11-15-2017

Safaris Unlimited, LLC v. Von Jones Respondent's Brief 2 Dckt. 44914

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAFARIS UNLIMITED, LLC, a Georgia limited liability company,

Plaintiff/Respondent/Cross-appellant,

v.

MIKE VON JONES,

Defendant/Appellant/Cross-respondent.

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

RESPONDENT / CROSS-APPELLANT'S REVISED 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.

THE TRIAL

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

[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 and the events occurring after Judgment had been entered. 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.

contractual arrangement," HHK provides safari services for Safaris Unlimited's clients. *Id*. at p. 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

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

"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*. at p. 460.

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.

At this point, 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 has appealed.

AFTER THE TRIAL

Following entry of the Amended Judgment against Jones, which awarded Safaris Unlimited its attorney's fees and costs, Safaris Unlimited sought and, on June 2, 2017, obtained a Writ of Execution. R Vol. II, pp. 25–29. The Writ directed the Twin Falls County sheriff to satisfy the Amended Judgment

> out of the personal and real property of Mike Von Jones, including, without limitation,
>
> > all right, title, claim, and interest of Defendant Mike Von Jones in and to all claims, demands, damages, debts, liabilities, accounts, reckonings, obligations, bonds, guarantees, warranties, costs, expenses, losses, liens, actions, and causes of action of each and every kind, nature and description, whether now known or unknown, suspected or unsuspected, which Jones might have, own, or hold, or at any time heretofore ever had, owned, or held against Jeremy Sligar and/or Overtime Garage, LLC, including, without limitation, those claims that are the subject of the lawsuit of *Mike Jones v. Jeremy Sligar and Overtime Garage, LLC*; Twin Falls County Case No. CV42-16-1554, and any and all proceeds thereon ["the Sligar Lawsuit"],
>
> and make return of this Writ within twenty (20) days after receipt hereof, entering that which you have done thereon.

Id at p. 28. Although Jones alleges multiple counts against the defendants in the Sligar Lawsuit, and the defendants allege multiple counterclaims against Jones, that case, at its heart, involves the dissolution and accounting of an alleged partnership or other business relationship between the parties thereto. *Id*. at pp. 39–64; Tr Vol. II, p. 38, L. 18–24.

On June 7, 2017, the Twin Falls County sheriff served a copy of the Writ, along with a Notice of Levy, Notice of Sheriff Sale, and Claim of Exemption forms personally on Brooke Redmond, counsel for Jones in the Sligar Lawsuit. *Id*. at pp. 36, 76. Copies of the

aforementioned documents were also mailed to Ms. Redmond and Jones on that same date. *Id*. At no point did Jones file a claim of exemption with regard to his rights in the Sligar Lawsuit. Tr Vol. II, p. 18, L. 23–25.

In accordance with Idaho Code § 11-302, on June 22, 2017, the Twin Falls County sheriff posted Notices of Sheriff's Sale in three (3) public places in the City of Twin Falls, specifically the Twin Falls County Courthouse, Twin Falls City Hall, and Twin Falls Public Library. *Id*.

On June 23, 2017, Jones filed with the trial court a *Motion to Vacate Sheriff's Sale*, an *Ex Parte Motion to Vacate Sheriff's Sale Pending Hearing*, an *Affidavit of Brooke Baldwin Redmond in Support of Motion to Vacate Sheriff's Sale*, and a *Motion to Shorten Time*. R Vol. II, pp. 30–66. Safaris Unlimited objected to Jones's motions and subsequently filed a memorandum in support of its objection. *Id*. at 67–75. Ultimately, Jones was unable to have his motions heard prior to the scheduled date of the sheriff's sale, evidently due to the trial judge being out of the office at the time. Tr Vol. II, p. 3, L. 13–18.

On June 28, 2017, at 10:00 a.m., as noticed, the Twin Falls County sheriff sold Jones's rights in and interest to the Sligar Lawsuit at the Twin Falls County sheriff's office. R Vol. II, pp. 76–77. Counsel for Safaris Unlimited was the only bidder present at the sale and credit bid the amount of $2,500. *Id*.; Tr Vol. II, p. 19, L. 12–17. The Twin Falls County sheriff filed a Sheriff's Return of Service on June 30, 2017. R Vol. II, pp. 76–77. Later that day, Jones noticed his *Motion to Vacate Sheriff's Sale* for hearing on July 17, 2017.

