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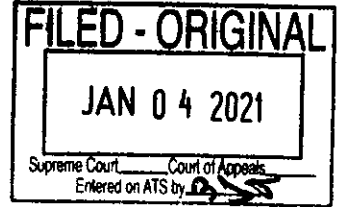
Bettwieser v. Bettwieser Appellant's Brief Dckt. 47817

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IN THE COURT OF APPEALS OF THE STATE OF IDAHO

MARTIN BETTWIESESR)
Plaintiff/ Appellant)
v.)
CAROLE BETTWIESER)
Defendant/Respondent)
_____)

Docket No. 47817-2020
Case No. CV 01 19 05432

APPELLANT'S BRIEF

Appealed from the Fourth Judicial District, State of Idaho, in and for the county of Ada.
The Honorable Nancy Baskins, District Judge, presiding

MARTIN BETTWIESER
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

APPELLANT
PRO-SE

NATE PETERSON
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1. STATEMENT OF CASE

A. NATURE OF CASE

This case arose as a breach of contract claim between the parties Martin and Carole Bettwieser, as husband and wife. The parties entered into several pre marriage agreements and post marriage agreements. Carole decided to dissolve the marriage and cited the agreements she wanted to dissolve and filed for divorce. After a period of attempts for reconciliation failed Carole was trying to hide her whereabouts after filing for divorce so Martin could not serve her for breach of contract where the issues and facts were different than in the divorce proceeding. After Carole's whereabouts became known she was served with the petitions and summons on that claim.

B. PROCEDURAL HISTORY

The breach of contract complaint was filed and served on March 27.(R 7-10) Carole through counsel filed a Motion to Dismiss and sought for attorney fees through that motion and set a hearing date. (R- 11-15) Martin filed a response opposing the dismissal. (R 17-18) Hearing was held and the court ruled from the bench the basis and law to dismiss the complaint and allowed attorney fees (Tr.p.19 L. 9-25; p. 20 L.1-25; p.21 L.1-12; p. 24 L. 20-25; p.25 L. 1-5) and costs, Counsel was instructed to prepare the orders (R 19) and submitted the proposed order to the judge for signature and served Martin on June 13, 2019 the proposed order. The judge signed the order 2 days after the hearing and before Martin could review or object. The day Martin was served the signed order (R. 21-22) he filed an objection to the order as it was proposed. (R p.23)

After receiving the signed order dismissing the complaint, Martin filed a Motion and Memorandum to have that set aside, amended or altered on June 26, 2019.(R.24-25; Ex 1 pgs. 1-3). The court set the matter of setting aside, amending or altering for hearing on 7-08-19 for

8-21-19 (R. 26) but amended the order dismissing the complaint by signing it before that hearing on 7-10-19. (R. 27-28) and no amended proposed order was served upon Martin. (R. p.3) There after there were various responses and replies to the various motions and objections before the court up until the hearing on 8-21-19.

On 8-16-19 Martin filed a Motion to Disqualify with Cause. (R. 48-50) Hearing was held on 8-21-19 and the motion to disqualify was denied and the court stated it's legal basis for signing the Amended Order of 7-10-19 . (Tr.p.43 L, 5-12; p. 45 L. 2-7) The court addressed additional matters that were set for hearing and others that were not set for hearing. (R. 51-52) Thereafter the court signed an Order Granting Attorney fees and costs. (R. 53-54)

On October 29, 2019 the court gave a new and different and third ruling on Martins motion to set a side and to reconsider and issued a new and different and 3rd Judgment in the case. Motion to Clarify the Order was filed. (R.78-82) From that new and different Judgment another Motion for Reconsideration was filed. (Ex.2 pgs. 4) After responses and replies and request for decision, the court issued an order on Motion for Reconsideration on January 17, 2020 (R.88-93) The court denied and signed the request for hearing but did not file it or serve it. (Ex 3. Pgs.2) A timely appeal followed. (R. 94-104).

C. STATEMENT OF RELEVANT FACTS

- 1) There was no final determination on the merits in the divorce proceeding between the parties.
- 2) There were different agreements and claims in the divorce cases and district court case.
- 3) The Defendant's nor the court requested to take judicial notice of the divorce case nor were there any documents from the divorce case part of the Motion to dismiss to take judicial notice from.

