or issues between the parties; and (c) **the extent to which each of the parties prevailed on each of the issues or claims.**"

Under I.R.C.P., 54(a), "...a judgment shall state the relief to which a party is entitled on one or more claims for relief in the action. Such relief can include dismissal with or without prejudice." As stated in Straub v. Smith, 145 Idaho 65, 71 (2007), **a dismissal is a final judgment**. Appellant dismissed Counts 1 through 4, pursuant to his Motion on March 28, 2013. R. 250. It followed the

Court's *sua sponte* dismissal of Count 5 on January 15, 2013, Tr., Vol. 1, p. 27, L. 20 - p. 28, L. 3 and denial of Dennis Motion for Partial Summary Judgment, Tr, Vol. 1, p. 29, L. 3-4, and the denial of Dennis' Motion to Strike, Tr., Vol. 1, p. 33, L. 22 through p. 34, L. 1. The dismissal of Dennis' Verified Motion Re: Contempt and his Amended Verified Motion for Contempt dismissed all relief requested in his contempt motions and was a final Judgment. Rule 54(a), I.R.C.P. As a criminal contempt it could not be filed again.

1.

Respondent Was the Prevailing Party
After Appellant Voluntarily Dismissed his Contempt Motions

Appellant's Motion to Dismiss did not state whether it was to be with or without prejudice, but pursuant to Rule 41(a)(2), I.R.C.P., unless otherwise specified in the Order, a dismissal under that paragraph is without prejudice.

Appellant argues that there was no prevailing party in part because Counts 1 through 4 were dismissed without prejudice, which is illogical and disingenuous[3]. Appellant purposely chose not to request as part of his Motion to Dismiss that each party pay their own attorneys fees. Respondent's attorney reserved Judy's right to seek attorneys fees following the dismissal. Tr., Vol. 1, p. 35, lines 7-8, 11-14, 16-18. Also, the Magistrate stated "...and I granted the dismissal. But the Respondent-the Plaintiff [Judy], most certainly did reserve her right to request attorneys fees." Tr., Vol. 1, p. 80, L. 14-16.

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[3] It is that "without prejudice" argument, that was brought back before the Court to justify why it was inappropriate to award attorneys fees after Dennis' own voluntary dismissal. Tr., Vol. 1, p. 59, L. 22-24.

Appellant being fully aware of the same, **chose** to dismiss Counts 1 through 4, knowing full well that Judy reserved the right to seek attorneys fees. Judy timely filed a Motion for attorneys fees and Memorandum and Affidavit of Attorneys Fees and Costs, R. 254, supported by Exhibits 1, 2 and 3. The Magistrate granted Dennis' voluntary dismissal subject to the terms and conditions which by law included Judy's right to seek attorneys fees after the voluntary dismissal.[4]

Appellant's argument that Judy was not a prevailing party is based on words from Mr. Justice Eismann's concurring opinion in Straub v. Smith, supra, at page 73, which read, "The dismissal of Straub's action with prejudice was a precondition to Smith's right to recover court costs and attorneys fees, not a denial of that right". The phrase is dicta[5] as it was unnecessary in view of Mr. Justice Eismann's statement citing Eighteen Mile Ranch, LLC v. Nord Excavating and Paving, Inc., 141 Idaho 712, 719 (2005), that "[i]n litigation avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. Supra, stated previously at p. 72. The voluntary dismissal without prejudice avoided liability and it was a final judgment.[6] Straub, supra at p. 71.

The magistrate here did not agree with reading the sentence from the concurring opinion as

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[4] The trial court exercised its jurisdiction pursuant to Rohr v. Rohr, 118 Idaho 689 (1990) in granting the voluntary motion to dismiss, pursuant to Rule 41(a)(2). Also see: Parkside Schools, Inc. v. Bronco Elite Arts & Athletics, 145 Idaho 176 (2008).

[5] Straub v. Smith, supra, is distinguishable as it dealt with a dismissal with prejudice **through a stipulation** which was silent as to attorneys fees. The attorney representing Straub was up to mischief in submitting the Order with words that each will bear their own attorneys fees.

[6] Since a right to recover attorneys fees is not a claim for relief included in a pleading, the dismissal of the pleading with prejudice does not constitute any determination of the prevailing party's right to recover attorneys fees." Straub v. Smith, p. 72 (Mr. Justice Eismann concurring opinion). The foregoing statement should hold true for a dismissal without prejudice.

barring a claim for attorney fees, when an Order granting Dennis' Motion for Dismissal was entered one day before trial, after Judy had answered extensive discovery and an amended motion for contempt and affidavits to which she responded, and after defeating Dennis' poorly thought-out summary judgment motion, to the tune of $8,867.50 in attorneys fees and costs. R. 350. This is particularly so since Dennis did not prevail[7] on any claims, as the Magistrate and District Court so stated. Tr., Vol. 1, p. 75, L. 20-21, R. 486.

The District Court stated,

> "In determining which party to an action is a prevailing party...the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or Judgments obtained. Eighteen Mile Ranch LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 718-719, 117 P.3d. 130, 132-33 (2005). R. 489.

As noted by District Judge McLaughlin, citing Eighteen Mile Ranch v. Nord Excavating & Paving Inc., supra at p. 719, he followed the same language that Mr. Justice Eismann used, namely "In litigation avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff".

The District Court considered the timing of Dennis' voluntary motion to dismiss. "The motions for contempt were filed by the Appellant in May and June of 2012...and some discovery was

[7] Judy was the sole prevailing party in the contempt action. Tr., Vol. 1, p. 75, L. 5. The court could not find a good faith basis for Dennis' Motion for Partial Summary Judgment in a criminal contempt matter. Tr., Vol. 1, p. 78, L. 7-9. The court could not think of any logical argument for entering **a summary judgment of conviction of contempt,** given the constitutional rights afforded an alleged contemnor in a criminal contempt action. Tr., Vol. 1, p. 78, L. 18-19; Rule 75(f)(1)(c)(d)(e) and Rule 75(j), I.R.C.P.

also conducted prior to the filing of the motion to dismiss by the Appellant on March 28, 2013, nearly a year later and shortly before the trial was set in the matter (April 11, 2013)." R. 490.

The District Court concluded that Judge Day "found that, apart from Count 5, the Respondent was the prevailing party in relation to the contempt motions filed by the Appellant, which were subsequently dismissed." R. 490. The District Court, citing the transcript, quoted the Magistrate's **final conclusion** that Mrs Charney was the only party who won. Accordingly, the District Court "finds that Judge Day did not abuse his discretion by so finding. The dismissal of the contempt motions meant that that [sic] no order remained to be entered to adjudicate the claims in those motions and that the Respondent received all of the relief which was available to her." R. 490.

