

2-17-2015

# Gordon v. Hedrick Appellant's Reply Brief 2 Dckt. 42191

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**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

ROGER CARL GORDON

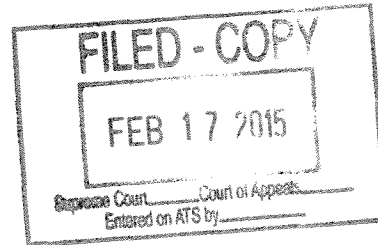
Plaintiff-Respondent/Cross-Appellant

v.

SHANNON LEE HEDRICK,

Defendant-Appellant/Cross-Respondent.

SUPREME COURT No: 42191-2014



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PLAINTIFF-RESPONDENT / CROSS APPELLANT'S REPLY BRIEF

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Appeal from the District Court of the Third Judicial District for Canyon County

Case No. CV-2013-2118

The Honorable Duff Mckee, District Judge

The Honorable Gary D. DeMeyer, Magistrate Judge

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## INTRODUCTION

Throughout her Reply Brief Hedrick characterizes the proceedings as one to establish paternity (Appellant's Reply, p. 9, L. 21), or non-paternity. This characterization fails to account for the fact that a legal finding of paternity had already occurred. A finding of paternity under I.C. §7-1106(1) is significant and confers rights upon the parties and the child, including inheritances. That in extreme measures such as fraud, duress or material mistake the finding can be overturned does not make it insignificant, or as Hedrick refers to it, "fictional" (Appellant's Reply p. 14, L. 11).

Hedrick's characterization of the factual basis for her Motion to Dismiss is also misleading as it is impossible for Hedrick to have truly been mistaken about the identity of the father. While judicial notice of the Pre Trial Memorandum submitted by Hedrick in the guardianship proceedings was not requested, Gordon alleged in his Verified Motion for Relief from Judgment Pursuant to I.R.C.P. 60(B) that Hedrick had claimed to be pregnant before meeting Gordon, citing the Pre Trial Memorandum (R. p 60-61 and p. 90). Hedrick has yet to allege in any affidavit or verified pleadings in these proceedings that she actually reasonably thought or had any reason to believe that Gordon was the more likely biological father. Further, even if Hedrick did not know for certain Gordon was not the biological father of the child, it does not change the fact, as logically concluded by the District Court, either Hedrick knew Gordon was not the father, or knew he was one of two possibilities and was indifferent to the truth. Either conclusion makes it impossible to characterize her actions as a "mistake" to invalidate the legal finding of paternity.

## CROSS APPEAL REPLY ARGUMENT

- A. Gordon Should not be Punished for any Perceived Failure to Properly Respond to a Motion Made Under the Wrong I.R.C.P., that Cited no Basis in Law for the Relief Requested, that Failed to State any of the Elements Required by Statute for Bringing about the Relief Requested, and gave him Inadequate Time to Respond.**

The Motion to Dismiss that is central to this case gave very little clue as to how or under what law it was seeking to do what essentially amounted to a termination of parental rights. No citation was made in the Motion to Dismiss to Idaho Code § 16-2005 or to Idaho Code § 7-1106. No relevant evidence was submitted to support claims under either of those two statutes. If Hedrick was aware of the requirements of I.C. § 16-2005 or I.C. § 7-1106(2) she should have cited it and stated how each element was met, if she was not then she cannot expect to file a vague motion to dismiss and expect Gordon to fill in the blanks. Even so, Hedrick maintains that Gordon should have somehow made the proper objections and legal arguments in front of the magistrate before his Motion for Relief from Judgment despite being shortchanged on time to respond. Any argument that the Motion to Dismiss was simply granted based on a defect of Gordon's pleadings is invalidated by the Amended Pleading filed with the Court. It was not until a Motion for Relief from Judgment that the proper authority was identified for removal from the birth certificate (and done so by Gordon) and not until an appeal that the arguments were fully developed concerning that authority. This shows that indeed Gordon was surprised and prejudiced by Hedrick's failure to base her motion on applicable laws and with a factual basis that could meet that law and grant the relief requested.

Hedrick cites several cases purporting to show that Gordon waived his objections by failing to present them, none of them involving a motion for summary judgment

pushed through a 12(b)(6) procedure. Because Hedrick’s Motion to Dismiss failed to cite any law or outline the proper elements, it was impossible for Gordon to formulate the proper objections. Further, this Court has held previously that “when matters outside the pleading, in the form of affidavits, are presented to and considered by the court it is the *duty* of the court to treat such motion to dismiss as a motion for summary judgment.” *Boesiger v. DeModena*, 88 Idaho 337 (1965); *citing Rush v. G–K Machinery Co.*, 84 Idaho 10 (1961).