- 4) Martin was not served a proposed amended order dismissing the complaint.
- 5) Defendant's did not file a memorandum to their motion to dismiss nor cite any case for authority in that motion.
- 6) The Defendant's have not cited a single case for authority and argument to its own issues nor any of its filings, from the whole case before the district court. (R. 1-122)
- 7) The district court cited all the cases and facts for the defendants in support of their motion to dismiss.

2. ISSUES ON APPEAL

a. Was the district court bias and erred and abuse it's discretion in dismissing the complaint and awarding attorney fees?

3. ARGUMENT

STANDARD OF REVIEW

“ This court freely reviews conclusions of law, drawing it's own conclusions from the facts in the record.” Eller v Idaho State Police, 165 Idaho 15,19; 437 P.3d 15,19 (2019) and constitutional questions and of statutory interpretation. Regan v. Denney, 165 Idaho 15,19; 437 P.3d 161,167 (2019)

Authorities cited in each particular issue on appeal can be the standard of review for that particular issue and question presented, Asherschott v. Mtn View Hospital Redicare Docket No. 46205 February 6, 2020 pg.4.

1) whether the lower court correctly perceived the issue as discretionary; 2) whether the court acted with the boundaries of it's discretion and consistent with legal standards; 3) and whether it's decision was reached by an exercise of reason; Sun Valley Shopping Center, Inc. v. Idaho Power Co. 119 Idaho 87 (1993)

a. Was the district court bias and erred and abuse it's discretion in dismissing the complaint and awarding attorney fees?

The history and ruling of the court on attorney fees and dismissing the complaint without prejudice is confusing and ambiguous as to the courts applying the rational, legal reasoning, conflicting facts to the courts findings and application. The court found a basis for attorney fees under Rule 12(b)(6) which is on the merits, as well as others.(Tr. p.24 L. 20-25; p. 25 L. 1-5) with an order dismissing the case, which is with prejudice. (R. 21-22) Martin objects to that findings and order for judgment on the merits and sought to proceed with summary judgement proceedings. (R. p. 24-25; Ex 1 p.1-3). To avoid a summary judgment proceedings the court amends the order of dismissal, (R. p. 27-28) but states that the grounds for dismissal is still pursuant to Rule 12(b)(6) and 12(b)(8). (Tr.p.50 L. 12-15) The court also rationalizes that the reasoning was so that I could refile the case if need be, (Tr. p.31 L. 9-12) all the while claiming,(Tr. p. 19 L.9-10) and continuing in claiming,(Tr. p.50 L. 3-4) that complaint in the district court and family law court are identical thereby needing dismissal. This is contrary to the facts and argument presented to the district court. (R.p.55-61) Page 61 shows that the agreements Carole petitioned the court to address are different than the ones Martin complained in the district Court and asks this court to accept (R.p.55-61) as argument and authority to Martins argument in this brief and issue in this case for factual error and abuse of discretion and not consistent with legal standards.

There are additional factual errors the court used to arrive to a predetermined outcome, on any basis and was biased against Martin. Martin argued that counsel did not serve Martin the proposed Amended Order Dismissing the Complaint and the court found that they did not have an obligation under the rules to do so. (Tr. p. 33 L. 9-14) The record shows this to be in error. (R.p. 34-38) specifically page 35-36. Martin seeks this court to accept and review (R.p. 34-38) as argument and authority to this brief and issue for error and abuse of discretion and not consistent to legal standards, so not be redundant and overburden the brief. Martin filed a Motion and

Memorandum for Reconsideration on June 26, 2019 and the court set the matter for hearing on July 8, 2019, but before hearing, signed the proposed amended order before hearing could take place. The court took judicial notice and stated it had properly taken judicial without the defendant's specifying the specific documents that were to be noticed, and did not request the court take judicial notice and that notice was not given that there was to be judicial notice taken until ruling.(R. p. 55-61) contrary to Fortin v. State 160 Idaho 437, 374 P.3d 600 (2016). The court error and abused it's discretion and failed to act and consistent with legal standards.