The District Court's citation to an apparent unpublished opinion is not error. The District Court's logic was consistent with the Magistrate and was supported by additional case law. The District Court referred to Eby v. State, 148 Idaho 731, 735 (2010) and Castle v. Hays, 131 Idaho 373, 374 (1998) and Chenery v. Agri-Lines, Corp., 106 Idaho 687, 692 (Ct. App. 1984) . Eby stands for the proposition that the dismissal without prejudice is a final order "as no order remained to be entered. Eby, supra at 735. Castle long recognized that an order dismissing an action is in effect a final judgment that put an end to the suit. Castle, supra at 374. The District Court found Chenery supra, persuasive. The Court in Chenery, recognized that a dismissal after an offer of Judgment by Defendant was accepted by the Plaintiff, does not necessarily mean that Plaintiff was the prevailing party. Dismissal of a claim may be one of many factors to consider in determining whether defendant was a prevailing party, but "**when** the claim was dismissed may be another." Chenery, supra at p. 692. Here, as in Chenery, Dennis voluntarily finally dismissed after nearly 11 months on

the eve of trial. Id. Judy had incurred $10,918 in costs and fees at that time[8]. The Magistrate Court analyzed and properly gave specific findings, as evidenced in the Transcript, Vol. 1, page 97, L. 7 - p. 99, L. 17 and no abuse of discretion has been shown. As the Court stated, "But this was not a normal contempt action; this was a contempt action that had a lot of filings. This contempt action **takes up the entire File 2, over 2 inches thick of documents filed with the Court on just this contempt action.**" Tr., Vol. 1, p. 81, L. 19-24. The court stated, "that frankly this [was] a substantially undesirable case. Tr. Vol. 1, p. 99, L. 4-5.

Your undersigned does not read the concurring opinion in Straub v. Smith, supra, as barring a prevailing party claim when a defendant voluntarily dismisses on the eve of trial. This is particularly so in a contempt action given the wording of I.C., § 7-610 and Rule 75(m), I.R.C.P. Rule 75(m), provides, "In any contempt proceeding, the court may award the prevailing party costs and reasonable attorneys fees under Idaho Code, Section 7-610, regardless of whether the court imposes a civil sanction, a criminal sanction, or no sanction." The District Court did not abuse its discretion in finding that Judy was the only prevailing party in the contempt action, after Dennis chose to dismiss his contempt motions.[9]

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[8] Attorneys fees and costs on Count 5 were not allowed to Judy as a prevailing party, reducing the Judgment entered to $8,976.10. R. 350.

[9] As the District Court stated in footnote 7, R. 491, "there is no published Idaho appellate court holding that a party can't be a prevailing party just because the dismissal is without prejudice." Appellant cites to cases outside the State of Idaho for the proposition that attorneys fees cannot be awarded as a prevailing party when a defendant dismisses the complaint without prejudice. See for example, Hometown Services, Inc. v. Equitylock Solutions, Inc., 2014 U.S. Dist. LEXIS 148613 (W.D.N.C. October 20, 2014); Sparks Pita Store #1, LLC v. Pita Pit, Inc., 2010 U.S. Dist. LEXIS 6720 (U.S. Dist.Ct. D.Nev. January 14, 2010); Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481 (Wash. 2009); Buchanan Board and Care Home, Inc. v. West Virginia Dept. of Health & Res., 532 U.S. 598, 600 (2001) and Cadkin v. Loose, 569 F.3d 1142 (9th Cir. 2009). None of the foregoing cases dealt with a contempt action. That further, Dennis cannot re-file his contempt actions because they are barred by the statute of limitation. See Argument V.B. in this Brief.

Since the conclusion of law that Judy was a prevailing party follows from the finding that Judy was the only party who won, and given that the District Court affirmed the Magistrate's decision, the District Court's decision should be affirmed as a matter of procedure.

Appellant also relied on Puckett v. Verska, 144 Idaho 161 (2007), and argued that the voluntary dismissal therein was without prejudice and no final judgment had been entered. A closer reading of Puckett, supra, in fact distinguishes the same from this case. In Puckett, the Court stated that the dismissal was without prejudice and no final judgment was entered based on the fact that the dismissal without prejudice in Puckett was during the "first trial" and in regards to the "indications for surgery claim", but there were still claims that were pending. As such, the court in Puckett found that no final judgment was entered by the dismissal without prejudice. Further, in Puckett, after the dismissal of the first trial, the second trial took place eight months later and the Court found in favor of Puckett. It was **not the dismissal without prejudice** in Puckett that caused the court to find that there was no final judgment, but it was in fact Puckett's **claims that were still pending when the dismissal was made that led the District Court to conclude that there was no final judgment**. In considering Puckett, supra, with Straub, supra, for which Appellant argues that the dismissal of an action is a precondition to the right to recover costs and fees, in Puckett, the court considered Verska's claim for fees after the dismissal, which is consistent with other Idaho law that there is no requirement that the court address the attorney fee issue at the time of the dismissal. In Jones v. Berezay, 120 Idaho 332 (1991), the Supreme Court stated that the award of costs and attorneys fees, or either, is not a prerequisite to an order granting voluntary dismissal pursuant to

I.R.C.P. 41(a)(2), nor would that be logical. "**Although costs and attorneys fees are often imposed upon a plaintiff who is granted a voluntary dismissal**...no...court has held that payment of the defendant's costs and attorneys fees is a prerequisite to an order granting voluntary dismissal...". Jones v. Berezay, supra, at 336.

The purpose of the court's discretionary authority [under I.R.C.P. 41(a)(2)], is to insure that the court pays due regard to both the Plaintiff and the Defendant. Parkside Schools, Inc. v. Bronco Elite Arts & Athletics, supra. **Voluntary dismissal in this case of Appellant's Motion for Contempt could not unfairly jeopardize Respondent's right to seek fees as the prevailing party.**

> "And it was the Defendant, the Petitioner in the contempt action [Dennis], who ultimately determined that he was not willing to face a trial on the matter, and--sought a dismissal without the stipulation of the other party, and I granted the dismissal. But the Respondent-the Plaintiff [Judy], most certainly did reserve her right to request attorneys fees." Tr., Vol. 1, p. 80, L. 10-16.

It was not until Appellant's Motion for Summary Judgment that Count 5 was dismissed and it was not until after the Pre-Trial Conference that Appellant dismissed Counts 1-4. Not only is the dismissal of the claim a factor in determining the prevailing party, but also **when** the claim was dismissed. Chenery v. Agri-lines Corp., 106 Idaho 687, 692 (Ct.App. 1984). District Court decision at R. 491. The fact that the Order of Voluntary Dismissal was entered one day before trial cannot be overlooked and such a late dismissal is also pertinent to the reasonableness of the amount of Respondent's attorneys fees. Dennis cites to Gibson v. Ada County Sheriff's Department, 139 Idaho 5, 9 (2003) as in accord with Mr. Justice Eismann's concurring opinion in Straub v. Smith, 145

Idaho 65 (2007). Dennis cites to the statement in Gibson "as a result the matter is dismissed without prejudice and the ACSD is not a prevailing party entitled to attorneys fees or costs on appeal". Gibson, supra, was not a voluntary dismissal case. The phrase "as a result" is the key to a denial of ACSD's attorney fee request on appeal. Gibson's appeal to the Supreme Court was dismissed because her termination from ACSD was not reviewable. Attorneys fees were denied to ACSD because ACSD told Gibson that she had the right to appeal to the District Court, which was false and left the Supreme Court without jurisdiction to review the District Court decision.