That it is the duty of the Court to implement the proper procedure implies that the objection is not waived should the party fail to voice their objection in time. Applying this logic the Court of Appeals held in *Hellickson v. Jenkins* “Even if we had concluded that such issue had not been adequately raised by Hellicksons, there is a further reason for vacating ... It is difficult for us to determine from the record before us whether the magistrate, in granting the motion to dismiss... applied the Rule 12(b)(6) ...or applied the Rule 56” 118 Idaho 273, 277-78, (Ct. App. 1990). Failing to properly convert a 12(b)(6) motion into one for summary judgment may not completely prevent an aggrieved party from being heard, but it does seriously hamper their ability to present a competent defense and results in the use of an improper standard. As previous decisions of this Court put an affirmative duty on the courts to convert a 12(b)(6) motion to a motion for summary judgment when matters outside the pleadings are considered, and because an appellate court cannot determine whether or not the applicable standard was used, failure to treat such motion as one for summary judgment constitutes reason to vacate and remand for further proceedings whether or not a party is able to voice an articulate objection to the improper proceedings before being rushed through them.

**B. The District Court Should have Awarded Gordon Attorney's Fees based on Hedrick's Motion that was not well Grounded in Fact or Warranted by Existing Law.**

As argued in Gordon's initial brief, Hedrick's Motion to Dismiss was not grounded in fact nor did it attempt to cite any existing law that would enable it to remove Gordon from the birth certificate. Because of this, Gordon has requested attorneys fees against Hedrick and her counsel under I.R.C.P. 11(a)(1). Not until Gordon himself identified I.C. § 7-1106(2) as at least a potential statute on which to base the relief Hedrick had requested did Hedrick respond with any mention of a material mistake or the applicable law. These arguments were not relevant to the Motion for Reconsideration as the Court had already terminated Gordon's parental rights under the original Motion to Dismiss.

Only after appeal did Hedrick make arguments concerning the biological father of the child, revealing his identity in an appellate brief before this Court. Only in Gordon's Brief Supplement was mentioned the procedure found in Idaho Code § 16-2005 for termination of parental rights, which is essentially what Hedrick originally requested of the Magistrate. This is another example of Hedrick and her counsel leaving Gordon to fill in the blanks by guessing under what law Hedrick might have potentially sought relief and defending against it in advance. That such attempts are necessary demonstrates that Hedrick's Motion to Dismiss was not grounded in fact or warranted by existing law. While Gordon concedes that the ultimate issue before this Court, that of statutory interpretation concerning the phrase "material mistake" in § 7-1106, is not a frivolous issue, Hedrick's insistence on jamming a square peg Motion to Dismiss into a round hole has increased attorney's fees for both parties and prohibited the arguments, both factual and legal, from being developed at the magistrate level.



Rather than seek to address and change the problematic motion and the incorrect proceedings, Hedrick continues to push the defective Motion to Dismiss all the way to this Court. She only now retroactively makes an attempt to attach the Motion to some existing law that potentially could have given her the relief requested. Had Hedrick simply re-filed the motion under I.R.C.P. 56, based it on the existing law of Idaho Code § 7-1106, and at least made some attempt to conform the motion to the elements found in § 7-1106 this issue could have been developed fully before arriving at the Supreme Court. Discovery requests, depositions, and summary judgment briefing could have established sufficient facts for the Magistrate to have fully examined the proper issues. The standard for awarding attorneys fees is not whether a party ultimately has or could have raised a legitimate issue, but where her position was “pursued frivolously.” *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87 (1991) Even though Hedrick *could* have pursued her position in good faith she chose to cling to a motion with no basis in law, pushed through improper procedures, that fails to allege facts that can grant the relief requested. Therefore the District Court erred in not awarding Gordon attorney’s fees.

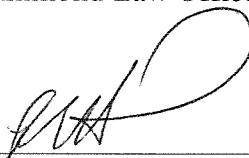
Hedrick also argues that Gordon has waived his right to attorney’s fees before the Magistrate and District Courts. The Amended Petition filed with the Magistrate Court paragraph 13 lays out the applicable statutes and rules of civil procedure under which Gordon has requested attorneys fees (R. at 188). Admittedly an oversight in the compilation of the record has resulted in the non-inclusion of a supplemental brief filed with the District Court concerning attorney’s fees. Should this Court allow Gordon to rectify that oversight it will possess sufficient documents in the record to rule on the issue.

**CONCLUSION**

For the reasons set forth above and in Respondent's Opening Brief, Gordon respectfully requests that this Court affirm the District Court's decision regarding custody and reverse the District Court's decision concerning attorney's fees.

DATED THIS 17 day of February 2015

Hammond Law Office, PA



Richard L. Hammond  
Attorney for the Respondent/Cross Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17 day of February I delivered a true and correct copy of the foregoing BRIEF OF THE CLAIMANT/RESPONDENT to the following via the described method:

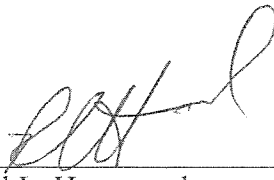
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