Martin also cited the courts rulings for error to the facts in cases the court used for case law justification for dismissal. The court essentially would rule and when reconsideration was sought the court would essentially imply, well if that case is in error, Young v. City of Ketchum 132 Idaho 102(2002) for dismissal then this case should used as the basis for dismissal, Emp' Res Mgmt. Co. v. Ronk 162 774 at 776,777, when that case was cited for error then it essentially implied again, well then we will use this case for the standard, Scott v. Agricultural Products, 102 Idaho 147 and finally when that case was cited for error that another case was used to justify dismissal. Hindmarsh v. Mock, 138 Idaho 92, 94. Even under that case it could not apply because there would need to be a judgment on the merits in the prior proceeding. D.A.R., Inc. v. Sherffer, 134 Idaho 141, 144. Ticor, 144 Idaho at 125, 157 P.3d at 618 The agreements or claims would need to be the same. Carole cited a February 3 2014 agreement in controversy and Martin cited a May 8, 2013 agreement. Clearly different claims. Also, the district court wanting to rely on Hindmarsh brings an element of concern to the district courts legal rational of changing the order of dismissal to "without prejudice" so that Martin could refile the complaint. (Tr. p.31 L. 9-12; p. 45 L.3-7) According to that ruling after there is a judgment on the merits then if refiled the other party could claim preclusion according to Hindmarsh from the district courts ruling (R. p. 68) and 5.

so converting to “without prejudice” does not benefit Martin at all, in fact harms and prejudices his cause by allowing the other party to now be able to claim res judicata because all related matters concerning any or the other claims would bar further litigation and because they have now been decided on the merits. Therefore the many motions and modifications from the courts rulings are a proper basis for claiming bias and prejudice, as well as an abuse of discretion, and not acting consistent to legal standards, as well as the districts courts misplaced harmful reasoning that allowing the lower court to rule on the merits benefits Martin, by allowing him a refiling of the claim already before the district court.

The district court appears to present at hearings that because Martin is pro-se, then that is the problem. (Tr.p. 14 L. 2-4; p. 27 L.5; p. 30-31 L. 24-2; p. 37-38 L. 18-1; p.40 L.2-10) and that Martin is representing that he is be held to a different standard. Actually he is presenting himself under the same standard. The defendants filed a motion to dismiss but did not file a memorandum with that motion, (Ex 1 p.2) according to Local Rule 8.1. in fact it could be argued that the district court is applying a higher standard to pro-se Martin because the defendants were not required to file memorandum to it’s motion to that same rule (Tr.p.14 L. 2) to where Martin could address more than conclusory statements and from case citations and authority. The court further ruled that Martin only denied the allegations (Tr. p. 14 L. 11-16) but this would be consistent to relying to pleadings. I.R.C.P. 8(b)(3) and Joyce v. Rubin, 23 Idaho 296, 130 P.793 (1913) The district court never held the defendant’s accountable for serving upon Martin the proposed Amended Order dismissing complaint, but the court denied Martins Objection to the Memorandum of Fees and Costs because he state it as an “Objection” and not a “Motion to Disallow. The court required cited case for authority and argument from Martin and none from the defendant’s and from other comparisons. Therefore the facts sustain bias and prejudice against pro-se litigants

and for attorneys.

The Defendant's filed a Motion to Dismiss and in that Motion requested attorney fees. (R. 11-13 #5) In appeals, the Defendant's claim for attorney fees would fail on a number of points and law. Borley v. Smith 149 Idaho 171, 187, 233 p.3d 102 118 (2010) provides that in order to be entitled to attorney fees there must be authority and argument. The defendant's argument in this case rests entirely of the following;

.....and also awarding Respondent her reasonable attorney fees and costs related to this matter pursuant to I.C. § 12-121 and Rule 54(e) of the Idaho Rules of Civil Procedure.

A citation to statutes and rules authorizing fees, without more is insufficient. Goldman, 139 Idaho at 947-48, 88 P.3d at 733-67. Even if it could be considered there were some conclusory statements, Sheridan v. Jambura, 135 Idaho 787, 792, 25 P.3d 100, ,105 (2001) cites cases and opinions that mere conclusory sentences are not sufficient if not supported by law and authority. The defendant's cite no case history for entitlement of an award of attorney fees. In, Athay v. Rich County 153 Idaho 815, 827 (2012) the court showed an example that there must be case citation to be sufficient to allow a claim for attorney fees. Also there is no basis in law to order payment in 30 days nor was there a claim made for such. Furthermore on arguing to the facts and law in this issue, the award was improper because the complaint was not frivolous, unreasonable or without foundation as Martin was awarded an opportunity to refile and the court stated; "The Court realized Plaintiffs claims may have merit," (R. 90 second paragraph) by stating: "but such could be resolved in the magistrate court proceeding" this is speculative and contrary to the statement that Martin claims may have merit because Martins claims do not state that the issue could be resolved in the magistrate court. Therefore another basis for an abuse of discretion and not consistent to the facts or legal authority.