The federal magistrate's decision in Kugler v. Bohus, 2009 U.S. Dist., Lexis 84190, Sept. 15, 2009, is not controlling. In Kugler, a pro-se Plaintiff voluntarily dismissed his action by stipulation upon his signature and the signature of defense counsel, and since it did not state it was with prejudice, by rule the dismissal was without prejudice. The U.S. District Court had previously erred and treated it as a Motion. The federal magistrate properly held in Kugler that in determining who was a prevailing party, the Court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The magistrate was in error when she stated that generally there is no prevailing party unless the merits of the law suit have been decided and there is a final judgment. That was not what was stated in the majority decision by Justice Burdick, Justice Jones, or by Justice Horton. There was a final judgment in Straub, supra, at p. 71. See Rohr v. Rohr, 118 Idaho 689 (1990). Rather, the language quoted by the federal magistrate came from the concurring opinion in Straub. Kugler v. Bohus, supra, does not stand for the proposition that attorneys fees must be denied against a Plaintiff who dismissed without prejudice. The magistrate held that Dr. Bohus was not a prevailing party since no final judgment had

been entered. Here, a final judgment was entered. The result in Kugler may have been driven by the court's error in treating a stipulation as a motion to the prejudice of a pro-se litigant.

If Kugler, supra, is cited for the proposition that attorneys fees can never be awarded to a defendant when a plaintiff voluntarily dismisses, that simply cannot be law in a contempt case. The purpose of the court's discretionary authority under I.R.C.P. 41(a)(2) is to insure that the court pays due regard to both the Plaintiff and Defendant. Parkside Schools, Inc. v. Bronco Elite Arts & Athletics, 145 Idaho 176 (2008). To absolutely bar attorneys fees to a defendant when plaintiff on the eve of trial decides to finally voluntarily dismiss his contempt case, is seriously counter-intuitive because it creates future mischief in a contempt action that is prejudicial to a defendant who prevailed and conflicts with Jones v. Berezay, 120 Idaho 332 (1991) observation which stated, "although costs and attorneys fees are often imposed upon a plaintiff who is granted a voluntary dismissal..." Jones v. Berezay, at p. 336. **Moreover, Dennis could not re-file his contempt action because it is barred by the statute of limitation.** With reference to Goodspeed v. Shippen, 154 Idaho 866, 873 (2013), attorneys fees could not be awarded to a defendant because a remand had been ordered in the appeal. Here, under I.C., § 7-610, Dennis cannot re-file a criminal contempt as it is time-barred. Whether or not Dennis could file a civil contempt is irrelevant to the attorney fee award below and is also not germane as to whether Judy was the prevailing party in this criminal contempt action.

Dennis was clearly on notice that Judy sought her attorneys fees and costs, and he is not legally entitled to file a notice of voluntary dismissal in an I.C., § 7-610 case and have the absolute right to escape such an award where he caused $8,976.10 in attorneys fees and costs. Judy requested

attorneys fees under I.C., § 7-610, I.C., §12-121, I.R.C.P. 54, and other applicable law including I.C., § 12-123, and I.R.C.P. 75(m). Judy is the prevailing party per Rule 54(d)(1)(B), I.R.C.P., after considering **the final judgment or result of the action in relation to the relief sought by the respective parties** and **after considering all of the issues and claims involved in the action and the resultant judgment obtained.**

The **result of the action in relation to the relief sought** by the Appellant is clear. Stewart v. Rice, 120 Idaho 504, 510 (1991). Appellant had requested in two contempt motions, that Respondent be found guilty of contempt on five counts, which she was not. On the other hand, **Respondent prevailed in the relief that she requested on June 22, 2012**, in her Affidavit at p. 14 (R. 141) and in her Notice of Affirmative Defenses at p. 7, (R. 163), and that Dennis' Motion for Contempt be dismissed and that "**he take nothing thereby**". Contrary to Dennis' argument of public policy found in part 3 on page 15 of Appellant's Brief, a potential problem will arise if the concurring opinion in Straub, supra, is read to bar an attorney fee award, as it would take away statutorily conferred discretion. I.C., § 7-610. Second, it would give a plaintiff the right to run up a defendant's attorneys fees, and one day before trial dismiss the contempt case without prejudice, and thereby bar defendant from being made whole. Tr., Vol. 1, p. 57, L. 10-15; Tr. Vol. 3, p. 34, L. 4-5.

B.

APPELLANT'S CRIMINAL CONTEMPT MOTIONS

WERE BARRED BY THE STATUTE OF LIMITATIONS

Hinging upon the assertion that his Motions for Contempt were civil, rather than criminal, Dennis argues that he could re-file the same at a later date and not have criminal statute of limitation problem. The premise is incorrect, given the magistrate's well thought-out legal analysis that Dennis sought criminal contempt in Count 5 in his Amended Motion. Tr., Vol. 1, p. 25, L. 8-10; Tr. p. 15, L. 8-24. Count 5 sought an unconditional penalty which made it a criminal contempt.[10] Camp v. East Fork Ditch Co., Ltd., 137 Idaho 850, 860 (2002).

When Appellant voluntarily dismissed his first motion for contempt, he dismissed the criminal contempts sought in counts 1, 2, 3 and 4. Count 1 was pled as a criminal contempt and was cautiously and properly treated as such by the Magistrate. R. 400. **Appellant's Motion for Partial Summary Judgment was also denied because of material issues of fact in dispute, from which there has been no appeal. R. 100.**

A criminal contempt under I.C., Section 18-1801 is a misdemeanor and is more accurately the crime of contempt. Camp v. East Fork Ditch Co., Ltd., supra at 861. The statute of limitation was one year. I.C., § 19-403. Neither the magistrate court or the district court misperceived or

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[10] In Appellant's Brief filed in the District Court he wrote and **conceded** "the purpose of Mr. Charney's contempt claim 5 was to impose a sanction upon Mrs. Charney for a past failure to comply with a court order, but with the goal that she follow the PSA in the future." R. 386. Having conceded Count 5 was a criminal contempt, he should not now be heard in protest that it was really a civil sanction that he sought. **"When the sanction is imposed to punish the contemnor for past acts, the contempt is criminal."** Camp v. East Fork Ditch Co., Ltd., supra at 862.

misapplied the law regarding the statute of limitation, and **Dennis' refiling is barred by the one year statute of limitation.** Tr., Vol. 1, p. 75, L. 12-17.

It should be noted that in Appellant's initial brief to the District Court, Appellant did not raise the issue of statute of limitation as an issue on appeal, rather that issue was raised for the first time in Appellant's Reply Brief, which was improper. Suitts v. Nix, 141 Idaho 706, 708 (2005), "A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief". Suitts, supra. In this matter the District Court noted that Appellant's assertion of additional issues was in his reply brief, R. 488, wherein he cited to I.C., § 5-244, a civil statute of limitations, not the applicable criminal statute of limitations, I.C., § 19-403. R. 468.

The argument in the District Court that there was no final judgment was also incorrect. Mr. Justice Burdick who wrote the decision in Straub v. Smith, supra, held that the order of dismissal, based upon a stipulation, was a final judgment. Supra at p. 71. The Order of Dismissal here was a final judgment.

The Magistrate and the District Court properly applied the law and although freely reviewed by the Supreme Court should be affirmed. The law was properly applied to the facts found and as such is to be upheld on appeal. Stonecipher v. Stonecipher, 131 Idaho 731, 734 (1998).

C.

