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Fischer v. Croston Appellant's Brief Dckt. 44887

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IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM R. FISCHER AND M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,	)	Docket #44887
Respondents/Plaintiffs,	)	
vs.	)	
JAMES F. CROSTON and MARGORIE C. CROSTON, HUSBAND AND WIFE; et. al.	)	
Appellants/Defendants.	)	

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County
Honorable Joel E. Tingey, District Judge, Presiding

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TABLE OF AUTHORITIES

Statutes:

I.C. §12-121

Rules:

I.R.C.P, Rule 54.

I.R.C.P. Rule 56

I.A.R. 41.

Cases:

Celotex Corp. v Catrett, 477 U.S. 317; 106 S.Ct. 2548 (1986).

Flying Elk Inv., LLC v. Cornwall, 149 Idaho 9, 232 P.3d 330 (2010);

McKay v. Owens, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997).

McPheters v. Maile, 138 Idaho 391, 64 P.3d 317 (2003).

Minich v. Gem State Developers, Inc., 591 P.2d 1078, 99 Idaho 911, (Idaho 1979).

Mutual of Enumclaw Ins. Co. v. Pedersen, 133 Idaho 135, 138, 983 P.2d 208, 211 (1999).

Sims v. Daker, 154 Idaho 975, 303 P.3d 1231 (2013).

Sun Valley Potatoes, Inc. v. Rosholt, Robertson, & Tucker, Chtd., 133 Idaho 1, 4, 981 P.2d 236, 239 (1999).

Weitz v. Green, 148 Idaho 851 (2010).

Wensman v. Farmers Insur. Co. of Idaho, 134 Idaho 148, 151, 997 P.2d 609, 612 (2000).

Other:

A Primer for Awarding Attorney Fees in Idaho", Idaho Law Review, Volume 38, Number 1 (2001).

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STATEMENT OF THE CASE

The appellants are an elderly couple that has moved from the site of the dispute. Their children have carried forth with the litigation which brings us before this court. Linda Penning is the daughter, acting agent for the appellants, and her affidavit in opposition to the respondents' Motion for Summary Judgment is in the clerk file.1

This case involves a boundary dispute between the parties. An old fence had existed for numerous years between the real properties of the two parties. The old fence ran east and west which separated the two properties. The respondents' real property is on the north and the appellants' real property is on the south. This property is located in the town site of Ammon, Bonneville County, Idaho. The respondents built a house on the north side of a fence. The appellants had not lived in the old house on the south side for numerous years because of age. The "old fence" fell in to a state of disrepair and was removed by the respondents.2

Set forth hereafter, per the appellate rules, is a visual aid of the real property.

(See Paragraph 22 of the complaint for the survey visual as attached hereafter)3

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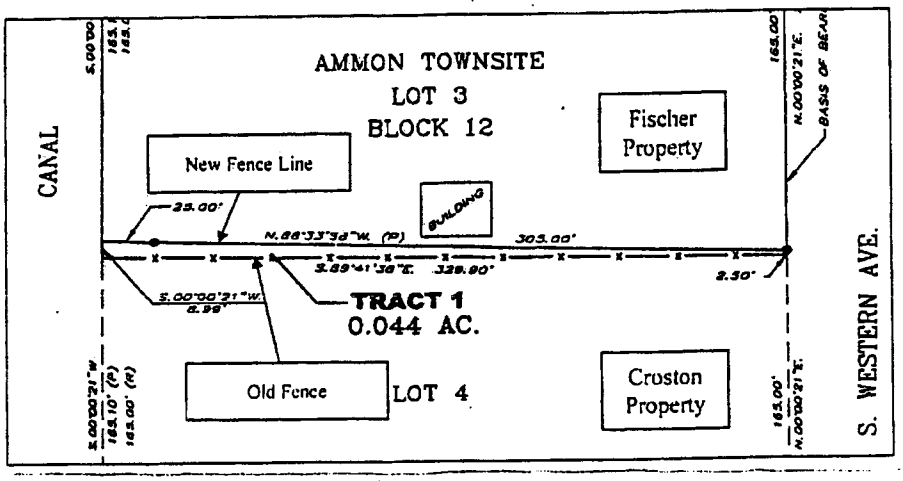
1 R. Vol. I., p.112; Exhibit C, Answer to Interrogatory 1.
2 R. Vol. I, p. 125; Exhibit D.
3 R., Vol. I, p. 11.


