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### Lujan v. Hillbroom Appellant's Reply Brief 2 Dckt. 48168

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID J. LUJAN,

Appellant, Cross-Respondent,

vs.

JUNIOR HILLBROOM, Individually and as  
Trustee of the JLH Trust, aka Junior Larry  
Hillbroom Trust,

Respondents, Cross-Appellants,

KEITH A. WAIBLE, as an Individual and as  
Trustee of the JLH Trust, aka Junior Larry  
Hillbroom Trust, and John Does 1-10,  
Individuals and entities presently unknown,

Defendants.

Supreme Court No. 48168-2020

Bonner County No. CV09-19-1604

Appeal from the District Court of the First Judicial District  
of the State of Idaho, in and for the County of Bonner

Honorable Barbara A. Buchanan, Presiding

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**CROSS APPELLANT'S REPLY BRIEF**

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Junior's cross-appeal asks this Court to consider whether he should have been awarded fees incurred in defense of Lujan's Complaint. Having prevailed against Lujan's entire complaint on summary judgment, Junior asked the district court to consider whether Lujan's complaint was brought or defended, in whole or in part, frivolously, unreasonably, or without foundation sufficient for an award of attorney fees under Idaho Code § 12-121.

The district court declined to consider whether any of Lujan's individual claims were brought frivolously, unreasonably, or without foundation and instead found that, "after taking into account the entire course of the litigation, this Court is not left with the abiding belief that this case was brought or pursued by the plaintiff frivolously, unreasonably, or without foundation." **R. Vol. I, pp. 154; 226.**

Of course, the district court was not required to award fees, in whole or in part, to Junior. Nevertheless, Junior posits that, in light of the patent lack of factual support for Lujan's claims, it was an abuse of discretion for the district court to conclude, without explaining its reasoning, that Lujan's case, or the discrete claims asserted therein, were not subject to I.C. § 12-121.

Junior argued in his opening brief in this cross-appeal that the district court failed to acknowledge that it had the discretion to apportion fees for those parts of Lujan's claims that were frivolous, unreasonable, or without foundation. *Respondent's Reply Brief and Cross-Appeal*, p. 32. The first prong of the abuse of discretion standard of review requires this Court to examine whether the district court correctly perceived the issue as one of discretion. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (When this Court reviews an alleged abuse of

discretion by a trial court the sequence of inquiry requires consideration of four essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion...).

Just because the district court perfunctorily stated that it was acting within its discretion when it declined to award fees to Junior does not mean that it was in fact acting within its discretion or that it “correctly perceived the issue as one of discretion.” There is nothing in the district court’s decision to suggest that it recognized it had the discretion to apportion fees to Junior. **R. Vol. I, p. 226.**

If the district court’s denial of fees was premised on the mistaken belief that it lacked the discretion to apportion fees for those parts of Lujan’s complaint that satisfied section 12-121, an abuse of discretion occurred. Because the record offers no insight into whether the district court understood it could apportion fees, there is no way to know whether the district court correctly perceived the limits of its discretion in this regard. Lujan’s response to Junior’s cross-appeal does not address this argument. Lujan’s failure to address this argument is fatal to his opposition to this cross-appeal. As a result, the district court’s denial of fees should be reversed or remanded as deemed appropriate by this Court.

Junior also argued that the district court abused its discretion by failing to comply with the third and fourth prongs of the abuse of discretion standard, which requires this Court to consider whether the district court acted consistently with the legal standards applicable to the specific choices available to it and whether the district court reached its conclusion by an exercise of reason. *Respondent’s Reply Brief and Cross-Appeal*, p. 34. Specifically, Junior argued that when deciding whether to award or apportion fees under 12-121, courts “are instructed to examine whether the

non-prevailing party argued the issues in good faith or acted without a reasonable basis in fact or law.” *Id.* at p. 34 (citing *Fitzpatrick Trustees of Fitzpatrick Revocable Tr. v. Kent Trustees of Alan & Sherry Kent Living Tr. Dated 11/07/2003*, 166 Idaho 365, 458 P.3d 943, 951 (2020)).

Junior reasoned that, by failing to consider whether Lujan argued the issues in good faith or acted with a reasonable basis in fact or law, the district court failed to act consistently with the legal standards applicable to the specific choices available to it. *Id.*

Lujan failed to squarely address these issues in his response brief. He claimed that the district court properly “considered the entire litigation and concluded that it was not brought unreasonably or without foundation.” *Appellant’s Response Brief*, p. 6. Although Lujan acknowledges that the district court “does [not] lay out the reasoning of its decision,” he claims the reasons for the district court’s conclusion are apparent from the record. *Id.* Lujan, however, failed to provide a citation to any portion the record that he believes makes the district court’s conclusion apparent, nor does he explain how the court reached its decision by an exercise of reason.

He does attempt to explain how the district court’s dismissal of his breach of contract claim, his claim for declaratory relief, and his claim for the imposition of a constructive trust do not constitute grounds for an award of fees under I.C. § 12-121. *Id.* pp. 6-7. However, it is in no way apparent from the record that the district court accepted, or even considered, any of these alleged facts or arguments advanced by Lujan. Indeed, as pointed out in Junior’s opening brief, it is impossible to determine which, if any, specific facts or arguments the district court relied on in concluding that, “after taking into account the entire course of the litigation,” it was not left with

the abiding belief that Lujan's case was brought or pursued frivolously, unreasonably, or without foundation.