THE PUBLIC POLICY ARGUMENT THAT ATTORNEYS FEES PURSUANT TO I.C., §7-610 SHOULD NEVER BE AWARDED AGAINST A CLAIMANT WHO VOLUNTARILY DISMISSED THEIR CASE, IS UNWISE, AND WAS NOT RAISED AS A GROUND FOR APPEAL BEFORE THE DISTRICT COURT

Dennis urges that if a litigant is going to be subject to an award of attorneys fees whether he voluntarily dismisses without prejudice prior to trial, there would be no incentive to dismiss claims that have become economically infeasible to pursue. There is a potential risk of attorneys fees when a case is filed. Dennis should have thought about economic infeasibility before he sued for ill-conceived criminal contempt two months after the Decree was entered and is fortunate he is not held to a higher standard per I.C., 12-123(b)(ii). He continues to march on with a second appeal and his third counsel. Dennis also unreasonably caused attorneys fees in connection with his Motion for Summary Judgment which lacked a good faith basis. Tr., Vol. 1, p. 50, L. 22 through p. 52, L. 9; Tr., Vol. 1, p. 78, L. 7-9. A public policy could just as easily be justified to award attorneys fees to discourage the unreasonable contempts and that such policy is already evident in I.C., § 7-610. The legislature enacted I.C., § 7-610 and it is public policy that a prevailing party in a contempt action may be awarded their costs and fees. The legislature enacted its policy beginning in 1881. See I.C., § 7-601.

Finally, Appellant did not raise the public policy issue in his Notice of Appeal (R. 354) or his issues in his initial brief to the District Court. (R. 357-358). In fact, Dennis' brief to the District

Court read, "the possibility of paying attorneys fees weighs into such a decision to dismiss claims, and the litigant may just have well decided to go through with the contempt hearing or not." R. 378. That statement does not appear to urge that Dennis was caught in a "hobson's choice". There are consequences for one's choice such as unwisely bringing two contempt motions in the first place. Having not raised this argument in his appeal to the District Court, it cannot be raised before the Supreme Court, even if the issues had been raised in the magistrate Court. State v. Doe, 144 Idaho 819, 822 (2007).

D.

THE TRIAL COURT COULD NOT GRANT SUMMARY JUDGMENT OF CONVICTION ON A CRIMINAL CONTEMPT AND A SECOND APPEAL FROM THAT RULING IS UNREASONABLE

On November 16, 2012 Appellant filed a Motion for Partial Summary Judgment, R. 169, for nonsummary contempt for Counts 1 and 5 of his Verified Amended Motion Re: Contempt filed June 8, 2012. R. 74. Dennis asserted that no genuine issue of material fact existed and that he was entitled to a judgment as a matter of law. R. 170. The Magistrate found otherwise. R. 400.

This issue is improperly brought before this Court because there was no appeal from the second ground in denying summary judgment, namely that there were material issues of facts in dispute. If this Court addresses the first ground that Dennis brought a criminal contempt as opposed to a civil contempt, he still fails in this appeal because he did not appeal from the other ground. R. 400.

The Verified Amended Motion for Contempt requested a criminal penalty-sanction. R. 16 and 79. Criminal penalties may not be imposed upon someone who has not been afforded the protections that the constitution requires of such criminal proceedings. Hicks v. Feiock, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429-1430, 99 L.Ed.2d 721 (1988), cited in Camp v. East Fork Ditch Co., Ltd., 137 Idaho 850, 861 (2002). Judy filed a Memorandum in Opposition to Dennis' Motion for Summary Judgment which raised the issue, that the court did not have the ability to grant summary judgment and thereby deny Plaintiff her civil rights, citing Rules 75(h)(1) and (j), I.R.C.P. Judy was entitled to a trial and to confront witnesses, and that all elements of contempt must be proven by Dennis beyond a reasonable doubt.[11] Judy's Memorandum stated that "[t]here [was] no procedure in the Idaho civil rules or the Idaho criminal rules which would permit summary judgment in a proceeding where imprisonment is requested plus attorneys fees." R. 217.

When both civil and criminal relief is imposed in the same proceeding, then the criminal feature of the order is dominant and fixes the character for purposes of review. State of Idaho Dept. of Health and Welfare v. Slane, 155 Idaho 274, 277 (2013). Here, Dennis sought criminal contempt on Count 5[12] against Judy for allegedly **misappropriating** an asset awarded to Dennis. R. 78.

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[11] Judy's federal constitutional rights include but are not limited to (1) **notice that a criminal contempt sanction is being sought in contempt proceedings,** (2) the right to the presumption of innocence, (3) the privilege against self-incrimination, (4) the requirement that contempt be proved beyond a reasonable doubt, (5) the right to cross examine witnesses, call witnesses, and to testify in one's own behalf. Camp v. East Fork Ditch Co., Ltd., supra. Rule 75(f), I.R.C.P. and Rule 75(j)(2), I.R.C.P.

[12] It is not clear from the Amended Motion for Contempt itself whether Count 1 pertaining to a J.B. Landscape invoice actually sought civil or criminal contempt since paragraph VII of Count 1 states "Plaintiff should be held in contempt for not paying the J.B. Landscape invoice in her name." R. 78. However, it is noted that Dennis' Memorandum filed November 16, 2012, five months after his initial contempt was filed, referred to civil contempt on Count 1 (R. 191) and criminal contempt on Count 5 (R. 194).

Dennis' Memorandum In Support of Partial Summary Judgment stated and Dennis therein bolded "**criminal sanctions should be imposed as to Count 5**". R. 194. The penalty section of the Verified Amended Motion Re: Contempt applied by its wording to "each" occurrence, namely Counts 1 and 5. R. 79.

At the hearing on Dennis' Motion for Partial Summary Judgment on Counts 1 and 5, Judy's attorney stated, "...I don't think that Judy can be deprived of her Constitutional rights by summary judgment". Tr., Vol. 1, p. 18, L. 6-12. Dennis' attorney, at the summary judgment hearing, inaccurately stated after alleging criminal penalties, "we're not asking for criminal penalties".[13]. Tr., Vol. 1, p. 9, L. 8-9. He protested that "we're not doing this to be spiteful; we're not doing this to be vengeful, we're trying to limit the issues that are going to be tried in the future." Tr., Vol. 1, p. 9, L. 14-16. The latter statement rang hollow and the former statement was not accurate, as both Dennis' Verified Petition on Counts 1-4, R. 16, and the Amended Verified Petition on Count 5, R. 79, sought criminal penalties.

The Magistrate correctly stated,

> "The Court: ...**it is my position that the Court cannot grant summary judgment of conviction on a criminal contempt**...--because one of the rights the criminal

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[13] An unconditional penalty is a criminal contempt sanction. State of Idaho Dept. of Health and Welfare v. Slane, supra. In Dennis' Verified Motion for Contempt for Count 1 the penalty was not conditional, as he alleged "Plaintiff should be held in contempt for not paying the J.B. Landscape invoice in her name". Counts 2, 3, and 4 were not conditional as they all alleged that, Plaintiff should be held in contempt, for incurring credit charges and not timely paying charges (Count 2), that Plaintiff should be held in contempt for not paying, saving and defending and holding Defendant harmless from debts (Count 3), and that Plaintiff should be held in contempt for impairing Defendant's credit rating (Count 4). As regards Count 5 it read, "Plaintiff should be held in contempt for misappropriating an asset". **All of the foregoing penalties were criminal and unconditional,** and save no indication that conditional sanctions were sought. Moreover, if both civil and criminal relief are imposed in the same proceeding then the criminal feature of the Order is dominant and fixes its character for purposes of review. State of Idaho Dept. of Health and Welfare v. Slane, supra.

