9-12-2017

Safaris Unlimited, LLC v. Von Jones Respondent's Brief Dckt. 44914

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAFARIS UNLIMITED, LLC, a Georgia limited liability company,

Plaintiff/Respondent,

v.

MIKE VON JONES,

Defendant/Appellant.

Supreme Court Docket No. 44914-2017
Twin Falls County Case No. CV-2013-2706

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls

Honorable Randy J. Stoker, District Judge, Presiding

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I. STATEMENT OF CASE[1]

This case arises from the defendant's, Mike Von Jones ("Jones"), failure to pay Safaris Unlimited, LLC ("Safaris Unlimited") for an African hunting safari that occurred in late 2012 (the "2012 Hunt"). Jones's principal defense in this case has been that Safaris Unlimited is not a real party in interest and that any amount owed by Jones for the 2012 Hunt was owed to HHK Safaris (Pvt) Ltd ("HHK"). HHK is a Zimbabwe-based corporation that contracts with Safaris Unlimited to provide safari hunting services to Safaris Unlimited's clients. Tr Vol. I, p. 115, L. 5–14; p. 123, L. 22–25; p. 124, L. 5; p. 162, L. 23–25.

Following this Court's remand of this case pursuant to its decision in Idaho Supreme Court Case Docket No. 42614, 2015 Opinion No. 70, Safaris Unlimited amended its Complaint to allege alternative theories of relief relative to its breach of contract claim, including the existence of a contract between Jones and Safaris Unlimited directly; between Jones and HHK, under which Safaris Unlimited is a third-party beneficiary; and between Jones and HHK, where HHK assigned its rights to receive payment to Safaris Unlimited.

At trial, Safaris Unlimited called three witnesses with regard to its case in chief: Graham Hingeston, Derek Adams, and Jennifer Ryan. Mr. Hingeston is an owner and the managing director of HHK. *Id*. at p. 115, L. 5–14. Mr. Hingeston testified that, pursuant to an "exclusive contractual arrangement," HHK provides safari services for Safaris Unlimited's clients. *Id*. at p.

[1] Because this case has been before this Court previously on appeal, Safaris Unlimited will focus on the evidence presented to the jury at trial that relates to the issues on appeal. Further, pursuant to Idaho Appellate Rule 35(b)(7), Safaris Unlimited will not set forth a complete statement of the facts elicited through testimony or documentary evidence at trial, as much of the evidence has been adequately addressed by Jones in his Opening Brief.

123, L. 22–25. Under that arrangement, Safaris Unlimited pays HHK for the services rendered to Safaris Unlimited's clients by HHK and then invoices and collects the cost of the safari from the clients directly. *Id*. at p. 124, L. 5; p. 162, L. 23–25.

Unlike prior years, Jones scheduled the 2012 Hunt with Mr. Hingeston directly. Ms. Ryan, the general manager of Safaris Unlimited, testified that Mr. Hingeston is authorized to schedule hunts on behalf of Safaris Unlimited. *Id*. at p. 308, L. 22–24. Mr. Hingeston testified that it was not uncommon for him to communicate directly with clients prior to a hunt in order to discuss and agree upon details concerning the hunt so that "there can be no confusion then." *Id*. at p. 124, L. 15 through p. 125, L. 12. Ms. Ryan also testified that returning clients frequently contact Mr. Hingeston or the professional hunter directly to schedule subsequent hunts. *Id*. at p. 267, L. 23 through p. 268, L. 10. Notably, with regard to the 2012 Hunt, Mr. Hingeston testified that he understood that the contract was between Safaris Unlimited and Jones and that Jones was to pay Safaris Unlimited for the 2012 Hunt. *Id*. at p. 197, L. 13–19.