At that hearing, the trial court asked the following of Jones's counsel during argument:

> THE COURT: How do I determine what the fair market value is? Again, let's assume I set aside this sale, Mr. Gadd notices up this action again. Does he have to bid more than his judgment in order to satisfy the requirement of an inadequate sheriff sale?
>
> MR. LARSEN: Your Honor, I think your question really answers itself. If you can't determine the fair market value of this asset, then should it be attached at all? Should it be levied upon at all?

Tr Vol. II, p. 10, L. 19–p. 11, L. 2.

Following argument, the trial court noted that the Sligar Lawsuit was disputed, stating that "[i]t may be that Mr. Sliger owes Mr. Jones some money, it may be that Mr. Jones owes Mr. Sliger some money, it may be that neither one of them owes anybody money. Who knows?" *Id*. at p. 38, L. 25–p. 39, L. 3. "The motion that is before the Court is to set [the sheriff's sale] aside because of the inadequacy of the bid by Safaris. I don't think -- I don't find that there's any other irregularity shown here." *Id.* at L. 10–13. The trial court further held that a creditor can levy on "virtually anything, anything in the State of Idaho to collect a judgment," subject only to a debtor's claim of exemption. *Id*. at L. 17–22. Specifically, the trial court held that "there's nothing wrong with having levied upon this litigation." *Id*. at p. 40, L. 1–2.

The trial court then pivoted, however, stating that "the sale has got to represent some reasonable relation between the value of the bid and the value of the property." *Id*. at L. 11–15. Despite being unable to determine itself the value of the Sligar Lawsuit, the court vacated the sheriff's sale and granted Safaris Unlimited what is effectively a lien against the Sligar Lawsuit. *Id*. at pp. 41, 44. The trial court referred to its decision as a "reasonable compromise to avoid the issue of letting a creditor control unliquidated claims." *Id*. at p. 42, L. 5–7. "Your judgment's

going to bear interest," the court told counsel for Safaris Unlimited. "That's all you're entitled to under the statutes." *Id*. at L. 5–7.

The trial court initially failed to identify any "additional circumstances" upon which its decision was based. When pressed for further explanation in this respect, the trial court stated, "I don't think there is anything that you did that was improper about noticing this matter up for sale. I think the notice was given." *Id*. at p. 43, L. 13–16. Eventually, the court held that the "additional circumstance" was "just the whole nature of this case." *Id*. at L. 19–22.

Upon being asked to clarify its findings as to the additional circumstances, the trial court explained,

> Well, the additional circumstances is the nature of this case, that it is an unliquidated litigation, and though I'm finding that you can levy upon and sell that, that creates a whole issue here of what's the right amount to bid? Do you bid 10,000, 50,000, 125,000? I mean, it's the nature of – the argument that the defendant is making here is that that's the whole problem with unlitigated claims is **you don't know what they're really worth**, like real estate. And I think that is the set of additional circumstances that differentiates this case from, perhaps, others.

Id. at p. 44, L. 6–16 (emphasis added). The trial court again reiterated that the "additional circumstance" were that the property sold was an unliquidated cause of action. *Id*. at p. 45, L. 3–6.

The trial court subsequently entered an *Order Granting Motion to Set Aside Sheriff's Sale*. Safaris Unlimited timely appealed that Order.

II. ADDITIONAL ISSUES ON APPEAL

A. Whether the trial court abused its discretion when it granted Jones's motion and ordered that the sheriff's execution sale be set aside.

B. 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*.

With reference to Safaris Unlimited's cross-appeal, this Court has held, "Whether to set aside an execution sale lies largely within the trial court's discretion." *Suchan v. Suchan,* 113 Idaho 102, 109, 741 P.2d 1289, 1296 (1986). "Each case depends largely on its own peculiar facts; and whether the circumstances, coupled with inadequacy of price, are sufficient to warrant setting aside the sale is a matter largely within the discretion of the trial court." *Gaskill v. Neal,* 77 Idaho 428, 433, 293 P.2d 957, 960 (1956).

