12-8-2014

Gordon v. Hedrick Respondent's Brief Dckt. 42191

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

PLAINTIFF-RESPONDENT / CROSS APPELANT'S BRIEF

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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I. STATEMENT OF THE CASE

A. Nature of the Case

Appellant/Defendant Shannon Hedrick ("Hedrick") filed a motion ("Summary Judgment") and requested the Magistrate Court to dismiss Plaintiff/Respondent Roger Gordon's ("Gordon") custody order, custody action and to remove Gordon from the birth certificate. Hedrick now misrepresents the facts to this court in her "Statement of the Case" as she alleged that she, "moved to dismiss Gordon's custody compliant and challenged the VAP on the basis of 'material mistake of fact' under Section 7-1106(2) of the Idaho Paternity Act." Appellants Opening Brief p. 1. However, Hedrick's Motion for Summary Judgment was for the reasons and grounds that Gordon was not the biological father of M.H. R. 37-39 as reflected in the original Motion for Summary Judgment attached for reference as Exhibit A herein. Hedrick's Motion for Summary Judgment failed to identify any law, statute or case that gave the court the ability to dismiss Gordon's case and terminate his rights.

Hedrick had placed Gordon on the birth certificate of M.H. (Previously M.G.) on the 4th of November 2010 R. at 63 and the parties lived together until the 1st of March 2013 caring for M.H. as the natural parents *Id.* At 6. Hedrick left the state with M.H. wherein Gordon filed an action for custody of the minor child M.H. A temporary custody order was entered in Case CV 2013-2046C granting Gordon and Hedrick visitations of M.H.; however, Hedrick requested an order of biological testing to as she alleged that Gordon was not the father wherein Gordon filed a separate action for guardianship in Canyon County CV 2013-6155C that was stayed pending the appeal herein.

After the Magistrate Court granted Hedrick's Motion for Summary Judgment, Gordon Appealed and the District Court reversed the Magistrate as the District court failed to find any record of "fraud, duress or material mistake of fact" as required by Idaho Code 7-1106(2) despite Defendant's new arguments and factual allegations brought for the first time on appeal. The Magistrate allowed Plaintiff leave to file an Amended Complaint for Custody which was filed on or about the 25th of June 2014.

B. Facts and Course of Proceedings

Ms. Hedrick stated under oath on the 4th of November 2010, to the government officials of the State of Idaho on the birth certificate of M.H. that, "I [Shannon Lee Hedrick] acknowledge that the man named above [Gordon] is the biological father of my child [M.H.]" (R. at 63). Plaintiff was of the understanding and belief that he was the biological father of M.H. as reflected in the birth certificate signed also by Plaintiff and as they had lived together since birth with Defendant, *Id.*

Plaintiff was the primary caregiver of M.H. since birth until the filing of the petition for custody including dressing, changing diapers, feeding, and taking him to work and errands as Defendant failed to care for M.H. due to various issues including drug use and verbal abuse and excessive punishment of M.H. (R. 67-70) Gordon was also the primary financial provider for M.H. *Id.*

Defendant left the family home which resulted in Plaintiff filing for custody of M.H. on or about the 1st of March 2013 to establish custodial rights R. 6-19. Shortly after, Defendant informed Plaintiff that he may not be the biological father and Plaintiff filed for a guardianship in CV 2013-6155-C on or about the 24th of June 2013 *see* R. 65-66

After Plaintiff filed for custody in CV 2013-6155-C and served Defendant with such, Defendant filed a Motion to Dismiss (more appropriately labeled a motion for Summary Judgment) on the 11th of July 2013 herein to remove Roger Gordon from the Birth Certificate and dismiss his parental rights and custody case. R. 37-45. The Motion to remove Roger Gordon from the Birth Certificate, terminate his rights, and dismiss his custody case did not cite any authority, let alone the proper authority, to grant the relief of removing Plaintiff from the Birth Certificate. *See Id.* The Motion also contained additional facts or affidavits and required 28 days notice pursuant to IRCP 12(c) and 56(c); but was set for the 26th of July 2013, only fifteen days after the motion was filed without a motion and order to shorten time. R. 59-61

Defendant filed a Pre Trial Memorandum on or about the 29th of August 2013 admitting that she knew with the contrary position that she had made under oath to the State of Idaho and to Gordon and admitted she knew during the pregnancy of M.H. that M.H. was the son of another unknown male. R at 61 para. 1 In an attempt to limit the delay and confusion to M.H., Plaintiff brought the above issues before the court in its Motion for Relief and was denied.

II. ISSUES PRESENTED ON APPEAL

A. Cross Appellant's Issues Presented

1. Did the Magistrate Court err or abuse its discretion when it dismissed the case, removed the Plaintiff from the birth certificate, dismissed Plaintiff's custody order and Plaintiff's Motion for Relief from Judgment in violation of Idaho Code 7-1106(2) and IRCP 7(b)(1) as Defendant failed to cite statutory, case law or any basis in law for

such dismissal and failed to provide any evidentiary support of "fraud, duress or material mistake of fact" as required by Idaho Code 7-1106(2)?