AMMON TOWNSITE
LOT 3
BLOCK 12
Fischer Property
New Fence Line
BUILDING
25.00'
N.88°33'52"W. (M)
303.00'
S.89°41'38"E. 328.90'
2.50'
S.00°00'21"W.
0.99'
TRACT 1
0.044 AC.
Old Fence
LOT 4
Croston Property
CANAL
S. WESTERN AVE.
165.00'
N.00°00'21"E.
BASIS OF BEAR
S.00°00'21"W
184.10' (M)
185.00' (M)
165.00'
N.00°00'21"E.

The survey drawing shows that the original point of the old fence stayed the same on the right hand side of the drawing by Western Avenue. The old fence was then angled which created about a 9-12 foot variance on the left side of the drawing near the canal. This is the tract of land in dispute. The appellants believed and alleged4 that the fence was supposed to be on the new survey line placed the same across the survey markers without going onto the Fischer property. It should be noted that the "old fence" was completely torn down and destroyed at the time of the survey with the "new fence" in place.5

Obviously, marks existed for the survey company to determine where the old fence was located. Otherwise, the survey could not have determined the location of the old fence. This will be an important fact discussed later on. (See survey above).

The history and chain-of-title is not disputed by either party. The actual placement of the new fence is the dispute. The respondents had placed sand and building materials well into the property of the appellants and had used the appellants' property as a turn-around for larger vehicles.6 Thus, the appellants requested the respondents to stop using the southerly ground and did place" no trespassing signs" when a letter arrived from the respondent via their legal counsel. 7

The parties supported their respective positions with pleadings, affidavits, declarations and memoranda. The court granted summary judgment to the respondents and quieted title in the disputed property in the respondents. The district court held that the appellants technically trespassed and gave a sum of money for attorney fees under the trespass statutes. The district court, as alleged and believed, did not consider the sand and

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4 See footnote 2; Id.
5 R., Vol. I, pp. 77-78.
6 R., Vol. I., p. 125.
7 R., Vol. I, pp. 77, 78, 139, 140.

materials placed on the appellant property as a trespass. The counter-claim of the appellants was dismissed. (See Memorandum Decision).8

The facts, believed to be accurate relying on both the written submissions of both of the parties, are as follows:

1. An old fence that had separated the real properties was in a complete state of disrepair and was removed by the plaintiffs/respondents. The fence no longer existed.9
2. The plaintiffs/respondents obtained a survey from Ellsworth Engineering to determine the boundary lines per engineered standards.10
3. The material disputed facts are that the parties agreed to be bound by the survey and place a new fence on the survey line. The defendants/appellants would argue that no reason existed to obtain a survey unless the parties were going to rely upon the survey. The respondents did accomplish the task of obtaining the survey. The respondents disagree with the new fence being placed on the surveyed line.11
4. The respondents/plaintiff also removed a ditch and placed a large amount of gravel about the area in question.12
5. The appellants/defendants placed a fence on the survey line as prepared by the engineer work and the pins that were placed by said engineers.13

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8 R., Vol. I, p. 251.
9 R., Vol. I, p. 70, par. 8; p. 165.
10 R., Vol. I, pp. 10, 11; Par. 22 of Complaint.
11 R., Vol.I, pp. 70, par. 9-10; 112, 119, 124, 127.
12 R., Vol. I, p. 125.
13 R., Vol. I, pp. 77, 78.

STANDARD OF REVIEW

The summary judgment standard of review is well-known by most, if not all, practicing attorneys in the State of Idaho. I.R.C.P., Rule 56(c) states: Summary judgment is only appropriate if "the pleadings, depositions, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If reasonable minds might come to different conclusions summary judgment is inappropriate. *McPheters v. Maile*, 138 Idaho 391, 64 P.3d 317 (2003).