> contempt defendant has is the right to confront and cross-examine the witnesses. And confront means to be present in court while they testify....That simply isn't done when --when its decided on affidavits. So, if it is a criminal contempt, it -- it is my position, **as a matter of law, summary judgment of conviction cannot be granted.**" Tr., Vol. 1, p. 18, L.21 - p.19, L. 8.

Summary Judgment in a criminal contempt is not proper. See for example, Department of Housing Preservation and Development of New York v. Gottlieb, 518 N.Y.S.2d 575 (1987). The conclusion is based on the same logic that the magistrate used here, namely because of constitutional requirements, a summary judgment for criminal contempt is not proper. The distinction between civil and criminal contempt is important because of the federal constitutional rights that the United States Supreme Court has held applicable in nonsummary criminal contempt proceedings. Camp v. East Fork Ditch Co., Ltd, supra.

The Magistrate Court found that it was clear that the Amended Motion for Contempt was a Motion **solely** for criminal contempt and is not an error of law, nor an abuse of discretion.

> "It is clear to me that the Amended Motion for Contempt is a Motion **solely** for criminal contempt."[14] Tr., p. 25, L. 8-10.
>
> . . .
>
> The penalty for this contempt, which may be imposed upon the plaintiff for each occurrence if she is found guilty of contempt, includes a fine not exceeding 5,000 or imprisonment not exceeding five days, or both.
> Well, **that's ... clearly criminal**....It's...not in the prayer, but it is in the pleading. Under the title penalty, it's clearly criminal...penalties that are requested." Tr., Vol. 1, p. 15, L. 8-24.

When asked by the magistrate "so, as to Count 5, how can it be civil contempt?", Tr., Vol. 1, p. 5, L. 21-22, Dennis' attorney Shoufler responded "to just issue an injunctive relief to have her not do that again" in the future. Tr., Vol. 1, p. 6, L. 2-6. Said statement is not logical given Judy's

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[14] If this court were to determine that Count 1 was in fact civil, then the Magistrate's statement is harmless, as Dennis would later dismiss his case on Counts 1 through 4.

Affidavit which states, "Dennis informed me by email on May 17, 2012, that my Costco [membership] card was no longer active and he told me that I could no longer use the membership". R. 140. Said email to Judy was attached as Exhibit C to his Verified Amended Motion for Contempt as to Count 5. R. 126. Since Dennis had already canceled her card, Count 5 was clearly to punish her for her past act of renewing the membership. The argument concerning injunctive relief was silly and mis-perceived the nature of a conditional sanction. If an injunction was sought, the contempt motion was frivolous.[15] The magistrate rightfully disagreed with attorney Shoufler and correctly stated,

> "I don't have the power to do that as a civil contempt remedy. You can certainly bring an action for injunction[16], and that has a completely separate burden of proof, and...would ordinarily be brought in a separate action. (Tr., Vol. 1, p. 6, L. 9-13). . . . as to Count 5, it can only be a criminal contempt since its not something on which I can order compliance." (Tr., Vol. 1, p. 7, L. 1-3).

Count 5 sought to punish Judy, the alleged contemnor, for past acts and therefore the contempt was criminal. Camp, supra at p. 862. There was nothing in a sanction applicable to Count 5 which could be coercive. Id. To argue that a penalty could be imposed on Count 5 in the form of an injunction to induce future compliance with court orders is a concept flatly rejected by the Supreme Court in Hicks v. Feiock, supra, 485 U.S. at. p. 635. Camp, supra at p. 862.

Where the sanction sought is a conditional penalty then it is a civil sanction, whereas an unconditional penalty is a criminal contempt. Camp, at p. 863. The definition distinctions between

[15] No injunction was sought or labeled as such in Dennis' Memorandum in Support of Partial Summary Judgment Re: Contempt on Count 5. R. 195.

[16] On appeal to the District Court, Dennis' second attorney, Aaron Tribble, argued on Count 5 that the magistrate could "choose a civil penalty such that it would order Ms. Charney to follow the PSA in the future and no criminal sanction would be involved." R. 386. An injunction is not a sanction to coerce compliance.

civil and criminal contempt are important because of constitutional protections. Id. "A penalty is unconditional if the contemnor cannot avoid any sanction by complying with the court order violated." Camp, at p. 863. "A penalty is conditional if the contemnor can avoid any sanction by doing the act she had been previously ordered to do." Camp, at p. 864. There was nothing Judy could do to un-ring the bell on Count 5, and avoid a sanction. Dennis clearly wanted Judy punished. R. 194, 195.

Regarding Count 1, paragraph 7 of Dennis' Amended Motion for Contempt alleged that "Plaintiff should be held in contempt for not paying the J.B. Landscape invoice in her name". R. 76. When at the argument on summary judgment, Dennis' attorney realized that he had a constitutional protection problem, he then retreated at the Summary Judgment hearing to asking for relief that she should be ordered to pay the bill. Tr., Vol. 1, p. 12, L. 22 through p. 13, L. 4. That was different than what was alleged in Count 1. The alleged failure of Judy to pay a community bill to J.B. Landscape, incurred by both Judy and Dennis for a community purpose, did not leave for the Court a civil sanction to impose, since there was no affirmative showing that only Judy was liable to J.B. Landscape. Dennis ignored the word "incurred" in the Property Settlement Agreement attached to the Partial Judgment and Decree. The Court was unwilling to ignore the word "incurred". Tr., Vol. 1, p. 9, L. 21 through p. 11, L. 22; Tr., Vol. 1, p. 23, L. 8 - p. 24, L. 3; p. 28, L. 4 - p. 29, L. 4.

Appellant cites Steiner v. Gilbert, 144 Idaho 240 (2007), for the proposition that regardless of whether Dennis labeled Count 5 and the other 4 Counts as a criminal contempt, it is the form of relief actually imposed by the court that determines whether it is a civil or criminal contempt.

Steiner, supra stated that the real question in determining whether the contempt is criminal or civil in nature is not what the parties label it, but rather, what form of relief is "**actually sought**

and imposed. Steiner, supra at p. 246. Dennis **sought** criminal penalties[17]. Because Dennis voluntarily dismissed his Motions, the Magistrate did not impose a penalty. The reference to the foregoing statement in Steiner makes it clear that an unconditional penalty is a criminal contempt. As stated in Steiner, we need only determine if this was a criminal contempt case, and it was. Id. Obviously it is not the trial court's ultimate election of what sanction, "conditional or unconditional", is ultimately imposed which solely determines its character. The claimant must choose at the outset of its contempt case whether he is pursuing civil or criminal contempt, since proper notice, and the advice about the burden of proof, the right to confront and cross examine witnesses, and the right to remain silent are all constitutional guarantees. State Department of Health and Welfare v. Slane, 155 Idaho 274, 277 (2013).

E.

THE ALLEGATION THAT NO IDAHO STATUTE OR CASE LAW PRECLUDES SUMMARY JUDGMENT IN A CIVIL CONTEMPT CASE IS NOT GERMANE SINCE APPELLANT SOUGHT CRIMINAL CONTEMPT

On this appeal to the Supreme Court, Dennis' third attorney asserts that there is no Idaho statute or case law that would preclude summary judgment in a **civil** contempt proceeding. Appellant's Brief at p. 27. Appellant cites to cases from other states which permitted summary judgment in a civil contempt proceeding.[18]

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[17] Dennis sought punitive sanctions because he claimed a pattern had been developing where he alleged that Judy ignored her obligations to his detriment. R. 83.