2. Did the Magistrate err or abuse its discretion when it dismissed Plaintiff's case despite the fact that Defendant failed to cite the IC 7-1106(2) and or IRCP 56(c) in her Motion to Dismiss, failed to give notice to Plaintiff of his right to under IRCP 56(c) to 28 days notice before the hearing, and failed to give Plaintiff twenty eight days in violation of IRCP 56(c)?

3. Did the District Court err or abuse its discretion when it considered Defendant's new arguments raised for the first time on appeal?

4. Did the District Court err or abuse its discretion when it failed to grant Plaintiff attorney fees in spite of Defendant's failure to comply with the obligation of candor and pursuit of their motion without any basis in law and fact?

B. Appellants Issues Presented

1. Did the District Court err in interpreting a "material mistake of fact" under Idaho Code 7-1106(2)?

2. Did the District Court err when it reversed the Magistrate's dismissal of Gordon's custody action when genetic testing conclusively established that Gordon is not M.H.'s biological father?

III. STANDARD OF REVIEW

Much of this matter hinges on the interpretation of statute, specifically Idaho Code § 7-1106 and should be reviewed de novo. *Idaho Dep't of Health & Welfare v. McCormick,* 153 Idaho 468 (2012). On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court

originally ruling on the motion. *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 360, 93 P.3d 685, 691 (2004) (internal citations omitted). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). *Fragnella v. Petrovich*, 153 Idaho 266, 271, (2012).

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). To determine whether the trial court abused its discretion, this Court considers (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Nampa Charter School, Inc. v. DeLaPaz,* 140 Idaho 23 (2004).

IV. ARGUMENT ON ISSUES RAISED BY CROSS APPELLANT

1. The magistrate court abused its discretion, and the District Court should have found so, when it dismissed the case, removed the Plaintiff from the birth certificate, dismissed Plaintiff's custody order and Plaintiff's Motion for Relief from Judgment in violation of Idaho Code 7-1106(2) and IRCP 7(b)(1) as Defendant failed to cite statutory, case law or any basis in law for such dismissal and failed to provide any evidentiary support of "fraud, duress or material mistake of fact" as required by Idaho Code 7-1106(2).

Despite Hedrick's representation in her opening brief, "Statement of the Case" that in her Summary Judgment she, "moved to dismiss Gordon's custody complaint and challenged the VAP on the basis of 'material mistake of fact' under Section 7-1106(2) of the Idaho Paternity Act", R. 37-45, attached as Exhibit A for reference, failed to even cite

Idaho Code § 7-1106, let alone allege mistake of fact or provide any arguments or citations of the record to support her allegations of mistake.

When filing a motion for summary judgment, the moving party must notify the opposing party of the particular grounds for the motion. The motion must "state with particularity the grounds therefore including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought." Idaho R. Civ. P. 7(b)(1). "If a ground for summary judgment is not stated with particularity in the moving papers, the opposing party need not address that ground. For purposes of summary judgment, the moving party bears the initial burden of proving the absence of material fact issues." *Nava v. Rivas-Del Toro*, 151 Idaho 853, 862-63 (2011). As Hedrick's motion for summary judgment failed to assert any grounds for which it could be granted, it failed to meet this standard and Plaintiff could not address those grounds.

The Idaho Supreme Court, in referring to IRCP 7(b)(1) in *Patton v Patton*, 88 Idaho 288, 292 (Idaho 1965):

> In *Steingut*, supra, it was stated that 'There should be strict compliance with the rules, otherwise they will be whittled away and become meaningless and unenforceable' Further, practice demands that the basis of the motion and the relief sought shall be clearly stated If this be done to the end that the other party may not assert surprise or prejudice, the requirement is met *Monjar v Higgins, D.C.*, 39 F Supp 633 (1941) And, where it fails to state with particularity, then it is not in conformity with the Rules *Trammell v Fidelity & Casualty Co of New York, D.C.*, 45 F.Supp. 366 (1942).

The Supreme Court in *Patton* reversed a custody order because the record of the trial court was vacant of any evidence to support the claims outlined in the complaints.

The Idaho Appellate Court stated in *Mason v. Tucker and Associates*, 125 Idaho 429,432. (Idaho App. 1994) the following:

> Rule 7(b)(1), I.R.C.P.., requires notice to the nonmoving party of the grounds for a motion. It states: "An application to the court for an order shall be by motion which shall state with particularity the grounds therefore "In Patton v Patton, 88 Idaho 288, 292, 399 P 2d 262, 264 (1965), our Supreme Court noted that this requirement of particularity in Rule 7(b)(1) is "real and substantial" and good practice "demands that the basis of a motion and the relief sought shall be clearly stated" so that the other party may not complain of surprise or prejudice The Supreme Court then reversed the trial court's order, which had modified the child support provisions of a divorce decree following a show cause hearing, because the show cause order had given notice only of an issue as to child custody and not as to child support Similarly, in Hellickson v Jenkins, 118 Idaho 273, 796 P 2d 150 (Ct App 1990), we held that the magistrate erred in considering evidence outside the pleadings on a motion under I R C P 12(b)(6) without expressly converting the motion to one for summary judgment under I R C P 56 and giving the parties a reasonable opportunity to present evidence pertinent to a summary judgment motion See also Kelly v Hodges, 119 Idaho 872, 876, 811 P 2d 48, 52 (Ct App 1991) (vacating summary judgment entered on counterclaim where the motion had requested judgment only on the plaintiffs complaint) We do not suggest that summary judgment may never be entered by a court sun sponte or on grounds other than those raised by the moving party. However, in such event, the party against whom the judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered See WRIGHT, MILLER & KANE, IOA FEDERAL PRACTICE AND PROCEDURE § 2720 at 27-28