Prior to the hunt, Ms. Ryan prepared an invoice form from Safaris Unlimited, which was included in Jones's client file and taken on the hunt by the professional hunter. Tr Vol. I, p. 181, L. 8–16; p. 212, L. 3–12; p. 286, L. 5 through p. 287, L. 1. Among other documents, Jones's client file also included a "TR2" form required by the Zimbabwe government. Mr. Adams, the professional hunter on the 2012 Hunt, testified that he sat down with Jones at the conclusion of the hunt, completed the invoice form from Safaris Unlimited and the TR2 with the information about the animals taken by Jones during the Hunt, and reviewed the information in those documents with Jones. *Id*. at p. 221, L. 16 through p. 223, L. 13. Mr. Adams further testified that

he witnessed Jones sign both the invoice from Safaris Unlimited and the TR2, which were admitted as Exhibits 34 and 35, respectfully. *Id*. at p. 213, L. 17 through p. 214, L. 2; p. 221, L. 16 through p. 223, L. 13; Exhibits 34 and 35.

During his direct examination, Jones denied signing either Exhibit 34 or Exhibit 35. Tr Vol. I, p. 349–50. On cross examination, Safaris Unlimited questioned Jones concerning other documents that had been filed with the trial court in connection with this case, specifically those documents admitted as Exhibits 38 and 39. Exhibit 39 was signed "Mike Von Jones." Exhibit 39. Jones had testified that he "[n]ever [goes by] Von Jones, that's ridiculous." Tr Vol. I, p. 350, L. 3–5. When Jones was questioned concerning his signature on Exhibit 39, he refused to provide a direct answer and would acknowledge only that the signature did not look like his signature.

> Q Did you sign [Exhibit 39]?
> A I can't tell you. Doesn't look like my signature at all. I'm thinking, and this is my only thought, at that point in time this was after I'd had quite a bit of severe back and shoulder injury, and I think this accident happened in '12, '13, '14, somewhere in there. I don't know.
> Q Okay.
> A I'm still suffering from it. I don't know. Doesn't look like my signature, but I don't recognize the document.
> * * *
> A I don't know. I can't recognize that as my signature.
> * * *
> Q And your testimony is that that is not your signature?
> A It doesn't look like it, but at the time I had a severe arm and shoulder injury, and I couldn't write like I normally do.
> Q I understand. Let me ask you a different way. Is that your signature on line 39?
> A Doesn't look like my signature, no.
> Q Just a yes or no.
> A Doesn't look like my signature. I'm going to say that, no, that did not look like my signature. I won't say that it's not, because if it's notarized, it probably is, but certainly is a mess.
> * * *

> Q Are you saying this is probably your signature because it's notarized?
> A It very well could be, but that's not my signature, I mean that's not the way I write, and as I said, I had a severe injury. I, like, laid up for over two years, in fact, I am still laid up from it, and I couldn't write, so maybe that's what the writing in 2014. I don't have copies of that in front of me to verify.

Id. at p. 441, L. 24 through p. 444, L. 19.

Later, outside of the presence of the jury, the trial court noted that Jones had filed Exhibit 39, along with the attending discovery responses, with the court in support of his objection to Safaris Unlimited's motion for summary judgment a few years prior. *Id*. at p. 459, L. 23 through p. 460, L. 14. Exhibit 39. Specifically, the trial court stated,

> If [Jones] is denying that that is his signature [on Exhibit 39], he is estopped from doing that because, in my view, if that is not the truth, that is a fraud on this Court, and I will not tolerate it. For that reason, and I'm not making that finding, I'm just saying you don't get it both ways. I find that's sufficient foundation because it was represented to the court system that those were signed interrogatories, so he can deny all he wants, but that's not going to keep this document out.

Id. at p. 460, L. 6–14.

In addition to Exhibits 38 and 39, Safaris Unlimited sought to question Jones concerning a Reissuance of Temporary Restraining Order and Notice of Hearing, which had been filed in an unrelated case nine (9) days prior to date of Jones's testimony. Exhibit 40a.

Outside of the presence of the jury, Jones's counsel objected to the admission of Exhibit 40a on the grounds that it was not timely disclosed and contained irrelevant and prejudicial information. Tr p. 444, L. 21 through p. 446, L. 24. Assuming that the proper foundation would be laid, the trial court held that the all information from the document would be redacted, save the signature and date only. *Id*. at p. 452, L. 12 through p. 453, L. 13. At Jones's counsel's

request, the trial court directed Safaris Unlimited to lay appropriate foundation outside of the presence of the jury. *Id*. at L. 15–21.