Also, the court concluding that because the complaint was filed after the divorce in March that I should have known better because the claims were identical, but this is contrary to the facts argued here in and the court not knowing the substance of the divorce case and agreements did not consider that there may have been conditions of trying to reconcile before filing the complaint and that Martin did not have an opportunity to file the complaint before a divorce was filed and from the courts confusing and ambiguous rulings. It's reasoning was all speculative and not consistent to the facts and legal standards.

And lastly, the court had other alternatives than dismissing the complaint, have the parties amend their filings, proceed to summary judgment proceedings, to have the District court proceed on the claim that was not before the Divorce Court, to retain and suspend a case until one case was resolved. There are fees and costs to refiling a complaint that does not benefit Martin where retaining would be more appropriate

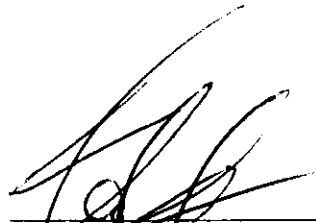
4. CONCLUSIONS

Essentially the standards of review and review of factual errors and legal errors abuses of discretion and bias in dismissing the complaint and in allowing attorney fees are closely related and argued together in this brief. It does not benefit Martin to refile the complaint as the court initially stated, as the court finally recognized and put to writing in it's last order before appeal, that Martins claims have merit. Therefore reversal of the courts orders and remand so that the merits of this case be addressed through summary judgement or otherwise would be appropriate and held to the same standard as an attorney.

This court can and should review the authority and arguments from the filings of the parties to supplement the brief to limit redundancy and to reduce an oversized brief.

Respectfully submitted

Date this 4th day of January, 2021

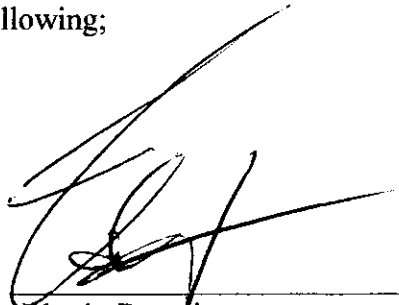


Martin Bettwieser

5. CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy this Appellate Brief to be served by prepaid first class mail on the 4th day of January 2021 to the following;

Nate Petersen
Katelyn Mitchell
355 W. Myrtle St. # 100-101
Boise , Idaho 83702



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

NO. _____ FILED _____
A.M. _____ P.M. _____

JUN 26 2019

PHIL McGRANE, Clerk
By AMANDA PARKER
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COURNTY OF ADA

MARTIN BETTWIESES)	
Petitioner.)	
)	CASE NO. CV 01 19 05432
v.)	
)	MEMORANDUM IN SUPPORT OF
)	MOTION TO SET-A-SIDE FINDINGS
)	ALTER OR AMEND ORDER
CAROLE BETTWIESER)	FOR A NEW PROCEEDING
Respondent)	
_____)	

COMES NOW the Petitioner Martin Bettwieser, acting in his own behalf and does support his MOTION TO SET A SIDE FINDINGS/ ALTER OR AMEND ORDER/ and FOR A NEW PROCEEDING with this memorandum.

MEMORANDUM

ARGUMENT

The Defendant filed a Motion to Dismiss the complaint without any supporting memorandum or evidences and requested oral argument. Martin opposed the Motion and there was no reply or objection from that opposition, and hearing was held. The Defendant's used oral argument as basis to state facts from that argument and that were not in it's motion to dismiss nor from any reply to Plaintiffs opposition , and should have been put in it's memorandum. Local Rule 8.1

After both sides gave argument the court ruled that Martin was to be held to the same standard

Ex. 1 p.1

as the attorney and stated it took judicial notice of documents outside the pleadings and ruled from those other documents.