Gordon was not given adequate notice or opportunity to respond to prevent the permanent removal of M.H. herein. The Idaho Appellate court in *Fournier v Fournier*,125 Idaho 789, 791-92 (Idaho App. 1994) upheld such statute and dismissed an order from a Magistrate that was upheld by the District Court because of the violation of IRCP 7(b)(1).

> The opportunity to be heard and advance legal argument on dispositive issues is essential to proper procedure As stated above, I R C P 7(b)(1) requires that some notice be provided to a nonmoving party of the grounds upon which a motion is based. In *Patton v. Patton*, 88 Idaho 288, 292,399 P.2d 262, 264 (1965), the Idaho Supreme Court stated that practice "demands that the basis of a motion and the relief sought shall be clearly stated" so that the other party may not complain of surprise or prejudice. See Mason v. Tucker, 125 Idaho 429, 432,871 P.2d 846, 849 (Ct App

> 1994) Therefore, any theory upon which an award of attorney fees is based, either used in the trial court to award fees or selected on appeal as the "correct theory" to uphold a correct result, must be advanced at the trial level by the party seeking fees If a particular statute, rule or contract is not advanced below, it cannot be the basis for upholding the award later on appeal.

Further, the decision cannot be based on arguments or facts not before the court. This court recently clarified in *Westby v. Schaefer and Mercy Medical Center*, Docket No. 40587, 2014 Opinion No. 121, page 10, that a court cannot base its decision on arguments not supported by affidavits or facts not before the court. The only argument in the Summary Judgment was that Gordon was not the biological father; however, such argument or basis is not allowed under the clear language of Idaho Code 7-1106(2), which only allows removal from the birth certificate if the moving party establishes "fraud, duress, or material mistake of fact".

As stated by the District Court:

> "Idaho law is clear that once a birth certificate is issued upon affidavits of paternity, and once the time for contesting the affidavits has expired, a duly issued birth certificate can only be set aside for specific reasons. Under I.C. § 7-1106, the birth certificate becomes conclusive as to the issue of paternity, and may only be avoided upon grounds of fraud, duress or material mistake. In this case, there was no evidence offered to the magistrate below other than the genetic test results.

R. 171, L. 9-15. Hedrick's argument relating to biology may be relevant to establish affiliation and parentage, but it is not relevant to removal of a party from the birth certificate and to terminate parental rights once established under Idaho Code § 7-1106. The voluntary acknowledgment of paternity (VAP) signed by Gordon and Hedrick constituted a legal finding of paternity. The only evidence presented with the Summary Judgment at issue and considered by the Magistrate was Dr. Wurzinger's affidavit and paternity findings. The Magistrate Court erred as a matter of law or abused its discretion

when it granted a motion for summary judgment despite the motion's failure to notify Gordon of the grounds for the motion.

2. The Magistrate erred or abused its discretion, and the District Court should have ruled so, when it dismissed Plaintiff's case despite the fact that Defendant failed to cite IRCP 56(c) in her Motion to Dismiss, failed to give notice to Plaintiff of his right to under IRCP 56(c) to 28 days notice before the hearing, and failed to give Plaintiff twenty eight days in violation of IRCP 56(c).

I.R.C.P. 56(c) gives the non-moving party 28 days notice before a hearing. Just as with I.R.C.P. 7(b)1, strict compliance with this rule is important. This Court dealt with a violation of this rule previously when it reversed a district court's ruling and held that a summary judgment was improper because *Saykhamchone* "was not given proper notice" of the time available to present evidence to counter the evidence of the motion for summary judgment as the motion did not include the proper rule of civil procedure in violation of IRCP 7(b)(1). *Saykhamchone v. State*, 900 P. 2d 795, 127 Idaho 319 (Idaho 1995). The court stated:

> However, if *Saykhamchone* had been given a twenty-day notice of the district court's "intention to dismiss the application and its reasons for so doing," *Saykhamchone* might have been able to respond in a way that would raise a genuine issue of material fact. I.C. § 19-4906(b) (emphasis added) ("In light of the reply ... the court may ... grant leave to file an amended application or, direct that the proceedings otherwise continue.") Likewise, if the state had filed a motion for summary disposition, *Saylthamchone's* reply might have been able to raise a genuine issue of material fact.