> THE COURT: Mr. Jones, we're going to give you Exhibit 40,[2] and Mr. Gadd will ask you some questions about that.
> BY MR. GADD:
> **Q Mr. Jones, do you recognize that document?**
> **A Oh, yes.**
> **Q Is that your signature on the respondent line?**
> **A I scratched on it.**
> **Q Is that a yes?**
> **A Yes.**
> MR. GADD: Your Honor, I'd move to admit a redacted version Exhibit 40.
> THE COURT: Mr. Larsen, I think that's sufficient foundation.
> MR. LARSEN: Yes. I agree.

Tr, Vol. I, p. 453, L. 25 through p. 454, L. 14 (emphasis added). The document then-marked as Exhibit 40 was taken and redacted pursuant to the trial court's instruction, leaving only Jones's signature and date. The redacted document was marked as Exhibit 40, and the unredacted document was re-marked as Exhibit 40a.

Jones was present in the courtroom on the witness stand during the entirety of the discussion between the trial court and counsel concerning Exhibits 40 and 40a. *Id*. at p. 444–64. He was present when the trial court directed Exhibit 40a be redacted. *Id*. He was present when his attorney objected on the grounds that, as a result of the redaction, he could not inquire of Jones concerning his state of mind at the time of his signature, including whether he was "anxious," "upset," or "shaking." *Id*. at p. 461, L. 1–3. He was also present when the trial court provided its admonishment with regard to Exhibit 39 and perpetrating a fraud on the court. *Id*.

[2] At this point in the trial, the unredacted document, Exhibit 40a, had been marked as Exhibit 40.

However, when Jones was presented with Exhibit 40 after the jury had returned and was asked questions nearly identical to the question that he had answered outside of the presence of the jury moments earlier, Jones attempted to evade and equivocate, just as he had with respect to Exhibit 39.

> Q Mr. Jones, do you recognize the signature on Exhibit 40?
> A It doesn't look like my signature, but if it's -- I don't -- and again, I'm not positive what document it's associated with. So it makes it very difficult for me to ascertain the validity of it. If it's the document that I think that it is, I was in a very precarious position, if I did, indeed, sign this, I signed it.
> Q I just need a yes or no.
> A With my hand like this, and I was in a very shaky situation, the circumstances were very shaky. It was not a normal circumstance like I was coming into your office and sitting down. Very extenuating circumstances involved if it's what I think it is. But I don't know what it is.
> Q Mr. Jones, is that your signature on Exhibit 40?
> A It didn't look like my signature but could be.
> Q Mr. Jones, I just need a yes or no. Is that your signature?
> A I don't know what the document is.

Id. at p. 462, L. 1–22.

The trial court interceded. "Mr. Jones, the question is very simple. Is that or is that not your signature, yes or no?" *Id*. at p. 462, L. 23–25. Again, Jones refused to answer the question directly.

> THE WITNESS: It --
> THE COURT: No, I don't want an explanation. I want a yes-or-no answer to that question.
> THE WITNESS: It's not the way I sign it, but it might be.
> THE COURT: That is not the question, sir. I want to give you one more opportunity to answer the Court's direct question.
> THE WITNESS: Okay.
> THE COURT: I'm getting tired of this --
> THE WITNESS: I suspect --
> THE COURT: Be quiet.

THE WITNESS: Thank you.
THE COURT: Is that or is that not your signature? Yes or no?
THE WITNESS: Yes.
THE COURT: Thank you.

Id. at p. 463, L. 1–19. The trial court admitted Exhibit 40 over Jones's objection and explained to the jury that irrelevant information on the document had been redacted. *Id*. at p. 464. Jones did not object to the trial court's questioning of Jones at any point during the trial.

Following the presentation of the evidence, the trial court and counsel met outside of the presence of the jury to review and discuss post-proof jury instructions. Tr Vol. I, p. 477–527. Notably, with respect to Instruction No. 13, Jones did not object to the proposed instruction, but rather advocated for its inclusion. *Id*. at p. 500, L. 2 through p. 509, L. 15. Jones's counsel's comments concerning Instruction No. 13 included, "We need the agency instruction," the trial court should "keep it," and it includes "a correct recitation of the law." *Id*. at p. 503, L. 6; p. 504, L. 16; p. 509, L. 13.