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 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 *Jenkins* court, "[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, this Court has previously 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 his signature on Exhibit 40 when 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.

> 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.

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

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 mere 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 merely 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 trial 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 TRIAL 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. BECAUSE THE TRIAL COURT COULD NOT DETERMINE THE VALUE OF THE SLIGAR LAWSUIT AND THERE WERE NO IRREGULARITIES IN THE SALE ITSELF, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SET THE SHERIFF'S SALE ASIDE.

"Whether to set aside an execution sale lies largely within the trial court's discretion." *Suchan v. Suchan,* 113 Idaho 102, 109, 741 P.2d 1289, 1296 (1986). In determining whether the trial court abused its discretion, this Court asks:

> (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.

Sirius LC v. Erickson, 150 Idaho 80, 87, 244 P.3d 224, 231 (2010).

Safaris Unlimited acknowledges that the trial court correctly perceived its decision to set aside the sheriff's sale as discretionary in nature. *See* Tr Vol. II, p. 39, L. 8–9. However, the trial court failed to act consistently with the legal standards applicable to the motion before it. As a result, it exceeded the boundaries of its discretion when it found that the purchase price was grossly inadequate and found that the fact that the property levied on was "unliquidated litigation" constituted the "additional circumstances" necessary to set the sale aside. Furthermore, the trial court did not reach its decision by an exercise of reason. For these reasons, as more fully explained, below, the trial court abused its discretion when it ordered the sheriff's sale of the Sligar Lawsuit be set aside.

1. The Trial Court Erred in Finding that the Purchase Price Was Grossly Inadequate.

Nearly ninety years ago, this Court announced, "As a general rule, mere inadequacy of consideration is not sufficient ground for setting aside a sheriff's sale, but it is uniformly held that gross inadequacy of consideration, coupled with very slight additional circumstances, is sufficient." *Fed. Land Bank of Spokane v. Curts*, 45 Idaho 414, 262 P. 877, 880 (1927). This Court has consistently held that there must be both gross inadequacy of consideration and additional circumstances that justify setting aside the sale. Neither is sufficient by itself.

In prior cases, the Court's determination of whether consideration is grossly inadequate has been made using evidence of the property's "value."[4] In *Curts*, for example, the Court used a higher, unaccepted bid to determine this amount. *Id*. In other cases, the Court used extrinsic evidence to determine the property's value. *See Suchan v. Suchan*, 113 Idaho 102, 741 P.2d 1289 (1986); *Gaskill v. Neal*, 77 Idaho 428, 293 P.2d 957 (1956). Regardless of the methodology used or evidence considered, in every case, the Court first made a finding, either expressly or impliedly, regarding the asset's value before finding that the consideration was grossly inadequate. Indeed, it would be illogical to make the latter finding without first making the former.

The trial court in this case, however, expressly stated that it did not know what the Sligar Lawsuit is "really worth." Tr Vol. II, p. 44, L. 14. "[W]hat's the right amount to bid?" the trial court asked rhetorically. "Do you bid 10,000, 50,000, 125,000? . . . [T]he whole problem with unlitigated claims is you don't know what they're really worth[.]" *Id*. at L. 10–14.

The Mississippi Supreme Court has addressed this issue and articulated an appropriate rule governing the situation. "As with any other personal property, a chose in action's value—for purposes of levy and execution—is determined at a sheriff's execution sale." *Citizens Nat. Bank v. Dixieland Forest Prod., LLC*, 935 So. 2d 1004, 1010 (Miss. 2006). This is a reasonable approach, given the issues inherent with unliquidated and disputed claims. As the trial court noted, "So what do you get when you buy a piece of unresolved litigation? You get an expectancy." Tr Vol. II, p. 40, L. 19–20. The trial court acknowledged that that expectancy may be worth absolutely

[4] In each of these prior cases, the property sold was real property and, therefore, easily appraisable or otherwise valued.

nothing. “It may be that Mr. Sliger owes Mr. Jones some money, it may be that Mr. Jones owes Mr. Sliger some money, it may be that neither one of them owes anybody money. Who knows?” *Id*. at p. 38, L. 25–p. 39, L. 3.