In the case currently before the Court, no motion to shorten time was made or granted to Hedrick, neither did Gordon stipulate to such. The record reflects the opposite as Gordon objected to the hearing and provided a detailed list of the objections before the Magistrate in Gordon's Motion for Relief from Judgment / Motion for Reconsideration R. 59-66 with the newly acquired evidence. Gordon's Motion for Relief from the

Judgment contained obvious and serious legal issues that should have been addressed by the court which included the termination of any parental rights that were legally established under Idaho Code 7-1106. Further, courts have noted there are circumstances in which an appellate court is justified in resolving an issue not passed on below, where the court finds "plain error" or "fundamental error." "The plain error principle is best understood as a device for mitigating the harshness of the adversary system, serving as a safety valve or an anchor to windward. Plain error is commonly described as constituting only mistakes that are obvious, serious, ...egregious, substantial, manifest, highly prejudicial or grave." Christopher B. Mueller and Laird C. Kirkpatrich, *Evidence* at 29 (1999) citing *United States v. Young*, 470 U.S. 1 (1984); see also *Herzog v. United States*, 235 F.2d 664, 666 (9th Cir. 1956) The Court also will allow such issues as where the proper resolution is beyond any doubt, or where, 'injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1975).

The magistrates application of the incorrect legal standard removing Appellant from the life of a minor child would constitute a manifest injustice and legal issues are common exceptions to the rule that issues not passed on below will not be reviewed by the courts of appeals. *see*, *Colorado Interstate Corp v. CIT Group/Equipment Fin., Inc*, 993 F.2d 743, 751 (10th Cir. 1993); *In Re McLean Indus., Inc.*, 30 F.3d 385, 387 (2d Cir. 1994) (per curiam) (we reserve 'considerable discretion' to review purely legal questions not formally raised in the district court."). The Ninth Circuit has held in *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998) that waivers of questions of law are not automatically waived if not raised as are to objections to waivers of questions of law. *In Jones v. Wood*, 207 F.3d 557 (9th Cir. 2000), the Ninth Circuit stated that "[f]ailure to

object to a magistrate judge's recommendation waives all objections to the judge's findings of fact. (Citation omitted) However, in this circuit, failure to object generally does not waive objections to purely legal conclusions. (Citation omitted)." Id. at 562 n.2. In *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), the Ninth Circuit similarly stated "[f]ailure to object to a magistrate judge's recommendation waives all objections to the magistrate judge's findings of fact. (Citations omitted.) While in most other circuits, failure to object also waives any objection to purely legal conclusions (citations omitted) that is ordinarily not the case in this circuit. (Citation omitted) Rather, a failure to object to such a conclusion 'is a factor to be weighed in considering the propriety of finding a waiver of an issue on appeal.' " Id. at 455.

Hedrick's brief incorrectly cited to Idaho Code 7-1115 and 7-1116 (Proceedings to Establish Paternity) and alleged incorrectly The Idaho Paternity Act "allows and gives great weight to genetic evidence as evidence of non-paternity and does not prohibit those signing an acknowledgment from seeking such evidence." Defendant failed to cite the correct section for removal from the birth certificate and failed to point out that Idaho Code 7-1106(2) does not consider genetic evidence as a basis for removal from the birth certificate or from the "legal finding of paternity". Genetic testing is relevant to establish paternity, however, once the "legal finding of paternity" has been found under Idaho Code 7-1106(2) does not consider genetic testing.

The Magistrate Court erred as a matter of law or abused its discretion when it granted a motion for summary judgment that failed to advise Gordon of this 28 day time period at hearing just fifteen days after the filing of the motion.

3. The District Court erred or abused its discretion when it considered Defendant's new arguments raised for the first time on appeal.

The Appellate court review is "limited to the evidence, theories and arguments that were presented ... below." *State v. Vierra,* 125 Idaho 465, 469 (Idaho App.1994). Consequently, appellate courts will not consider new arguments raised for the first time on appeal. *Dominguez ex rel. Hamp v. Evergreen Resources, Inc.,* 142 Idaho 7 (2005). Hedrick's only argument presented in their Summary Judgment and at the hearing on dismissal was that the Plaintiff was not the biological father. Any additional arguments not raised previously are not properly before this Court. The recent Idaho Supreme Court Decision on the 19th of September 2014, Docket 41889, *Brown and Hopson v. Greenhart*, Boise, 2014 Opinion No. 100 again stated, "An issue cannot be raised for the first time on appeal." *Bank of Commerce v. Jefferson Enters., LLC*, 154 Idaho 824, 828, 303 P.3d 183, 187 (2013)."

Hedrick alleged for the first time on appeal in its District Court Brief R. 143 p. 3 that she met the burden of IC 7-1106(2), despite not citing such standard in the Summary Judgment, despite not citing the elements in the Summary Judgment, and despite not alleging facts to support the requirements of IC 7-1106(2); nevertheless she alleged additional facts and arguments for the first time on appeal that the Summary Judgment was based on "a material mistake of fact as to the acknowledgment of paternity-".