After a brief deliberation, the jury unanimously found that Jones had an express or implied contract with Safaris Unlimited directly and that he breached that contract. R, Vol I. p. 77–88. The jury also unanimously awarded damages in the amount of $26,040.00, the entire amount prayed for by Safaris Unlimited in its complaint. *Id*. at p. 23–29; 77–88. The trial court entered Judgment pursuant to the verdict, from which Jones appeals.

II. ADDITIONAL ISSUES ON APPEAL

A. Whether Safaris Unlimited is entitled to attorney fees on appeal under Idaho Code § 12-120(1).

III. STANDARD OF REVIEW

Jones contends that the trial court committed reversible error by admitting Exhibit 40 over his objection, by questioning Jones in a manner that Jones asserts casted doubt on his credibility, and by instructing the jury on the law as it pertains to principals and agents.

"Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected." *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995). Concerning Jones's assignment of error to the trial court's questioning of him, "A trial judge is vested with broad discretionary powers in the conduct and during progress of a trial. His exercise of that discretion will not be disturbed unless abused or material harm be done to the complaining party." *Cardoza v. Cardoza*, 76 Idaho 347, 350, 282 P.2d 475, 476 (1955).

"[T]he burden is on the person asserting error to show an abuse of discretion." *Merrill v. Gibson*, 139 Idaho 840, 843, 87 P.3d 949, 952 (2004). "A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008). "A party alleging error on appeal must also show that the alleged errors were prejudicial." *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 157 Idaho 106, 334 P.3d 780 (2014). "[A]lleged errors not affecting substantial rights will be disregarded." *Weinstein v. Prudential Prop. and Cas. Ins. Co.*, 149 Idaho 299, 310, 233 P.3d 1221, 1232 (2010).

"The propriety of jury instructions is a question of law over which this Court exercises free review, and the standard of review of whether a jury instruction should or should not have been given is whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 257 P.3d 755 (2011) (citing *Clark v. Klein*, 137 Idaho 154, 156, 45 P.3d 810, 812 (2002)). The appellate court reviews jury instructions as a whole "to determine whether the instructions fairly and adequately present the issues and state the law." *Id*. "Even where an instruction is erroneous, the error is not reversible unless the jury instructions taken as a whole mislead or prejudice a party." *Id*.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED EXHIBIT 40 INTO EVIDENCE.

Jones's contention that the trial court erred in admitting Exhibit 40 is without merit because Exhibit 40 was both relevant and had been authenticated by Jones's testimony. "All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state." Idaho R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id*. at 401.

In addition to being relevant, documentary evidence must also be authenticated. Idaho R. Evid. 901. "Authentication or identification of documentary evidence is a condition precedent to its admissibility." *Harris, Inc., v. Foxhollow Constr. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011). "Pursuant to I.R.E. 901(a), authentication or identification 'is satisfied by

evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Shea v. Kevic Corp.*, 156 Idaho 540, 546, 328 P.3d 520, 526 (2014). Testimony of a witness with knowledge concerning a matter is sufficient to satisfy the authentication requirement for documentary evidence. Idaho R. Evid. 901(b)(1).

At trial, Mr. Adams testified that Jones signed Exhibits 34 and 35 before leaving the camp. Tr Vol I., p. 213, L. 17–18; p. 222, L. 10–12. These exhibits provided evidence of the amount owed by Jones for the safari services, his obligation to pay Safaris Unlimited rather than another entity, and of his acknowledgement of that obligation. When Jones himself testified, he denied signing Exhibits 34 and 35. *Id*. at p. 349, L. 14 through p. 350, L. 20. Furthermore, Jones then compared the signature on Exhibit 2, a cashier's check, to the signatures on Exhibits 34 and 35, testifying that the signatures on the latter exhibits bore no resemblance to the signature on Exhibit 2. *Id*. at p. 350, L. 21 through p. 351, L. 18. By denying that he signed Exhibits 34 and 35 and then comparing the appearance of the signatures on those documents to the signature on Exhibit 2, Jones placed the appearance of his signature at issue. Consequently, other examples of Jones's signature, such as the one on Exhibit 40, became relevant.