Because of this uncertainty and the expense of litigation, the market for causes of action is understandably smaller than the market for real property. In this case, Safaris Unlimited was the only bidder present at the sheriff’s sale. If the only bidder at the sale bid $2,500 for the Sligar Lawsuit, then that fact alone should be conclusive evidence of the Sligar Lawsuit’s value. This Court should, therefore, adopt the rule pronounced in *Dixieland Forest* and hold that for purposes of levy and execution, a cause of action’s value is determined at a sheriff’s execution sale. If the Court adopts that rule, the amount of the bid will be equal to the value of the Sligar Lawsuit, and there is no gross inadequacy of consideration.

Regardless, if the trial court was unable to determine the value of the Sligar Lawsuit, then it could not possibly determine that the consideration obtained at the sheriff’s sale was grossly inadequate. Therefore, the trial court did not act consistently with the applicable legal standards and did not reach its decision by an exercise of reason. Consequently, the trial court abused its discretion when it entered the *Order Granting Motion to Set Aside Sheriff’s Sale*, and this Court should vacate that order.

2. A Sheriff’s Execution Sale May Be Set Aside Only If the Trial Court Finds There Was an Irregularity in the Sale in Addition to Gross Inadequacy of Consideration.

As noted above, in order to set a sheriff’s execution sale aside, the trial court must not only find that the consideration obtained at the sale is grossly inadequate but also that there were

additional circumstances surrounding the sale that justified setting the sale aside. *Curts*, 45 Idaho 414, 262 P. at 880. While the language used by the Court to refer to these "additional circumstances" has changed somewhat over the years, the underlying requirement has not. Each time this Court has addressed the issue, the "additional circumstances" have been or were required to be an irregularity with the conduct of the sheriff's sale.

In *Curts*, the "additional circumstances" involved the conduct of a foreclosure sale of real property. Prior to the scheduled date of the sale, the creditor's attorney submitted a written bid to the sheriff, asking that the sheriff accept the bid as though it was made at the sale itself. The sheriff did not reject the bid or otherwise inform counsel prior to the sale that the bid would be disregarded. In reliance upon his letter and the sheriff's silence with regard to the bid, the creditor's attorney did not attend the sale. The only person who did attend the sale was a representative of a junior lien holder, whose winning bid was significantly lower than the creditor's written bid. In addition, the sheriff allowed the bidder to direct the order in which subdivisions of the property were sold. This Court held that the bidder had no right to direct the order in which the subdivisions were sold and that the sheriff erred in disregarding creditor's counsel's written bid and selling the property for a lower amount. The *Curts* Court held that these two facts—both irregularities with conduct of the sale—constituted the requisite "additional circumstances" and set the sale aside.

In *Gaskill*, this Court found that there was an "irregularity" in the sheriff's sale when, as in *Curts*, the sheriff followed the directions of a third party who had no right to direct the order in which the parcels of real property would be sold. *Gaskill*, 77 Idaho at 432, 293 P.2d at 960. The real property sold consisted of two parcels, but the parcels were used as a single unit, with the house and

garage situated partly on each lot. This Court found that the sale of the property as separate parcels, as requested by a junior lien holder, caused confusion among the bidders, which led to the sheriff's refusal to accept the highest bid that was offered at the sale. Following the rule announced in *Curts*, this Court held that these irregularities in the sale were sufficient "additional circumstances" that, when coupled with the inadequacy of the consideration, justified the trial court's decision to set the sale aside.

In both *Curts* and *Gaskill*, this Court found that irregularities in the sale itself constituted the requisite "very slight additional circumstances." In *Suchan*, the term "very slight additional circumstances" was not used by this Court at all. Instead, the rule, as restated by the *Suchan* Court, provides that "gross inadequacy of price coupled with irregularities in the sale warrants vacation." *Suchan*, 113 Idaho at 109, 741 P.2d at 1296 (emphasis added). The fact that the appellant in that case misunderstood her legal rights was held not to be an irregularity in the sale. The appellant's objection that the property was sold as separate parcels rather than as a single unit was also not an irregularity because, unlike in *Curts* and *Gaskill*, the debtor directed the manner and order of sale under the authority of Idaho Code § 11-304.