Hedrick also argued for the first time after the appeal that the custody of M.H. should be had by the biological father as raised in Hedrick's objection to Gordon's request for temporary custody pending appeal. However, such arguments are contrary to established law and not relevant to the original hearing. This Court has stated "Mere

biology does not create a father with legal rights and responsibilities to a minor child." *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 88, 90, 244 P.3d 232, 234 (2010) (quoting *Doe v. Roe*, 142 Idaho 202, 205, 127 P.3d 105, 108 (2005))."

Gordon's brought to the District Court's attention that issues and arguments not raised below and presented for the first time on appeal will not be considered or reviewed and cited *Sandpoint Convalescent Servs., Inc. v. Idao Dep't of Health and Welfare*, 114 Idaho 281, 284 (1988) R. 154; however, Defendant herein continues to raise new facts, arguments, and issues not previously raised in the Summary Judgment. Therefore, any additional facts, arguments, or issues addressed not previously raised are not properly before this Court and Plaintiff asks that this Court not consider such.

4. The District Court err or abuse its discretion when it failed to grant Plaintiff attorney fees in spite of Defendant's failure to comply with the obligation of candor and pursuit of their motion without any basis in law and fact?

Plaintiff humbly seeks fees and costs against Defendant and her attorneys of record under Idaho Appellate Rule 11.2, Idaho Code 12-123, 12-121, Idaho Rules of Civil Procedure 11(a)(1), 54(d)(1)(b) and (e)(1) and Idaho Rules of Professional Conduct 3.3. This request is made as Defendant and her counsels of record sought to remove Plaintiff from the birth certificate in violation of IRCP 11(a)(1) and IC 12-123 as such position was pursued without basis in law and in violation of Idaho rules of Professional Conduct 3.3(1 and 2) as they knowingly failed to disclose to the tribunal legal authority in the controlling jurisdiction and maintained such position after the controlling law was brought to their attention.

Idaho Rules of Professional Conduct 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

Hedrick and her counsels sought to remove Gordon from the birth certificate and to remove his visitation rights under the sole legal grounds he was not the biological father implying that such position is based in law and violated IRPC3.3(1). Hedrick and her counsels further failed to disclose to the tribunal known legal authority in the controlling jurisdiction known to the counsels to be directly adverse to the position of Hedrick, namely Idaho Statute 7-1106(2), 15-5-213, 32-1705; *Stockwell v. Stockwell* 116 Idaho 297 (1989) and *Hernandez v. Hernandez*, 151 Idaho 882 (2011). Idaho Statutes and case law are contrary to Defendant's position as Defendant and her counsels knew Gordon lived with Hedrick and M.H. since birth for more than two years.

Idaho Rules of Civil Procedure 11(a)(1) states

> ...the signature of an attorney or party constitutes a certificate that the attorney or party has read the pleadings, motion or other paper...and that after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
> ...
> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney's fee.

Idaho Code 12-123 regarding Frivolous Conduct in a Civil Case states:

> (1) As used in this section:

> (a) "Conduct" means filing a civil action, asserting a claim, defense, or other position in connection with a civil action, or taking any other action in connection with a civil action.
> (b) "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action;
> (ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

Idaho Appellate Rule 11.2 is the similar standard for fees herein. The Idaho Rules of Civil Procedure and the Idaho Rules of Professional Conduct, specifically rule 3.3, impose the duty of candor upon the parties and their counsels. Rule 11 requires reasonable investigation into the facts and law before signing pleadings. Rule 11 require that the pleading be (1) well grounded in fact, (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (3) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increases in the costs of litigation. I.R.C.P. 11(a)(1). An attorney is required to perform a pre-filing inquiry into both the facts and the law involved to satisfy the affirmative duty imposed by Rule *11. Sun Valley,* 119 Idaho 87 at 95 (1991). "Reasonableness under the circumstances" is the appropriate standard to apply under I.R.C.P. Rule 11. *Durrant v. Christensen,* 117 *Idaho* 70, 74, 785 P.2d 634, 638 (1990). Under the "reasonableness under the circumstances" standard, the appropriate focus of the trial court should be whether the attorney conducted a "proper investigation upon reasonable inquiry" into the facts and legal theories of the case. *Hanf v. Syringa Realty, Inc., 120 Idaho 364, 369, 816 P.2d 320, 325 (1991)* Hedrick and her counsels knew that Gordon had lived with M.H. and that Plaintiff was listed on the birth certificate since that date, and had filed an action for custody in CV 2013-6155-C; nevertheless they sought to

remove Plaintiff from the birth certificate and remove all visitations rights on the sole grounds he was not the biological father in violation of Idaho Rules of Civil Procedure 7(b)(1) as they did not cite any authority to reflect that such gave the court to remove Plaintiff from the birth certificate and or remove any visitations rights.

Hedrick and her counsel further failed to give notice to Gordon of their type of motion as it did not give Gordon adequate notice of the standard, burden, and time frame of 28 days to respond limiting his ability to research and appear as required by IRCP 56(c). A reasonable pre-filing inquiry would have revealed the proper authority and necessary elements required to remove Plaintiff from the birth certificate. It would also have revealed that the motion was in fact one for summary judgment and Plaintiff should have been given the proper time to respond under Rule 56.