Jones later testified that the signature on Exhibit 40 was his signature. Thus, Exhibit 40 was properly authenticated by Jones himself. Because Exhibit 40 was both relevant and authenticated, it satisfied the requirements for admission into evidence and was properly admitted by the trial court.

In his Opening Brief, Jones does not argue that Exhibit 40 was not relevant or had not been authenticated. Rather, Jones relies upon federal case law for the proposition that juries

should not be allowed to make handwriting comparisons when there are "extreme or unusual circumstances." Appellant's Opening Br., p. 10. Jones's reliance on federal case law is misplaced. As explained by the Ninth Circuit Court of Appeals, "'Extreme or unusual circumstances' involve situations where the authenticity of the handwriting is the primary issue in the case, as where forgery is alleged." *United States v. Jenkins*, 785 F.2d 1387, 1395 (9th Cir. 1986) (emphasis added). There was no allegation of forgery in this case. Therefore, there were no "extreme or unusual circumstances" that would preclude the jury from comparing the Jones's signatures with those on Exhibits 34 and 35. Indeed, as stated by the court in *Jenkins*, "[T]he jury is obliged to make such comparisons and draw conclusions from them." *Id*.

Idaho law expressly contemplates the trier of fact comparing documents with an exemplar. Idaho R. Evid. 901(b)(3) (stating that a document may be authenticated by "[c]omparison by the trier of fact . . . with specimens which have been authenticated"). In fact, it appears that this Court has allowed the jury to compare handwriting samples even in cases involving allegations of forgery. *See e.g.*, *State v. Bentley*, 54 Idaho 780, 36 P.2d 532 (1934); *State v. Allen*, 53 Idaho 737, 27 P.2d 482 (1933); *State v. Carlson*, 53 Idaho 139, 22 P.2d 143 (1933).

Furthermore, Jones himself opened the door to the line of questioning concerning the appearance of his signatures by asking the jury to compare the signatures on Exhibits 34 and 35 with the signature on Exhibit 2. He cannot now argue that the jury should not have been allowed to compare his signature on Exhibit 40 with the signatures on Exhibits 34 and 35. Jones's

contention that the trial court should not have admitted Exhibit 40 in light of the "extreme or unusual circumstances" present in this case is wholly without merit.

Jones's argument that Safaris Unlimited's failure to disclose Exhibit 40 in accordance with the trial court's deadlines and that the case from which Exhibit 40 originated should have been sealed are also meritless. As noted by the trial court, Exhibit 40 was created a mere nine days prior to trial, so the trial court did not deem it a "discovery issue." Tr Vol. I, p. 451, L. 14–20. Indeed, it would have been impossible for Safaris Unlimited to disclose Exhibit 40 in accordance with the trial court's exhibit disclosure deadline. Furthermore, Exhibit 40 was used for the purpose of impeachment, and parties are generally not required to disclose impeachment exhibits. *See* Idaho R. Civ. P. 16(d).

Jones also argues that Exhibit 40 should not have been admitted because he did not have the ability to testify effectively concerning the circumstances in which he signed it without discussing the irrelevant and potentially prejudicial facts involving another lawsuit. While, as Jones noted, "effective rebuttal lessens the danger that jurors will assign improper weight to their comparisons of handwriting samples," that principal goes to the weight of the evidence, not its admissibility. *United States v. Clifford*, 704 F.2d 86, 91 (3d Cir. 1983). In fact, the *Clifford* court expressly stated that "evidentiary arguments . . . are properly addressed to the weight and not to the admissibility of the . . . correspondence." *Id*. (emphasis added).

Jones has failed to demonstrate that the trial court abused its discretion by admitting Exhibit 40.

B. THE TRIAL COURT DID NOT ERR BY INSTRUCTING JONES TO ANSWER COUNSEL'S QUESTION REGARDING EXHIBIT 40.

Jones argues that the trial court violated his procedural due process rights and committed reversible error by questioning Jones in a manner that evidenced the court's "anger and frustration" with him. Appellant's Opening Br., p. 15. This argument is without merit for at least two reasons. First, Jones failed to preserve the issue for appeal by neglecting to object to the trial court's comments during trial. Second, Jones has failed to demonstrate that the trial court's comments were an abuse of discretion under the circumstances. Each of these reasons will be addressed in turn.