[18] For example, Department of Housing Preservation and Development of City of New York v. Gottlieb, 136 Misc. 2d 370, 518 N.Y.S. 2d 575 (1987), the civil court for the City of New York did distinguish between a criminal contempt where summary judgment was improper, from a civil contempt where it may be proper.

While cases from other jurisdictions may permit certain motions for summary judgment in a civil contempt proceeding, here Dennis brought a criminal contempt proceeding in which summary judgment was not possible, as constitutional protections applied. At the outset of the contempt motion, before entry of a plea, it was Judy's right to have "notice that a criminal contempt sanction is being sought in the contempt proceeding". Camp v. East Fork Ditch Co., Ltd., 137 Idaho 851, 860. Neither Motion gave any contra-indication that a civil contempt was sought, nor did the supporting Affidavits give notice of a "conditional sanction", or that Dennis sought only a civil contempt. The penalty section in the Verified Motion (R.16) coupled with paragraph 31 of Dennis' Affidavit (R.36) makes it a criminal contempt, namely that Judy is to be punished, fined and pay attorneys fees for what she allegedly committed. To recharacterize at the summary judgment hearing that Dennis only sought civil contempt on Counts 1 and 5 is belied by both Motions. Regardless, at the Summary Judgment hearing, Count 5 was a criminal contempt per Dennis' Memorandum filed in support of Summary Judgment which read in bold print, "Criminal sanctions should be imposed as to Count 5". R. 194. Even new lipstick cannot change that statement.

Dennis' Verified Amended Motion Re: Contempt adding Count 5, coupled with the Verified Motion made it a criminal contempt on all 5 counts. The Magistrate was correct in so finding (Tr., Vol. 1, p. 15, L. 8-24). The District Court did not abuse its discretion in declining to determine the merits in the dismissal order of Count 5 of whether the contempt sought was criminal or civil. The appeal was untimely because it was filed on August 5, 2013, after Judge Day entered his Judgment awarding attorneys fees and costs, but the Order Dismissing Count 5 was filed January 23, 2013. Therefore, the issue concerning the merits of that order could not be asserted in the appeal to the District Court, which should apply as well to the Supreme Court's review. R. 492-493.

F.

A DIRECT REVIEW OF THE MAGISTRATE'S DECISION AWARDING ATTORNEYS FEES AND COSTS TO RESPONDENT UNDER I.C. § 12-123(b)(ii) IS NOT NECESSARY

The District Court on appeal did not address Dennis' appeal from the Magistrate's award under I.C., §12-123(b)(ii) because it properly concluded that attorneys fees for an improvident Motion for Summary Judgment were appropriately awarded to Judy under the contempt statute, I.C. § 7-610. R. 492. A direct review is not necessary if the Supreme Court affirms the I.C., § 7-610 award. The affirmance under I.C., § 7-610 was not shown to be an abuse of discretion, which would be the same standard applied under an I.C., § 12-123(b)(ii) review.

The Magistrate awarded attorneys fees pursuant to I.C., § 12-123(b)(ii) as regards the Motion for Summary Judgment and that does not constitute an abuse of discretion since there was no logical argument for partial summary judgment for conviction of contempt. Tr., Vol. 1, p. 78, L. 18-19. See Argument Section D of this Brief. As regards I.C., § 7-610, the contempt statute, the Court on page 79-80 of the transcript realized that its decision was a matter of discretion which could not be abused. Tr., Vol. 1, p. 79, L. 23 - p. 80, L. 2. The Court ruled, clearly within its discretion, as follows:

> "In a contempt matter, the determination of attorneys fees is always much easier if there is a trial on the merits. But in this case, the Plaintiff...was prepared for trial and was not willing to stipulate to a dismissal of the action without an award of her attorneys fees....And it was the Petitioner in the contempt action who actually determined that he was not willing to face a trial on the matter and sought a dismissal without the stipulation of the other party, and I granted that dismissal." Tr., Vol. 1, p. 80, L. 3-14.

So, why did Judy's attorneys fees reach the level of $10,000? The answer is evident, as the Court stated as follows:

> "There is no question that there were a great many of...a great deal of attorneys fees incurred in this case and, frankly, there is no question in my mind that the cost of this action was increased, time and again, by Mr. Charney preparing his own documents. He prepared many Affidavits that were lengthy, wordy, went into matters that at least arguably weren't admissible in court, and were worded in such a way as to inflame passions of the parties". Tr.. Vol. 1, p. 80, L. 17-25.

> "I think if he [had] stayed out of it and let his attorney control the case, it might well have been a much more civil litigation and might well have cost a great deal less...for the Respondent, the Plaintiff. Frankly, I think, under all the circumstances, it is an appropriate use of my discretion to award attorneys fees under Idaho Code, § 7-610. So, **as to a portion of the attorneys fees, that is those incurred--reasonably incurred related to the Motion for Partial Summary Judgment,** I find attorneys fees appropriate under 12-123, **and as to the entire action, I find attorneys fees appropriate under Idaho Code, 7-610."** Tr., Vol. 1, p. 81, L. 1-15. (Emphasis added).

> "There was the Motion for Summary Judgment that had no basis". Tr., Vol 1., p. 82, L. 3-4.

The Magistrate stated,

> "So I can't say that ... $9,000 in fees and $1,000 [sic $108.60] in costs, ... are facially inappropriate for a case of this nature and complexity, and with the vigor in which it was pursued by Mr. Charney." Tr., Vol. 1, p. 82, L. 4-8.

Normally, the trial court's award of attorneys fees is awarded a great degree of deference as being within its unique expertise and discretion. Lunn v. Lunn, 125 Idaho 193 (Ct. App. 1994). Appellant has not demonstrated a clear abuse of the trial court's discretion. U.S. Bank National Association v. Kuenzli, 134 Idaho 222, 228 (2000). Similarly, the trial court's determination that the summary judgment motion pursued by Dennis was frivolous conduct, is supported by the Court's proper exercise of discretion and the detailed findings in that regard. See Puckett v. Verska, 144 Idaho 161, 170 (2007), wherein a court may award reasonable attorneys fees to any party reasonably affected by adverse conduct.

G.

ATTORNEYS FEES WERE PROPERLY REQUESTED BY RESPONDENT

IN DEFENDING APPELLANT'S APPEAL TO THE DISTRICT COURT

In Judy's Respondent's Brief to the District Court she requested her attorney fees on appeal. R. 421. While I.C., Section 7-610 was not specifically identified in Section IV, that Section read,

> "**In order to be made whole,** Judy requests her attorneys fees on this appeal pursuant to Rule 40 and 41, I.A.R., I.C., § 12-121, I.C., § 12-123(b)(ii) and Rule 54(e)(1), I.R.C.P., in that the appeal particularly is pursued frivolously or unreasonably or without foundation."