Hellickson v. Jenkins, 118 Idaho 273, 796 P. 2d 150 (Ct. App. 1990) has been the standard, in that taking judicial notice outside the pleadings is the taking of evidence outside the pleadings thereby requiring converting the motion to dismiss to a summary judgment proceeding with proper notice. It has been continually upheld, as in Pasley v. A&B Irrigation District 162 Idaho 866, 872 (2017) stating that this court approved Hellickson on a bar of Judicial Notice of other proceedings: Taylor v. McNichols 149 Idaho 826, 849, 243 P.3d 642, 665 (2010) when considering 12(b)(6) motions.

The proper procedure should have been for the Defendant's to schedule an evidentiary hearing on the matter which would have been sufficient for due process. "If defendant thinks the court lacks jurisdiction, his proper course is to request an evidentiary hearing on the issue. Crawford v. United States 796 F.2d 924 at 928(7th Cir. 1986) The Defendants did not file a memorandum, did not request an evidentiary hearing, and the court took judicial notice of matters outside the pleadings thereby not allowing proper notice or due process to present evidences in opposition to the motion to dismiss.

The court also stated it was holding Martin to the same standard as an attorney with reprimanding his opposition to the motion with denials, as not complying with Local Rule 8.4 by not supplying a memorandum to his opposition but this is the same standard of the Defendant's attorney when it didn't supply a memorandum with it's Motion to Dismiss pursuant to Local Rule 8.1. Thereby under the circumstances Martin was pleading under the same standard as the Attorney and should be duly noted and allowed.

Although other grounds to the facts to alter and amend may be asserted, but are not necessary,

Ex 1 p. 2


as this is sufficient error to proceed with a summary judgment proceeding where it can present those other facts in opposition to the alleged claims from the Motion to Dismiss and of taking judicial notice .

Further more dismissal on grounds of Subject Matter Jurisdiction pursuant to 12(b)(1) is also void pursuant to Wilbanks v. State 126 Idaho 341 because the issue of propriety and sufficiency of an assignment is not a matter for subject matter jurisdiction.

Therefore there is sufficient error and appropriate to commit to altering, amending, the finding of fact and the judgement and would be appropriate under the circumstances for converting this case to a summary judgement proceedings pursuant to I.R.C.P. 56 and Hellickson.

Respectfully submitted:

Dated this _____ day of June . 2019



Martin Bettwieser

Certificate of Service

I certify that I caused a true and correct copy of the MEMORANDUM IN SUPPORT TO SET A SIDE ORDER OF DISMISSAL to be served by pre-paid first class mail on the _____ day of June. 2019 to the following:

Nate Peterson
Katelyn Mitchell
355 W. Myrtle Suite 101.100
Boise, Idaho 83702



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
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NO. _____ FILED _____
A.M. _____ P.M. _____

NOV 14 2019
PHIL McGRANE, Clerk
By HEATHER HOVET
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESESR)
Plaintiff,)
)
v.) CASE NO. CV 01 19 05432
)
) MOTION RECONSIDER
)
CAROLE BETTWIESER)
Defendant)
)
_____)

COMES NOW the Plaintiffs and seeks this Courts reconsideration of it's "Judgement" of October 29, 2019 from its Memorandum Decision and Order. This is a partial reconsideration pending clarity from it's ruling.

The history from this case shows that the court originally made a voluntary dismissal of this case after taking notice of materials outside the pleading and making a findings for attorney fees on a basis that the filing was made to harass. After Martin moved for a summary judgment proceedings, Defendant's council submitted to this court, without Martin's knowledge, an Amended Judgement which was without prejudice, so it could argue against summary judgment proceedings and not allow Martin a Summary Judgement proceeding. The Court signed the

Ex 2 p.1

Amended Judgement and cited the basis at hearing for amending the Judgment and that it was to Benefit Martin. Martin applied for the Court to reconsider, stating it is not a benefit to him as this court allowed materials outside the pleading and that he is not able to contest the award of attorney fees because the court awarded attorney fees from a summary judgment proceeding but only dismissed without prejudice the underlying motion to dismiss and not the attorney fees. Claim preclusion is not the issue but that Martin is entitled to a summary Judgment proceeding from the harsh findings for attorney fees and because the court took judicial. This court now issues a different Judgement and differant findings with different citation of law to support the 3rd Judgment from this case.