1. By Failing to Object to the Trial Court's Comments During Trial, Jones Has Waived the Issue on Appeal.

To preserve this argument, Jones was required to object to the prejudicial nature of the trial court's questioning during the trial.

> This Court has specifically held that where a party fails to object to allegedly prejudicial comments made by the trial judge, that issue is normally waived on appeal. Where no objection was made, the Court will only review for fundamental errors—errors that "go[] to the foundation or basis of a defendant's rights." However, the fundamental error analysis does not apply in civil cases.

Ballard v. Kerr, 160 Idaho 674, 711, 378 P.3d 464, 501 (2016) (internal citations omitted); *First Realty & Inv. Co. v. Rubert*, 100 Idaho 493, 497, 600 P.2d 1149, 1153 (1979). "Objections to the interrogation of a witness by the court may be made at the time of interrogation or at the next available opportunity when the jury is not present." Idaho R. Evid. 614(c).

The record reveals that Jones failed to object to the trial court's questioning at any time during the course of the trial, including at the time of the subject interrogation and at the next

available opportunity when the jury was not present. Having failed to object, Jones has waived the right to argue the issue on appeal.

2. The Trial Court Did Not Abuse Its Discretion in Requiring Jones to Answer Directly the Question Posed by Counsel.

Assuming, *arguendo*, that Jones properly preserved this issue for appeal, the trial court did not abuse its discretion when it required Jones to answer directly the question posed to him by counsel. "[A]mong the inherent powers of the judicial branch is the authority vested in the courts to protect and maintain the dignity and integrity of the court room and to achieve the orderly and expeditious disposition of cases." *Talbot v. Ames Const.*, 127 Idaho 648, 652, 904 P.2d 560, 564 (1995). "A trial judge is vested with broad discretionary powers in the conduct and during progress of a trial. His exercise of that discretion will not be disturbed unless abused or material harm be done to the complaining party." *Cardoza v. Cardoza*, 76 Idaho 347, 350, 282 P.2d 475, 476 (1955).

Requiring a witness to answer directly a question posed to him by counsel is well within the trial court's discretion, particularly when a witness is attempting to evade the question. For example, in *State v. Glanzman*, 69 Idaho 46, 202 P.2d 407 (1949), this Court found that there was no prejudice to a defendant when the trial court spoke "sharply" and threatened him with contempt in front of the jury because of the defendant's refusal to answer the questions posed to him. In so finding, this Court stated,

> The text of the remarks by the court (criticised [sic] by appellant) clearly show he was merely attempting to get appellant, when on the witness stand, to answer the questions without circumlocution and while it is better for the trial court not to threaten the defendant with disciplinary proceedings in the presence of the jury,

> the attitude of appellant, apparent to the learned trial judge and perforce not to us, may have indicated **it was necessary to speak sharply to secure the attention of witness to the questions and responses thereto**.

Id. at 52, 202 P.2d at 410 (emphasis added).

In his Brief, Jones quoted the exchange between himself and the trial court. Those quotations, however, by themselves, do not accurately reflect what occurred during the trial. A more thorough review of the transcript reveals that, much like the court in *Glanzman*, the trial court below was attempting to get Jones to answer those questions posed to him without providing unsolicited explanation or equivocation.

Prior to the subject exchange, Jones frankly answered questions concerning the signature outside of the presence of the jury. *Id*. at L. 15–21.

> THE COURT: Mr. Jones, we're going to give you Exhibit 40,[3] and Mr. Gadd will ask you some questions about that.
> BY MR. GADD:
> Q Mr. Jones, do you recognize that document?
> A Oh, yes.
> Q Is that your signature on the respondent line?
> A I scratched on it.
> Q Is that a yes?
> A Yes.
> MR. GADD: Your Honor, I'd move to admit a redacted version Exhibit 40.
> THE COURT: Mr. Larsen, I think that's sufficient foundation.
> MR. LARSEN: Yes. I agree.