The U.S. Supreme Court case of *Celotex Corp. v Catrett*, 477 U.S. 317; 106 S.Ct. 2548 (1986) has guided courts throughout the jurisdictions on the standard to be used. Idaho has numerous cases on the standard for summary judgment. On appeal, the standard is as follows:

On appeal from the grant of a motion for summary judgment, this Court employs the same standard as used by the district court originally ruling on the motion. *Mutual of Enumclaw Ins. Co. v. Pedersen*, 133 Idaho 135, 138, 983 P.2d 208, 211 (1999); *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997). Summary judgment is proper "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). This Court liberally construes all disputed facts in favor of the non-moving party, and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Wensman v. Farmers Insur. Co. of Idaho*, 134 Idaho 148, 151, 997 P.2d 609, 612 (2000). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion must be denied. *Id.* However, if the evidence reveals no disputed issues of material fact, only a question of law

remains, and this Court exercises free review. *Sun Valley Potatoes, Inc. v. Rosholt, Robertson, & Tucker, Chtd.*, 133 Idaho 1, 4, 981 P.2d 236, 239 (1999).

ATTORNEY FEES SHOULD BE GRANTED AT TRIAL AND ON APPEAL

For the reasons stated later in this brief, fees and costs should be granted on appeal and for the trial work.

ARGUMENT

I. INTRODUCTION.

Boundary by agreement or by acquiescence is not applicable to this cause. The events which took place between the parties had nothing to do with the years prior to the old fence and the history of the two properties. The parties either entered into an agreement to relocate the fence or, on the other hand, did not reach such an arrangement. Under either scenario, the court has conflicting versions of the material facts on this issue. Thus, summary judgment could not be granted. The appellants rely upon both of the party's declarations, sworn statements, pleadings and documents.

For instance, the following factual assertions preclude summary judgment.

1. The affidavit of Linda Penning disputes the assertions of the plaintiffs as to a non-agreement.
2. The plaintiff tore down whatever remained of the old fence. In reality, an old fence no longer existed. The plaintiffs also removed natural landmarks such as a ditch AND hauled in gravel to supplement the area in question.

3. The old fence no longer existed. Therefore, how did either party use the land up to the old fence or claim adversity to the fence that no longer was in existence?
4. Exhibit D to the affidavit of Linda Penning indicates that the plaintiffs stated: "They believed that there was already an agreement in place. . ."14 See also, Exhibit F to the declaration of Fischer.15
5. The plaintiffs argue for fees and yet they "demolished the existing fence". See *Weitz v. Green*, 148 Idaho 851 (2010). They are guilty of the very issue that they are trying to enforce. See also, Exhibit D to the declaration of Fischer. See the threats to the elderly Mrs. Croston, Exhibit H to Declaration of Fischer.
6. Exhibit L to the declaration of Fisher shows no fence and the gravel that was to be spread on the appellants'/defendants' property.

Until the factual basis can be determined it is difficult, if not impossible to apply legal theories. The plaintiffs argue legal theories pertaining to the boundaries; on the theories of trespass; on the issue of fees and other related matters. Until the fact-finder determines the facts, the briefing of the parties is nothing more than pre-trial opinions.

II. BOUDARY BY AGREEMENT WITH ACQUIESCENCE.

The lower court correctly defines boundary by agreement on page 5 of its memorandum decision. The court quotes *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 232 P.3d 330 (2010); *Sims v. Daker*, 154 Idaho 975, 303 P.3d 1231 (2013). The appellants have no disagreement that a boundary is established, as in the instant case, after being in place for numerous years by monument such as a fence. However, in the instant case, the

14 R., Vol. I., p. 178.
15 R. Vol. I, p. 127.

respondents removed the fence and obtained a survey to determine the actual boundary. The appellants believed and thought an agreement existed to place the new boundary on the actual true line of the survey.

The issue is not whether the fence constituted the old boundary but rather did the parties jointly abandon the old fence markings and establish the boundary based upon the actual and correct survey markings. Appellants believe that was the case; and the respondents disagreed at summary judgment. This is a material issue of fact that precluded summary judgment.

The court even states at page 6 of its decision: "Once the fence line had fallen down or was removed, it would be possible for the Parties to make an oral agreement fixing a new fence line as the properties' boundary. (Citations omitted)."16

The district court then goes on to make inferences which are susceptible of various reasonable interpretations. The court states that no evidence to support a claim that an agreement existed between the two owners. That is correct because the Crostons are very elderly. However, there can be no mistake that the children of the Crostons were acting as agents for their parents and had direct communications with the Fishers.

The court then goes on to state, by way of inference, that Mrs. Fischer would have no way of knowing that the new survey line would differ from the old fence line. If that were the case, why would anyone purchase a new survey. The parties could simply place the fence where the old holes and marks existed. The reasoning of the lower court is flawed in believing that another interpretation is just as plausible. The court then goes on to state that

16 R., Vol. I, p. 248.

the comments by Penning were not sufficiently clear to give rise to an enforceable agreement to change the property line.