To emphasize what is stated above, the responsibilities attendant upon signing a document pursuant to Rule 11 require the signer certify that he has "read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law ... and that it is not interposed for any improper purpose...." I.R.C.P. 11 (a)(1). "If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction...." *Id.*

Rule 11's mandatory language regarding sanctions make it clear that courts should detect and enforce violations of the certification requirement. Accordingly, Rule 11 gives the courts discretion to tailor the sanctions to the violation. "The intent of the Rule is to grant courts the power to impose sanctions for discrete pleading abuses or other types of

litigative misconduct." *Campbell v. Kildew and Daltoso,* 141 Idaho 640, 115 P.3d 731 (2005). Thereafter, the court's discretion includes that power to impose sanctions on the client alone, solely on the counsel, or on both. *See* I.R.C.P. 11 (a). Idaho Rule of Professional Conduct RULE 3.3(a)(2) states that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Despite this rule Hedrick's counsels elected not to bring such authority to the attention of the Magistrate.

Counsels for Hedrick brought a motion with no basis in law and without sufficient facts, mislabeled that motion so as to avoid giving Gordno the proper time to respond, and knowingly failed to disclose contrary authority in an attempt to lure the finder of fact to a hasty ruling based solely on the DNA test results. Because this conduct is exactly the kind Rule 11 is meant to address, Gordon asks this Court to impose sanctions under I.R.C.P. 11(a)(1) against Hedrick and/or her counsel and grant him attorneys fees. Finally, Hedrick's Pre Trial Memorandum in CV 2013-6155-C filed on or about the 29th of August 2013 admitted that she knew since birth that Plaintiff was not the biological father of M.H. reflecting that she knowingly caused the issue herein to the detriment of M.H., Plaintiff, and this Court.

In an attempt to limit the disruption to M.H. and to limit fees and costs, Gordon brought the above issues before the court in its Motion for Relief and Defendant and their counsels continued their position despite the issues presented herein contrary to established law.

V. REPLY ARGUMENT

1. The District Court correctly interpreted Idaho Code § 7-1106(2).

The burden was upon Defendant to establish fraud, duress, or material mistake of fact and the Defendant failed to meet and failed to even attempt to meet such burden with any admissible evidence. As the period for rescission passed long before custody proceedings were initiated, such an acknowledgement can "be challenged only in court on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the party challenging the acknowledgment." Idaho Code § 7-1106(2). Such an acknowledgement constitutes a legal finding of paternity under I.C. § 7-1106(1) The District Court correctly interpreted the mistake of fact provision to mean a mutual mistake of fact in light of the meaning of the term and within the context of the surrounding language and other statutes contained in Title 7.

a. The Defendant's Plain Language of the Statute does not Indicate that a Unilateral Mistake on the Part of the Party Opposite the Party Seeking to Challenge the Statute is Sufficient to Challenge a VAP.

The District Court held that "the mere fact that the mother named the wrong father at the time of the birth of the child does not constitute a 'material mistake' in the context of the statute that is sufficient to set the birth certificate aside." R. 172 L. 12-14. Defendant responds by looking up the individual words in a dictionary and declaring that any error constitutes a mistake of fact and that any error as to who is the biological father is material in this context. This interpretation cannot stand in light of the term in its ordinary use, the statute taken as a whole and the absurd result this type of interpretation would create.

First, the term "material mistake of fact" is a common term used in legal settings and particularly when dealing with contracts. It is no accident that the Legislature chose

to use this term and it should be taken into account. To suggest that a mistake of fact on anyone's part (perhaps even a third party) at any time should invalidate a legal finding of paternity creates an absurd result. Of particular importance is that the term material mistake of fact is generally on the part of one or more parties. Who has made a material mistake of fact is important in determining who can contest a contract, who can assert certain types of criminal defenses, or in this case, who can challenge a VAP. To understand the context of the term it is helpful to look to the other grounds for which a VAP can be contested, fraud and duress.

Under the Defendant's simplistic interpretation, any fraud, duress or mistake would invalidate a VAP. Though the statute does not explicitly state so, it can only be assumed that the party that committed the fraud or applied the duress could not turn around and later challenge a VAP based on their own fraud or duress. Rather, only the party who was the victim of the fraud or duress would be able to challenge the legal finding of paternity on those grounds. Similarly, only the party who was mistaken about a material fact when the VAP was executed should be able to raise a challenge based on mistake of fact.