In addition, the *Suchan* Court found that various factors explained the purchase price. The Court concluded that "[i]n light of these factors relevant to the adequacy of price, and [the appellant's] failure to prove any irregularity in the sale, we cannot say the magistrate court abused its discretion in refusing to vacate the execution sale." *Id*. at 110, 741 P.2d at 1297 (citing *Gaskill*, 77 Idaho at 433, 293 P.2d at 960) (emphasis added).

Even when a party is able to prove gross inadequacy of consideration, that fact, standing alone, is an insufficient basis to set aside a sheriff's sale; there must also be an irregularity with the sale itself. *Phillips v. Blazier-Henry*, 154 Idaho 724, 302 P.3d 349 (2013). "Our decisions have uniformly held that there must be some irregularity in the sale or other slight additional circumstance." *Id*. at 730, 302 P.3d at 355. It is unclear from the *Phillips* opinion whether this Court intended to revive the "slight additional circumstances" standard that was apparently abandoned in *Suchan*. Each of the cases cited in *Phillips* involved an irregularity with the sale itself or, as in *Tudor Engineering Co. v. Mouw*, 109 Idaho 573, 709 P.2d 146 (1985), with the circumstances surrounding the sale.

Issued the year prior to *Suchan*, the *Tudor Engineering* opinion neither cites *Curts* or *Gaskill* nor uses the same standard as those cases. This is because the trial court in *Tudor Engineering* had granted an equitable right of redemption to the debtor, rather than set the sale aside. However, the Court did note that "the circumstances surrounding the execution sale" justified the equitable relief. *Tudor Engineering*, 109 Idaho at 575–76, 709 P.2d at 148–49. Those circumstances included the judgment creditor's failure to provide the interested parties with actual notice of the sale, failure to first execute on the bond that had been posted, and failure to first obtain a charging order.[5] However, the *Phillips* opinion notes only the failure to provide notice when citing *Tudor Engineering*.

[5] The property sold had been purchased by a partnership in which the judgment debtor was a partner. "Under Idaho law, the interest of a partner in partnership property is not subject to execution absent a charging order." *Id*. (citing Idaho Code §§ 53–325(2)(c) and 53–328).

Thus, it appears that the Court's inclusion of the "other slight additional circumstances" language in *Phillips* was not intended to significantly alter the rule stated in *Suchun* that there must be an irregularity in the sale for the sale to be set aside. In fact, in every Idaho appellate case that has reviewed an order granting or denying a motion to set aside a sheriff's execution sale, the Court's decision has turned on its finding that there was an irregularity with the sale. *See Phillips v. Blazier-Henry*, 154 Idaho 724, 302 P.3d 349 (2013); *Suchan v. Suchan*, 113 Idaho 102, 741 P.2d 1289 (1986); *Gaskill v. Neal*, 77 Idaho 428, 293 P.2d 957 (1956); *Fed. Land Bank of Spokane v. Curts*, 45 Idaho 414, 262 P. 877 (1927). When the Court found that there was an irregularity with the sale, the sale was set aside. When there was no irregularity, the sale was not set aside.

3. Because the Trial Court Found that Jones Had Not Shown Any Irregularity in the Sheriff's Sale, It Acted Inconsistently with Applicable Standards When It Ordered that the Sale Be Set Aside and that the Sligar Lawsuit Could Not Be Sold.

At the hearing, the trial court stated, "The motion that is before the Court is to set [the sheriff's sale] aside because of the inadequacy of the bid by Safaris. . . . **I don't find that there's any other irregularity shown here**." Tr Vol. II, p. 39, L. 10–13 (emphasis added). The words "any other irregularity" indicate that the trial court viewed the amount of the bid itself as an irregularity. When asked for clarification concerning this, the trial court stated that the additional circumstance justifying its decision to set aside the sale of the Sligar Lawsuit was "the nature of this case, that it is an unliquidated litigation." *Id*. at p. 44, L. 6–9.

In essence, the trial court used its inability to determine the value of the Sligar Lawsuit as the "additional circumstance" required by *Curts* and its progeny. Thus, the fact that the Sligar Lawsuit is unliquidated became the basis for the trial court's findings concerning both "gross

inadequacy of consideration" and "additional circumstances." As explained, above, this line of reasoning is not supported by any Idaho appellate case addressing the issue. This Court has never held that a singular fact can satisfy both elements. Each case has required an irregularity with the conduct of the sale. This Court has also rejected the notion that inadequacy of consideration is sufficient by itself. *Phillips*, 154 Idaho at 730, 302 P.3d at 355.