Tr, Vol. I, p. 453, L. 25 through p. 454, L. 14.

However, when Jones was asked nearly identical questions after the jury had returned, he attempted to evade and equivocate.

[3] At this point in the trial, the unredacted document had been marked as Exhibit 40.

> Q Mr. Jones, do you recognize the signature on Exhibit 40?
> A It doesn't look like my signature, but if it's -- I don't -- and again, I'm not positive what document it's associated with. So it makes it very difficult for me to ascertain the validity of it. If it's the document that I think that it is, I was in a very precarious position, if I did, indeed, sign this, I signed it.
> Q I just need a yes or no.
> A With my hand like this, and I was in a very shaky situation, the circumstances were very shaky. It was not a normal circumstance like I was coming into your office and sitting down. Very extenuating circumstances involved if it's what I think it is. But I don't know what it is.
> Q Mr. Jones, is that your signature on Exhibit 40?
> A It didn't look like my signature but could be.
> Q Mr. Jones, I just need a yes or no. Is that your signature?
> A I don't know what the document is.

Id. at p. 462, L. 1–22.

Presumably, Jones's evasiveness and refusal to answer questions directly stems from a belief that his testimony would harm his defense. He chose a similar tactic with regard to Exhibit 39, refusing to provide a direct answer to questions concerning his signature on the verification page of his discovery responses in this case. *See* Tr Vol I., p. 441, L. 1 through p. 444, L. 19. The trial court later noted that Jones had filed with the court those same discovery responses, including the verification page, in support of his objection to Safaris Unlimited's motion for summary judgment a few years prior. Specifically, the trial court stated, "If he is denying that that is his signature [on Exhibit 39], he is estopped from doing that because, in my view, if that is not the truth, that is a fraud on this Court, and I will not tolerate it." *Id*. at p. 460, L. 6–9. Jones was present on the witness stand when the trial court made this comment.

Yet not two minutes after this admonition, Jones was effectively denying that his signature was on Exhibit 40, contradicting his testimony from moments earlier. Faced with Jones

arguably perpetrating a fraud on and in front of the court and being charged with protecting and maintaining the dignity and integrity of the courtroom, the trial court interceded. "Mr. Jones, the question is very simple. Is that or is that not your signature, yes or no?" *Id*. at p. 462, L. 23–25. Again, Jones attempted to evade and equivocate:

> THE WITNESS: It --
> THE COURT: No, I don't want an explanation. I want a yes-or-no answer to that question.
> THE WITNESS: It's not the way I sign it, but it might be.
> THE COURT: That is not the question, sir. I want to give you one more opportunity to answer the Court's direct question.
> THE WITNESS: Okay.
> THE COURT: I'm getting tired of this --
> THE WITNESS: I suspect --
> THE COURT: Be quiet.
> THE WITNESS: Thank you.
> THE COURT: Is that or is that not your signature? Yes or no?
> THE WITNESS: Yes.
> THE COURT: Thank you.

Id. at p. 463, L. 1–19. With the appropriate context, it is evident that the trial court was attempting to protect the integrity of and maintain order in its courtroom by requiring Jones to provide a direct answer to a very simple question. The trial court did not threaten Jones with contempt or make any comment on Jones's credibility. Rather, the trial court insisted that Jones answer directly the questions posed to him. As it did in *Glanzman*, this Court should defer to the trial court, which was more aware of Jones's conduct and attitude as a witness during cross-examination.

Furthermore, any potential perception of bias by the jury was cured by Instruction No. 7. *See State v. Lovelass*, 133 Idaho 160, 983 P.2d 233 (Ct. App. 1999) (holding that a potential misperception by the jury may be cured by a curative instruction). Instruction No. 7 states,

> If during the trial I may say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Jones has failed to demonstrate that the district court abused its discretion or otherwise violated his due process rights under the circumstances. Therefore, his assignment of error with regard to the trial court's questioning of him should not be sustained.

C. THE DISTRICT COURT DID NOT ERR IN GIVING INSTRUCTION NO. 13 TO THE JURY.

Jones contends that the trial court erred in giving Instruction No. 13 to the jury because, while it contains a correct statement of the law, the evidence in the record did not support the instruction. As with Jones's argument with respect to the trial court's comments, this argument fails both on its merits and because Jones's did not preserve the issue for appeal.