An Illinois Appellate Court has had opportunity to address the position of a non-biological father who had voluntarily acknowledged paternity under a similar statute. Interpreting the "material mistake of fact" provision in their similar paternity statute, the court found:

> "In addition, even if it did have standing to challenge Alfred's on the basis of a material mistake of fact, we do not believe that the State met its burden The Parentage Act does not define what is required to prove a material mistake of fact in a challenge to a YAP, but under the common law, to rescind a contract based on a mistake of fact a party must show a mistake as to "a material feature of the contract, that the mistake is of such

> grave consequence that to enforce the contract would be unconscionable, that the mistake occurred notwithstanding the exercise of due care on the part of the party seeking rescission, and that the other party can be placed in statu quo "*Keller v State Farm Insurance Co*, 180 Ill App 3d 539, 548, 129 111 Dec 510, 536 N E 2d 194 (1989). Something is "material" if the party seeking rescission would have acted differently had he been aware of the fact, or if it concerned the type of information upon which he would be expected to rely when making his decision to act *Jordan v Knafel*, 378 111 App 3d 219, 229, 317 Ill Dee 69, 880 NE 2d 1061 (2007) It is unclear whether the genetic identity of N C is material as to Alfred, because even after discovering he was not the biological father he still has sought to uphold the validity of the YAP and remain the legal father of N C Also, even if the genetic identity of N C is material, there is nothing to suggest Alfred should bear not the risk of such a mistake, since by signing the YAP a man gives up his right to a genetic test to determine fatherhood Accordingly, we do not believe the DNA test results conclusively establish a material mistake of fact under the circumstances of this case Likewise, the State did not establish Alfred executed the VAP due to fraud". *In re NC*, 2013 IL App (3d) 120438, 993 N E 2d 134,142 appeal allowed, 996 N.E.2d 13 (Ill. 2013).

In re N.C., 373 Ill.Dec. 134 (2013)

While not binding on this Court, the interpretation of identical terms in a similar statute and the logic presented by the court above can be helpful.

Similarly, the mistake of fact at issue here is not material. Hedrick, the party seeking to challenge, would not have acted differently had she been aware Gordon was not the biological father, as she has already indicated that she was in fact aware. Further, the genetic identity of the minor child is immaterial to Gordon, who regardless seeks to further the best interests of the minor child by continuing to be his father.

As the District Court pointed out in its Memorandum Decision "either the Defendant knew Plaintiff was not the father..., or she was indifferent as to who the real father was...In any of the above events, a significantly greater evidentiary showing is required before the court can consider rescinding the birth certificate and dismissing the Complaint." R. 173 L. 10-16. Allowing Hedrick to either defraud Gordon or be

indifferent to the facts and later challenge the VAP based on her own fraud or indifference to the identity of the father is an absurd result that cannot be the intention of the Legislature.

b. Other Sections of Title 7 Clearly State the Affect of Genetic Testing, Demonstrating that the Legislature Intended Greater Protections for the Legal Finding of Paternity in I.C. 7-1106.

As Hedrick points out in her opening brief, several other code sections clearly state what the affects of a positive or negative genetic test have on certain proceedings, I.C. 7-1116(5) and §7-1118 a negative test excludes witnesses/Defendants (without a legal finding or paternity) from paternity proceedings, and § 7-1119 where a negative genetic test rebuts a child's presumption of legitimacy. These other statutes deal with witnesses, defendants and children who do not already possess the stronger legal finding of paternity that § 7-1106 confers. That the Idaho Legislature has opted to state definitively the effects of genetic test results in other sections, but stated that only "fraud, duress and material mistake of fact" are sufficient to challenge a VAP indicates their intention that a genetic test by itself is not sufficient grounds for a challenge to a VAP.

This makes sense in light of the legal importance of these acknowledgments. Indeed a "legal finding of paternity" would have very little importance if a simple genetic test, that can be raised in any proceeding, automatically invalidates them. Allowing a VAP to automatically be invalidated renders the "fraud, duress or material mistake of fact provision largely superfluous, as any such claims would not matter in light of the results of the test. Further, Hedrick's interpretation results in serious harm to children. Under Hedrick's interpretation of the statute a child who has enjoyed a loving relationship with a father, without either of them even suspecting a lack of a biological relationship, can be

ripped wholly and completely from that relationship by the mother at any time she chooses to bring proceedings and request a genetic test. This type of "at-will" fatherhood cannot be what the Idaho Legislature intended when it enacted I.C. § 7-1106 and damages the very children such laws were designed to protect.

c. Plaintiff's Interpretation of the Statute is not Likely to Raise Constitutional Issues.

Hedrick only now in an Opening Brief before the Supreme Court identifies a potential biological father of M.H. As stated above these new factual arguments have no place in this appeal, however, the Hedrick also raises concerns about the Constitutional Rights of biological parents in this situation. These constitutional concerns are unfounded.

First, Defendant claims that the VAP did not inform her of her rights concerning the VAP because it failed to educate her on what the meaning of mistake of fact was. As explained above, the terms used convey that the meaning clearly. Many statutes, including de facto custodian, Idaho Code 32-717 (grandparent standing), and criminal statutes regarding abuse and negligence, intrude upon a parents liberty interest in their children, yet no court that Plaintiff is aware of has ever ruled that a failure to warn new parents of these laws at the birth of their child constitutes violation of due process. It seems absurd for Hedrick to claim that she defrauded, or at the very least failed to mention a potential paternity issue, Gordon in order to induce him to take on the responsibilities of a father, while simultaneously complaining of a due process violation because she was not warned beforehand what the consequence of her fraud would be. Finally, some states have elected, and Title IV-D allows, for a VAP to be a conclusive

finding of paternity. To Plaintiff's knowledge, these statutes have not been successfully challenged based on violations of due process.