Penning states, in her affidavit at paragraph 8, as follows:

> "I was present on an earlier date when Ann Fischer indicated that the fence was being torn down, a new survey was being obtained and the new fence would be placed on the new survey line."17

Furthermore, Jim Croston's statement is contained in the respondents' declaration of their attorney citing the discovery responses of appellant at page 127 of the record. His statement is as follows:

I went to my parent's property at 3020 E. Western Ave. Ammon, 10 after the Fischers took It out their fence and filled In their Irrigation ditch. This was on August 30, 2015. I was marking and measuring where the original fence had been. Ms. Fischer came out and asked me who I was and what I was doing.
I answered her questions. When I told her I was determining where the fence line used to be, she replied, "We will be replacing the fence with a much better fence. We are going to get a survey to find out where the line Is at. We are using the same surveyors as the City uses so shouldn't be any disputes."
I said OK. Ms. Fischer then returned to her house.

Certainly, the actions taken by the appellants in being very precise in placing a new fence on the surveyed line give rise to an extreme inference that an agreement had been reached.18 Various exhibits and photographs exist showing this detailed and measured analysis. The small nature of the land in question would not be of great value. However, the true line of the land and to prevent the respondents from turning vehicles and placing materials on the appellants' land is in question.

The district court then makes a hyper-technical analysis that no consideration was supplied by the appellants, Crostons, for the alleged agreement. The appellants supplied all of the materials and work for the new fence. This is consideration. The Respondents did not

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17 R., Vol. I, p. 165.
18 R., Vol. I, pp. 77, 78.

pay for anything on this phase. The lower court is in error when it asserts that consideration was lacking.

Summarizing the summary judgment ruling, it is alleged the lower court's analysis is misguided as follows:

-Pleadings: Appellants assert in the Second, Third and Fourth affirmative defenses of the Answer that an oral agreement existed for the placement of a new fence on the surveyed line.19

-Affidavit of Linda Penning cited above acknowledging an oral agreement.

-Discovery responses of appellant citing the statement of Jim Croston as set forth above.

-The respondents disagree via the declaration of Ann Fischer.20

III. COUNTERCLAIM.

The lower court dismissed the counterclaim because it states there was no agreement to breach. The appellants had asked for one-half of the cost of the new fence. Thus, the court should have been aware that there was consideration for the installation of the new fence. It follows logically that if the summary judgment fails, the counterclaim is reinstated; and, vice versa.21

IV. TRESPASS.

The appellants could not have trespassed if the strip in question was unknown. There is no question the appellants went on the strip of land but never into the respondent

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19 R. Vol. I, p. 23.; See also Par. E of counterclaim at p. 24.
20 R. Vol. I, p. 70, Par. 9, 10.
21 R. Vol. I, p. 251.

land that was declared to be the respondent land. The appellants could not have trespassed because the court had never quieted title in the respondents. The appellants could not have trespassed on land that had never been declared to be owned by respondents. Until the same was or is the respondent land, then the appellants could not trespass despite the repeated trespasses of the respondents driving and storing materials on the appellants' land.22

ATTORNEY FEES AT TRIAL AND APPLICABLE ON APPEAL

Idaho follows what has been named "the American Rule"[23] when deciding the issue of attorney fees. The Supreme Court of the State of Idaho has in place, for numerous years, guidance on this issue. The first major treatise on the issue was written by *Lon Davis, Esq* in 1990. He was the personal attorney for the Idaho Supreme Court for numerous years. A treatise was updated by the Hon. Jesse Walters entitled, "*A Primer for Awarding Attorney Fees in Idaho*", Idaho Law Review, Volume 38, Number 1 (2001). The Walters publication explains the major statutes and all cases through the date of the publication. His treatise walks the reader through every step in the fee award process. According to the Justice, fees cannot be awarded as an "equity" determination or by the court sua sponte if not claimed under a pertinent statute. There is no inherent power of the court to award attorney fees. In sum, there must be a statute or rule to rely upon except in limited circumstances.[24]

Therefore, in the instant case the appellant relies upon the statutory language of I.C. Section 12-121 which must be read in conjunction with IRCP, Rule 54 wherein the case must be[brought or defended] frivolously, without foundation and so forth. IRCP, Rule 54(e)(1).