1. By Not Objecting to Instruction No. 13, Jones Has Waived His Right to Claim That the Trial Court Erred in Giving Instruction No. 13 to the Jury.

Rule 51 of the Idaho Rules of Civil Procedure provides, in pertinent part, that "[n]o party may assign as error the giving of or failure to give an instruction unless the party objects before the jury deliberates, stating distinctly the instruction to which that party objects and the grounds of the objection." Idaho R. Civ. P. 51(i)(3). When a party fails to timely object to a proposed jury

instruction, he fails to preserve the issue of the propriety of that instruction for appeal. *Bates v. Seldin*, 146 Idaho 772, 776, 203 P.3d 702, 706 (2009).

A review of the record reveals that Jones not only failed to object to Instruction No. 13, he actually advocated for its inclusion. Tr Vol. I, p. 500, L. 2 through p. 509, L. 15. By way of example, during the jury instruction conference with the trial court, Jones's counsel stated that "[w]e need the agency instruction," that the trial court should "keep it," and that it includes "a correct recitation of the law." *Id*. at p. 503, L. 6; p. 504, L. 16; p. 509, L. 13. As a result, Jones is precluded from assigning error on appeal to the trial court giving Instruction No. 13.

2. The Evidence at Trial Supported the Inclusion of Instruction No. 13.

Even if Jones did preserve the issue for appeal, his claim that the trial court erred in giving Instruction No. 13 to the jury is without merit. In reviewing whether a jury instruction should have been given, this Court asks "whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755, 758 (2011). Jones does not dispute that Instruction No. 13 correctly states the law as it pertains to agency. Appellant's Opening Br., p. 15 (acknowledging that Instruction No. 13 contains "a proper statement of the law"). Rather, his contention is that there was no evidence elicited during trial to support the finding that Hingeston "was authorized to book hunts on behalf of Safaris." *Id*. This position is simply incorrect.

During Ms. Ryan's redirect examination, counsel for Safaris Unlimited asked, "Is Graham Hingeston authorized to schedule hunts for Safaris Unlimited?" Tr Vol. I, p. 308, L. 22–23. Ryan's response was an unequivocal "Yes." *Id*. at L. 24. Based upon this testimony alone,

there was sufficient evidence for the trial court to give Instruction No. 13 to the jury. Jones's assignment of error is without merit and should be rejected.

D. SAFARIS UNLIMITED IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES ON APPEAL PURSUANT TO IDAHO CODE § 12-120(1).

Pursuant to Idaho Appellate Rules 35(b)(5) and 41, Safaris Unlimited respectfully requests an award of its reasonable attorney's fees on appeal. The district court awarded attorney's fees to Safaris Unlimited under Idaho Code § 12-120(1), as Safaris Unlimited was the prevailing party and the amount pled in Safaris Unlimited's Complaint was less than $35,000. Jones has not challenged that award on appeal, other than asking that it be vacated in the event this Court vacates the Judgment. This Court has held that section 12-120(1) can be the basis for an award of attorney's fees incurred on appeal, as well as at the trial level. *Loftus v. Snake River Sch. Dist.*, 130 Idaho 426, 429, 942 P.2d 550, 553 (1997); *see also Cornerstone Builders, Inc. v. McReynolds*, 136 Idaho 843, 41 P.3d 271 (Ct. App. 2001). Therefore, if Safaris Unlimited prevails on its appeal, it is entitled to an award of its attorney's fees under section 12-120(1).

V. CONCLUSION

For the reasons set forth, above, Safaris Unlimited respectfully requests that this Court affirm the Judgment entered by the trial court. Additionally, Safaris Unlimited requests that this Court award Safaris Unlimited its attorney's fees incurred in connection with this appeal.

DATED this 12th day of September, 2017.

WORST, FITZGERALD & STOVER, PLLC

By: _____
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Attorneys for Safaris Unlimited, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2017, I caused a true and correct copy of the foregoing RESPONDENT'S BRIEF to be served by the method indicated below, and addressed to the following:

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