This court cited Marek v. Lawrence, 153 Idaho 50, 53 278 P. 3d 920 923 (2012) for the standard or review for reconsideration. This case can also be used to set the standard of review as to error for the award of attorney fees. The court recognizes, as in this case from the Defendant's Motion to Dismiss, that their pleadings, " fails to meet the standard of attorney fees. Where a party merely cites to the code section and fails to provide any argument as to why the party is entitled an award."

Bagley v. Thomson 149 Idaho 799 at 805

Furthermore, the courts memorandum failed to address the issue as a summary judgment issue and whether the specificity requirement for taking judicial was met, as argued in Martin's Memorandum of August 22, 2019 Fortin v. State 160 Idaho 437, 374 P.3d 600 (2016) if not taking judicial was in error and the case should proceed.

The mere converting the Judgment to a Dismissal without prejudice does not benefit Martin, as this court would want to conclude. With this courts justification, with citations for claim preclusion, would not apply to this case as noted in *Berkshire Invs. LLC v. Taylor 153 Idaho 73,81:*

because there was not an original action that ended in a final judgment on the merits, therefore reconsideration would be justified, furthermore this court would have had to have taken judicial notice without prior notice to the parties as to facts that would allege pre-conclusion, there by denying Martin again the right to a summary judgment proceeding to oppose those facts and assessments . It appears this court has taken further judicial notice and "reviewed the agreements" in the Family Law case. (page 3 of court memorandum). There should be no reason that a new case be filed with new filing fees, this prejudices Martin and makes it into 2 court cases when one would be more prudent.

Also. this courts finding as to awarding attorney fees are different now from when it originally made them therefore further prejudicing Martin to contest those fees and as earlier stated there was never any argument as to attorney fees other than citing the rule or statute.

This court must also reconsider it's assessment as to Martin as a pro-se litigant, as not understanding legal concepts as a fair assessmemnt, when this court itself has had to issue 3 different findings, and judgments to correct them. Therefore this court should proceed with summary judgement proceedings to allow the material differences to the claims to be presented.

Martin reserves the right to supplement this motions when clarity is made on his request.

Dated this 13th day of November . 2019




Martin Bettwieser

Ex 2 p.3

Certificate of Service

I certify that I caused a true and correct copy of the Motion to Reconsider to be served by pre-paid first class mail on the 13 day of November, 2019 to the following:

Nate Peterson
Katelyn Mitchell
355 W. Myrtle Suite 101,100
Boise, Idaho 83702



Martin Bettwieser

Ex. 2⁴ P. 4

NO. _____ FILED 4:00
A.M. _____ P.M.

JAN 16 2020

PHIL McGRANE, Clerk
By RACHELLE HERRERA
DEPUTY

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

DENIED

Decision has been issued.

Signed: 1/2 12:50:12 48 PM *Henry A. B...*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESESR)
Plaintiff,)
)
v.)
)
CAROLE BETTWIESER)
Defendant)
_____)

CASE NO. CV 01 19 05432

REQUEST FOR DECISION


COMES NOW the Plaintiff and requests a decision from the Motion for Reconsideration filed November 14, 2019. A response to that motion having been filed on November 19, 2019 and reply to that response on November 26, 2019, and Martin being denied to set the matter for hearing on January 13, 2020, this case is now ripe and requested for decision.

Dated this 16th day of January 2020.

[Signature]

Martin Bettwieser

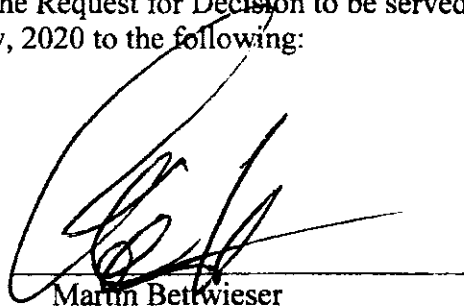
Ex. 3 p. 1

CV01-19-05432
REQU
Request
1813170


Certificate of Service

I certify that I caused a true and correct copy of the Request for Decision to be served by pre-paid first class mail on the 16th day of January, 2020 to the following:

Nate Peterson
Katelyn Mitchell
355 W. Myrtle Suite 101,100
Boise, Idaho 83702



Martin Bellwieser

Ex 3 p. 2