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22 R. Vol. I, p. 251.

23 The American Rule only allows for fees if there is an underlying statute or contract for entitlement.

24 One noted exception is the Private Attorney General provision which is not relevant in the case at bar.

This is the "frivolous' section that applies to fees.

The court is well aware that the fence in question was not maintained, was in disrepair and did not even exist in places throughout the fence line. Further, there was gravel stacked on the property of the appellants encroaching on the line. An examination of the affidavits granting summary judgment calls into question the verbal agreement of the parties as to placing the new fence on the new surveyed boundary.

Remember that the plaintiffs sought a new survey which should persuade the court that there was some reason for the parties to believe that the new survey was important to settle the case. The court did not even need the survey; yet, the plaintiffs desired a survey. It does provide that the parties were of some belief that the survey was important.

Additionally, the court was aware that only a temporary fence was placed on the survey line by the defendants until the court could rule. Thus, the defendants were trying to wait until a solution could be resolved.

Fees and Costs are set by statute.

The factors of 54(e) are as follows:

> Rule 54(e)(3). Amount of attorney fees. In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:
>
> (A) The time and labor required.
>
> (B) The novelty and difficulty of the questions.
>
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
>
> (D) The prevailing charges for like work.
>
> (E) Whether the fee is fixed or contingent.
>
> (F) The time limitations imposed by the client or the circumstances of the case.
>
> (G) The amount involved and the results obtained.
>
> (H) The undesirability of the case.
>
> I) The nature and length of the professional relationship with the client.
>
> (J) Awards in similar cases.
>
> K) The reasonable cost of automated legal research (Computer Assisted

Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

(L) Any other factor which the court deems appropriate in the particular case.

In sum, a statutory basis must exist for the award of fees; and, the rule [54] provides fees for the prevailing party. Costs are determined as of right and by discretion pursuant to IRCP, Rule 54(d)(1). Therefore, the court fixes the appropriate award. As discussed above, §12-121 applies because the case was defended properly and in good faith. The court erred in granting summary judgment as it is clear there are contested facts.

It is clear that the court questioned the grant of summary judgment. In the order on attorney fees the court stated: "Once the fence was no longer standing, reasonable minds could question the location of the boundary between the parties."25

ATTORNEY FEES ON APPEAL

Throughout this brief, appellant has repeatedly suggested the reasons for an award of attorney fees on appeal. The respondents believe they will be the prevailing party on appeal. (The prevailing party concept is centered on the I.R.C.P, Rule 54 and I.A.R. 41 analysis.)

This court has awarded fees, on appeal, when:

"In awarding reasonable attorney fees to the prevailing party on appeal, this court will be guided by the following general principles. Since the statutory power is discretionary, attorney fees will not be awarded as a matter of right. Nor will attorney fees be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented. In normal circumstances, attorney fees will only be awarded when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. See I.R.C.P.

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25 R. Vol. I, p. 293.

54(e)(1)."
Minich v. Gem State Developers, Inc., 591 P.2d 1078, 99 Idaho 911, (Idaho 1979)
---------- Excerpt from page 591 P.2d 1085.

The Minich standard is well known to all Idaho attorneys and to this court. Thus, it is believed that I.C. § 12-121 applies to the foregoing case. The principles set forth in Minich guide this court. The common law/statutory principles of abandonment and forfeiture are well known. The parties reached a new agreement which was contested. No valid reason existed for the grant of summary judgment.

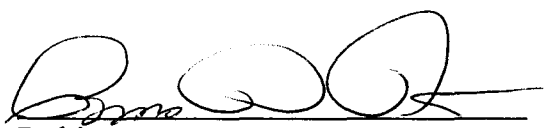
Finally, I.A.R. 41 is applicable to fees and costs on appeal.

CONCLUSION

The legal theories of boundary by acquiescence and by agreement are irrelevant to the events after the 2015 year. Summary judgment is precluded by disputed material facts between the parties.

However, the central and material point is the belief that an agreement existed to place the new fence on the survey line. The photos, the declarations, the affidavits and the sworn pleadings support this position.

Dated this 25 day of July, 2017.



Robin D. Dunn
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of July, 2017, a true and correct copy of the foregoing, with appropriate copies, was delivered, postage prepaid mail, to the following persons(s):

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