Dennis objected to an award of attorneys fees on appeal pursuant to I.C., § 7-610 claiming "Ms. Charney did not cite I.C., § 7-610 "a single time" as a basis for her claim for attorneys fees." R. 512. The argument was not true, causing Dennis' third counsel to morph the argument as follows:

> "Mr. Bevis is correct in that 7-610 was cited in the brief. It was cited in the conclusion.". Tr., Vol. 4, p. 14, L. 5-7. (May 29, 2014).[19]

In light of this Court's decision in Beco Construction Company, Inc. v. J-U-B Engineers, Inc., 145 Idaho 712 (2008), the argument in Dennis' subsequent appeal to the Supreme Court has now been adjusted to include a claim that citing I.C., § 7-610 in Judy's Memorandum and Affidavit of attorneys fees and costs on appeal, will not satisfy Rule 35(b)(5), I.A.R. either. Beco, supra, holds that adequate notice through the Memorandum and Affidavit of Attorneys Fees is sufficient before a trial court and its logic is controlling. Beco, supra at p. 726.

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[19] I.C., § 7-610 was mentioned in the Section wherein Judy requested the attorneys fees on appeal (R. 426) and it was stated more clearly in the conclusion. (R. 455). Judy sought to have Judge McLaughlin modify the 4th paragraph on page 4 of his Order. R. 528. But Mr. Justice Schroeder replaced Judge McLaughlin who was not given the opportunity to correct his misstatement. See Argument Section H of this brief.

Dennis was provided proper notice of Judy's claim for attorneys fees under I.C., § 7-610 in her brief to the District Court. R. 455. The purpose of Idaho Appellate Rules 35(b)(5) and 41(a) is to provide **notice** to the opposing party that attorneys fees were requested on appeal. Bingham v. Montane Resource Associates, 133 Idaho 420, 424 (1999). Dennis' quibble is that I.C., § 7-610 should have been stated in another section of the brief is classic form over substance argument. In her conclusion, Judy's Brief to the District Court stated,

> "Since this appeal is from an award of attorneys fees and there was no abuse of discretion, **attorneys fees should now be awarded on appeal** for the same reasons granted below, **I.C., § 7-610**, I.C., § 123(b)(ii), and now including I.C., § 12-121 in conjunction with Rule 54(e)(1), I.R.C.P." R. 456.

If the attorney fee request on appeal is deemed insufficient because it was in the wrong Section, then Beco, holds that stating it in the Memorandum is sufficient. There was considerable notice of Judy's claim under I.C., § 7-610 throughout this case. When Judy first responded by Affidavit to Dennis' contempt motion she stated in paragraph 11:

> "Dennis' Motion for attorneys fees is frivolous.[20] I request that the Court **award me attorneys fees and costs** incurred in responding to Defendant's Motion pursuant to **Idaho Code, Section 7-601 et seq.,** as well as applicable law". R. 141.

In Judy's Notice of Affirmative Defenses, paragraph 9 read, "Defendant's request for attorney fees is frivolous. **Plaintiff requests attorneys fees and costs incurred in responding to Defendant's Motion, Idaho Code, Section 7-601,** et seq., as well as other applicable law." R. 163. Notice of Judy's claim for **attorneys fees under the contempt statute, I.C., § 7-601 et seq., continued throughout** the contempt proceedings in the following documents:

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[20] Dennis' frivolous request for attorneys fees was asserted again in his initial brief filed December 23, 2013. R. 391.

- Supplemental Affidavit of Judy Charney in Opposition to Defendant's Motion for Summary Judgment Re: Contempt Counts One (1) and Five (5). R. 211 (paragraph 4);
- Judy's Memorandum in Opposition to Motion for Summary Judgment. R. 218 (paragraph v);
- Judy's Motion for Attorneys Fees and Memorandum and Affidavit of Attorneys Fees and Costs before the Magistrate Court. R. 257-260, at paragraphs 3(A)(B)(C)(D), 7 and 14;
- Judy's Memorandum in Opposition to Defendant's Objection and Motion to Disallow Costs and Attorneys Fees and Supplemental Memorandum. R. 317 at paragraph I(13), II(F), pages 10 and 13;
- Judgment awarding attorneys fees. R. 349.

Her Respondent Brief while stating in the conclusion (R. 455) her request for attorneys fees also cited I.C. § 7-610 on pages R. 415, 416, 417, in Section IV at R. 426, R. 429, R. 433 (Footnote 8), R. 437, R. 444, R. 450, and R. 452. Stating I.C., § 7-610 **eleven** times is certainly enough notice.

Yet there was more, as the Memorandum and Affidavit of Attorneys Fees and Costs on appeal to the District Court cited to I.C., § 7-610 four times at R. 498, R., 503, R. 505, and R. 506, which is legally sufficient. Beco, supra, at 726. Paragraph 11 at R. 506 provides the authority and argument as follows:

> "It is logical that if Respondent successfully defended the contempt action below, and in the discretion of the Magistrate was awarded attorneys fees **pursuant to I.C. Section 7-610, that in order for that award to be effective and Respondent to be made whole**, Respondent should be awarded attorneys fees pursuant to Idaho Code, Section 7-610 on appeal in the discretion of the Appellate Court." R. 506.

The District Court properly applied I.C., § 7-610 and held that "I.C. § 7-610 allows me to award attorneys fees to the prevailing party in a contempt matter and it is not subject to a finding of frivolousness and unreasonableness". R. 527.[21] The District Court followed Bingham v. Montane

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[21] The District Court in its Order stated, unfortunately and incorrectly wrote that Mrs. Charney failed to specifically state I.C., § 7-610 as a basis for an attorney fee award on appeal or clearly state it as a basis for an award of attorneys fees. But it was clear, as it was stated in Respondent's Brief, p. 42, that "**...attorneys fees should now be awarded on appeal for the same reasons below, I.C., § 7-610**...". R. 455.

Resource Associates, 133 Idaho 420, 424 (1999) which held that "in order to be awarded attorneys fees, a party must actually assert the specific statute or common law rule on which the award is based.[22] Per Bingham, a request for attorneys fees should alert the other party to the basis upon which attorneys fees are requested." Id. Dennis and his attorneys were placed on **full alert**.

That further, pursuant to Rule 41(a), I.A.R., the Supreme Court and the District Court may permit a later claim under such circumstances **it deems appropriate**. Pursuant to Rule 41(b), I.A.R., the District Court permitted Judy to present argument for attorneys fees on the basis that attorneys fees and costs were necessary for her to be made whole and that discretionary decision under Rule 41(a) has not been shown to be an abuse of discretion. U.S. Bank National Association v. Keunzli, 134 Idaho 222 (2000). Given the numerous cites to I.C. § 7-610 as a basis for attorneys fees and costs, the fact that it was stated in Respondent's brief, and in the Memorandum of Attorneys fees on Appeal, it was well within the District Court's discretion, and this Court's discretion, to permit the claim.

Normally, the trial court's award of attorneys fees is accorded a great degree of deference as being within the trial court's unique expertise and discretion. Lunn v. Lunn, 125 Idaho 193 (Ct. App. 1994).