The Constitutional rights of biological fathers is also not infringed upon by the District Court's interpretation of the statute. Defendant argued for the first time after the appeal that the custody of M.H. should be had by the biological father as raised in Hedrick's objection to Gordon's request for temporary custody pending appeal. However, such arguments are contrary to established law and not relevant to the original hearing. This court has stated in "Mere biology does not create a father with legal rights and responsibilities to a minor child." *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 88, 90, 244 P.3d 232, 234 (2010) (quoting *Doe v. Roe*, 142 Idaho 202, 205, 127 P.3d 105, 108 (2005))."

Courts routinely rule that a biological father can lose his ability to assert rights to a child if he fails to develop a relationship with that child. It is also important to note that a situation such as the one before this Court currently, can only occur in the absence of a biological father attempting to assert his rights. Citing the United States Supreme Court, the Idaho Supreme Court declared as follows concerning the rights of an unmarried biological father:

> The United States Supreme Court held that failure to give the putative father notice of the pending adoption proceedings did not deny him due process where the putative father had not established any custodial, personal, or financial relationship with the child and had not taken advantage of the statutory procedure by which he would have acquired the right to receive notice of adoption. The mere existence of the biological link with his child did not merit due process protection. The Supreme Court stated that "[t]he significance of the biological connection is that it offers the natural father an *opportunity* that no other male possesses to develop a relationship with his offspring." *Id.* at 262, 103 S.Ct. at 2993 (emphasis added). If the biological father "grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy

> the blessings of the parent-child relationship...." *Id.* The Court emphasized, however, that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 259–60, 103 S.Ct. at 2992 (quotation omitted). The Court then went to great lengths to make the distinction between fatherhood that arises out of mere biology and fatherhood that arises out of an actual relationship with the child:
>
> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban,* 441 U.S. at 392, 99 S.Ct. at 1768, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." *Id.* at 389, n. 7, 99 S.Ct. at 1766, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. **"[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship."**

Doe v. Roe, 142 Idaho 202 206 (2005) emphasis added.

Assuming that Mr. Bobos is actually the biological father of M.H., he has failed to attempt to develop any sort of relationship with M.H. Courts, including this Court, have held that the constitution is not violated by disallowing a biological father who has no relationship with his offspring from inserting himself into proceedings after years have passed. It was Gordon who changed M.H.'s diapers, who was there for his first steps and first words and it is Gordon who has developed the emotional attachments and intimacy that derive from daily association. It is Gordon who now seeks to further the best interest of M.H. and continue to take on the rights and responsibilities of fatherhood.

2. Because the District Court Correctly Interpreted Idaho Code § 7-1106 it was Correct in Overturning the District Court and its Decision Should be Upheld.

The District Court gave the terms of the statute their logical meaning. By understanding that the fraud, duress or mistake had to be on the part of the appropriate party in order for a challenge to a legal finding of paternity to be successful, the District Court preserved the intention of the Legislature in safeguarding children and preserving familial relationships. By holding so the District Court avoided the absurd result that a contrary interpretation would entail and avoided the harm inherent in the type of at-will fatherhood proposed by the Hedrick. The District Courts interpretation also avoids running afoul of due process and parental liberty interests. Therefore, the District Court correctly overruled the Magistrate's ruling that genetic testing automatically invalidates an executed VAP. Plaintiff asks this Court to uphold this ruling.

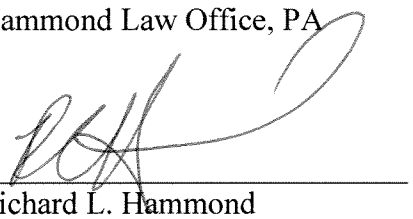
CONCLUSION

Hedrick failed to cite any law, standard or case or provide the applicable evidence or allegations in her summary judgment motion to obtain the relief sought. Hedrick also failed to allow Gordon sufficient time to prepare to argue a motion for summary judgment as it was improperly filed. Even if the motion for summary judgment had correctly cited the standard and given Gordon the proper amount of time, there was no material mistake of fact that would allow the legal finding of paternity to be successfully challenged. It is unjust that M.H. should be torn so suddenly and completely from the only father he has known, without at least a court first entertaining arguments concerning his best interest.

Gordon also humbly seeks costs and fees as requested above as the District Court's decision does not address the legal and factual deficiencies of the Motion to Dismiss outlined in Gordon's briefing above and previously filed herein.

DATED this 5 day of December 2014.

Hammond Law Office, PA



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CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of December 2014 I delivered a true and correct copy of the foregoing BRIEF OF THE CLAIMANT/RESPONDENT to the following via U.S. Mail and Email:

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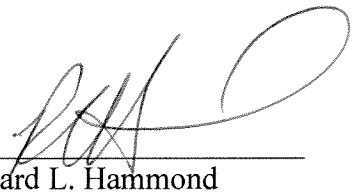

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