Furthermore, the trial court's order effectively renders any unliquidated claim or cause of action exempt from execution, which is contrary to Idaho's statutes addressing execution and exemptions. In Idaho, all property is liable to execution unless it is subject to a valid exemption. Idaho Code § 11-201. A cause of action is personal property. *Kopp v. Baird*, 79 Idaho 152, 164, 313 P.2d 319, 325–26 (1957) (holding that accrued royalties "are a mere chose in action, and therefore personal property"); *Taylor v. Maile*, 146 Idaho 705, 710, 201 P.3d 1282, 1287 (2009) (holding that "under Idaho law, a chose in action is an asset"). Like other property, a cause of action may be transferred to another party and is subject to encumbrances. Idaho Code § 55-402; 63C Am. Jur. 2d Property § 22. It is also liable to execution. Idaho Code § 11-201. The trial court acknowledged this when it stated that "there's nothing wrong with having levied upon this litigation." Tr Vol. II, p. 40, L. 1–2. Thus, the Sligar Lawsuit is liable to execution, unless it is subject to a valid claim of exemption.

The general rule is that an asset is exempt from execution only if there is a statute specifically providing an exemption. *Hooper v. State*, 127 Idaho 945, 950, 908 P.2d 1252, 1257 (Ct. App. 1995) (citation omitted). In Idaho, the exemptions available to debtors are set forth in Title 11, Chapter 6. There is no exemption available to Jones in those sections or elsewhere—

and Jones did not file a claim of exemption—relative to the Sligar Lawsuit. *See* Idaho Code 11-601 *et seq.*

However, the trial court's order effectively exempted the Sligar Lawsuit from being liable to execution. As summarized by the trial court, "[The order] simply means this: That there can be no sale of that litigation[.]" Tr Vol. II, p. 41, L. 20–21. "But why not?" the Washington Supreme Court asked in a similar case. *Johnson v. Dahlquist*, 225 P. 817, 818 (Wash. 1924).

> It is property. It is capable of being transferred. It is capable of being converted into a judgment which is subject to execution. It is an asset of the judgment debtor, and why should not his assets, whatever their nature, be taken to satisfy a judgment? We cannot see any logical reason why such property should not be levied on.

Id.

There is no logical reason for the trial court's order in this case. In fact, the Idaho legislature has expressly authorized that a judgment creditor may institute an action against those persons that are alleged to owe the judgment debtor money or property. Idaho Code § 11-507. If a judgment creditor is expressly authorized to institute and prosecute an action in name of the judgment debtor, then there can be no valid basis for denying that same creditor from executing on an action already commenced. As one court noted,

> The causes of action in this case may exist only in the mind of the beholder. Whether or not they do exist will, of course, depend on the facts (or lack of them) adduced at a trial. Nevertheless, these are potential assets and no logical or legal reason can be perceived why they should not be marshalled for the benefit of a judgment creditor just as any other asset of a judgment debtor.

Whitehead v. Van Leuven, 347 F. Supp. 505, 510 (D. Idaho 1972).

The trial court articulated no logical reason why it set aside the sale of the Sligar Lawsuit. The trial court found no irregularity in the sale itself and stated that the only "additional circumstance" was the fact that the Sligar Lawsuit involves an unliquidated claim. By so doing, the trial court acted inconsistently with Idaho law. Accordingly, the order setting aside the sale should be vacated.

E. 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 trial 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 and reverse and vacate the trial court's *Order*

Granting Motion to Set Aside Sheriff's Sale. Additionally, Safaris Unlimited requests that this Court award Safaris Unlimited its attorney's fees incurred in connection with this appeal.

DATED this 14th day of November, 2017.

WORST, FITZGERALD & STOVER, PLLC

By: _____
David W. Gadd
Attorneys for Safaris Unlimited, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2017, I caused a true and correct copy of the foregoing RESPONDENT / CROSS-APPELLANT'S REVISED BRIEF to be served by the method indicated below, and addressed to the following:

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