Finally, Respondent's request for attorneys fees on appeal in Section IV of Judy's Respondent's Brief to the District Court cited to Rule 54(e)(1), which provided in part that in a civil action the court may award reasonable attorneys fees provided for by statute. Under Rule 54(e)(1),

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[22] Bingham at p. 424 cited Curr v. Curr, 124 Idaho 686 (1983), for the proposition that I.A.R. 35(a)(5) requires a statement of the basis for the claim for attorneys fees on appeal be included in claimant's brief. Clearly, Judy's brief stated I.C. § 7-610 as the basis of attorneys fees on appeal. R. 455.

the citation to I.C., § 7-610, a statute, should be sufficient insofar as Rule 35(b)(5), I.A.R. Moreover, Rule 35(b)(5), I.A.R., should not be read to require that Respondent's claim for attorneys fees on appeal must appear in a particular section. Rather, Respondent must state in the brief that she is claiming attorneys fees and state the basis of the claim, all of which was done in Respondent's brief to the District Court.

H.

MR. JUSTICE SCHROEDER, SUCCEEDING DISTRICT JUDGE, DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION, NOW RE-CHARACTERIZED AS A MOTION TO AMEND

In response to Judy's Motion to Supplement and Amend the District Court's Order Awarding Attorney Fees to Judy (R. 533), Appellant filed a Motion for Reconsideration, asking again that the District Court, without any additional reasons provided, reverse its ruling awarding Judy attorney fees pursuant to I.C., § 7-610. The request simply invited the District Court to reconsider its decision affirming the trial court. Ustick v. Ustick, 104 Idaho 215, 219 (Ct. App. 1983). Justice Schroeder denied the Motion. See September 4, 2014, Order Denying Motions contained in the Supplemental Record as Exhibit C, pursuant to the Order on Motion to Augment entered October 1, 2014. At oral argument, Justice Schroeder stated:

> "Well, as I've indicated, I'm reluctant to the level of refusing to revise a former judge's opinion. I wanted to have this hearing in a formal that would give both parties the opportunity to lay their record specifically, because there has been a notice of appeal filed, and have the issues preserved for the Supreme Court." Tr., Vol. 5, p. 19, L. 25 through p. 20, L. 7.

The award of attorney's fees under I.C., § 7-610 was thoroughly briefed to Judge McLaughlin.[23] His failure to reconsider, and Mr. Justice Schroeder's subsequent declination to reconsider was not an abuse of discretion. Straub v. Smith, 145 Idaho 65, 71 (2007). Although the denial of Appellant's Motion to Reconsider was not an abuse of discretion, the error, if any, is harmless error.

Dennis' Motion to Reconsider failed to cite a rule permitting reconsideration. Perhaps this is form over substance, given notice that Dennis wanted to rehash the I.C., § 7-610 attorney fee award yet again, however, the Motion for reconsideration was not a Motion to alter or amend, nor labeled as such. [24]

Per Rule 83(x), I.R.C.P., with respect to appeals from the Magistrate division to the district court, Rule 42, I.A.R., a Petition for rehearing would be applicable. Dieziger v. Pickering, 122 Idaho 718, 719 (Ct. App. 1992), citing Ustick v. Ustick, supra.

I.

DENNIS IS NOT ENTITLED TO AN AWARD OF ATTORNEYS FEES ON APPEAL

This bold claim needs to be placed in context. Dennis unwisely sought attorney fees in both of his contempt motions. R. 16, R. 79. Aggressively, and now rather ironically, without identifying I.C., § 7-610 in his initial brief before the District Court in either the issue section or his discussion of that claim in paragraph 4 of the Brief (R. 363, R. 391), he sought attorneys fees on Count 5, which

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[23] Judge McLaughlin looked at and passed on the opportunity to reconsider. Tr., Vol. 5, p. 9, L. 16-19. Justice Schroeder as a succeeding Judge would have no right to reconsider it again.

[24] The contention is found in FN 12 of Appellant's Brief at p. 37.

the magistrate dismissed *sua sponte,* as trivial, and because there was no harm to Mr. Charney as he received $105 from Costco. Tr., Vol, 1, p. 27, L. 15-19. The claim was frivolous because Appellant supported his claim that "there was no basis in the law of Idaho following the doctrine di minimus non curat lex". R., 392. The case of Martin v. Spaulding, supra, was out there to be found by Dennis, Mr. Shoufler, and Mr. Tribble.[25] Lawyers should know that trivial claims do not belong in our busy courts. Moreover, Dennis was not a prevailing party on Count 5. Tr., Vol. 3, p. 30, L. 17. Dennis had not filed a cost bill below, and had dismissed voluntarily Count 5, without preserving his claim below. R. 444.

Moreover, the claim that Dennis was entitled to attorneys fees on Count 5 after it was dismissed by the Court was not raised in the magistrate court. As a result, on appeal, Judy argued that it could not be raised on appeal to the District Court. Tr., Vol 3, p. 30, L. 19-20. In terms of Dennis' contempt action, Judy was actually the prevailing party on Count 5, once Count 5 was dismissed, but since the magistrate dismissed it *sua sponte*, attorneys fees were not awarded to Judy for defense of Count 5.

As a trifecta, Dennis seeks attorneys fees on his appeal to this court. Appellant's Brief, p. 38. Dennis seeks attorneys fees under I.C., § 7-610 anticipating that he will be the prevailing party in his contempt action. Judy was and is the only prevailing party and to be made whole she should be awarded her attorneys fees under I.C., § 7-610. No abuse of discretion has occurred and the Supreme Court should affirm as a matter of procedure.

Even if the Supreme Court were to reverse the magistrate decision and the District Court affirmance, that would not make Dennis a prevailing party in the contempt action. Since he is not a

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[25] This claim like so many others was abandoned on appeal.

prevailing party, Dennis cannot be awarded attorneys fees. Armand v. Opportunity Management Co., Inc., 555 Idaho 592, 600 (2013).

VI.

CONCLUSION

Given the standard of review, there was no abuse of discretion by the Magistrate or the District Court, that Judy was the prevailing party in two contempt motions brought by Dennis, and that she was entitled to a statutory award of attorneys fees and costs pursuant to I.C., § 7-610. Dennis' voluntary dismissal one day in advance of the trial was a final Judgment and any re-filing of a criminal contempt is barred by the statute of limitation. Judy received all the relief available to her.

Although review is sought from a denial of Dennis' improper summary judgment motion for criminal contempt, he failed to appeal from the finding that material issues of fact were in dispute and conceded in his District Court appeal that Count 5 was a criminal contempt. A court cannot grant summary judgment of conviction of criminal contempt.

Judy requested attorneys fees in her Brief to the District Court, and in this Brief to the Supreme Court, and Dennis cannot properly claim he did not have notice of that claim before the Magistrate Court or the District Court. In order to be made whole, attorneys fees and costs should be awarded to Judy in this appeal pursuant to I.C., § 7-610 for the same reasons awarded below.

Issues not raised by Appellant in the Magistrate Court or the District Court cannot be reviewed in the appeal to the Supreme Court.

The District Court's failure to grant Appellant's Motion for Reconsideration was not an abuse of discretion. Dennis has no right to attorneys fees on appeal and the claim is unreasonable.

RESPECTFULLY SUBMITTED this 23rd day of Dec, 2014.

BEVIS, THIRY & SCHINDELE, P.A.

JAMES A. BEVIS,
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2014, I caused two true and accurate copies of the foregoing document to be served upon the following as indicated below:

Tricia K. Soper Mark D. Perison 314 S. 9th Street Suite 300 Boise, ID 83702	____ U.S. Mail _X_ Hand Delivery ____ Overnight Courier ____ Facsimile Transmission (208)938-9504

JAMES A. BEVIS