The record relating to Lujan's breach of contract claim certainly does not support the district court's denial of fees. In his response brief, however, Lujan argues that he never asserted a breach of contract claim and thus the district court did not err in refusing to apportion fees for Junior's defense of this claim. The record does not support this argument. He plainly alleged a breach of contract in his complaint. **R. Vol. I, p. 12.** (The Defendants have breached their contractual duties and obligations under the contract and/or agreement with Plaintiffs and such breach is without justification or legal cause).

This allegation was sufficient to put Junior on notice of a breach of contract claim, one which likely would have survived a Rule 12(b)(6) motion. Junior was obligated to defend this claim. Furthermore, Lujan opposed the summary judgment dismissal of the breach of contract claim in his written opposition to summary judgment. **R. Vol. I, p. 94.** (The non-payment under this contract for services, and the breach thereof, which forms the basis of the Judgment obtained in the Superior Court of Guam on September 7, 2018, and therefore the breach of contract claims should not be dismissed). Although the factual, legal, and logical bases for his opposition to summary judgment are incomprehensible, that he opposed the dismissal of his breach of contract claims is unmistakable.

The argument presented now on appeal, that he never had a breach of contract claim, is, like the breach of contract claim itself, frivolous, unreasonable, and without foundation. If Lujan did not intend to assert a breach of contract claim, then he should not have alleged it or defended

it up until the summary judgment hearing. Had Lujan simply responded in his summary judgment briefing that he was not asserting a breach of contract claim, this issue would not be before this Court.

But Lujan did allege a breach of contract claim and he did defend it in writing from summary judgment dismissal. Lujan had no legal or factual basis for this claim and he withdrew it at the summary judgment hearing. In order for the district court to reach the conclusion that it was “not left with the abiding belief that this case was brought or pursued by the plaintiff frivolously, unreasonably, or without foundation” then it must have ignored or discounted this claim when it took “into account the entire course of the litigation” and declined to award fees under I.C. § 12-121.” **R. Vol. I, p. 226.** If the district court determined that the other claims set forth in Lujan’s complaint were made in good faith and with a reasonable basis in fact or law, the written decision affords no insight into which claim, or claims, support that conclusion.

In defense of those other claims, Lujan argues that the district court could not have awarded fees under I.C. § 12-121 for the dismissal of his action for a declaratory judgment, which asked the district court to determine the priority of his judgment lien against the Subject Property. *Appellant’s Response Brief*, p. 7. He argues that the assertion of this claim was reasonable because, if he had been successful in setting aside the 2008 transfer of the Subject Property, his judgment would have attached to the Subject Property and he would then be entitled to a determination of priority. *Id.*

This argument is meritless for two reasons. First, “...an actual or justiciable controversy is...a prerequisite to a declaratory judgment action...” *ABC Agra, LLC v. Critical Access Grp.*,

*Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014). Uncertain, hypothetical, and conditional future events are not sufficient to satisfy the requirements for a justiciable controversy. *Id.* 783-786, 525-528; *Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 34, 253 P.3d 700, 708 (2011). Lujan's action for a declaratory judgment was premised on uncertain, hypothetical, and conditional future events and did not satisfy the justiciable controversy requirement.

Secondly, this is not the argument Lujan advanced below. In his Complaint, Lujan plainly alleged that his Guam judgment had already attached to the Subject Property and he was entitled to declaratory relief at the time he filed the complaint. **R. Vol. I, pp. 14-15** (Plaintiff is entitled to an attachment or other provisional remedy against the real property...Plaintiff is entitled to issuance of a writ of execution against the assets transferred or their proceeds, specifically including, but not limited to the real property...Plaintiff is entitled to a determination of the right, title, and interest and priority of the Plaintiff's judgments against the real property).

At no point in the proceedings below did Lujan suggest that his right to a declaratory judgment was contingent on the outcome of his UVTA claim, his constructive trust claim, or any other claim. The district court properly found that there was no evidence or authority supporting his claim that the Guam judgment had attached to the Subject Property and dismissed his action for a declaratory judgment on summary judgment. **R. Vol. I, p. 153**. Because the district court found that this claim lacked legal or factual support, it must have also ignored or discounted this cause of action when taking "into account the entire course of the litigation" and denying fees to Junior because it was "not left with the abiding belief that this case was brought or pursued by the plaintiff frivolously, unreasonably, or without foundation."



If the district court did not consider the patent frivolity, unreasonableness, and lack of foundation relative to the breach of contract claim and the application for a declaratory judgment when denying fees to Junior under I.C. § 12-121, it must have been considering one, or both, of Lujan's remaining claims in order to arrive at the conclusion that it was not left with the abiding belief that his case was brought or pursued frivolously, unreasonably, or without foundation.

Lujan argues that bringing an action to impose a constructive trust was not an act of bad faith, though whether or how he believes that argument insulates him from an award of fees under 12-121 is unclear. *Appellant's Reply Brief*, p. 7. What is clear is that Lujan makes no attempt to address Junior's argument that the constructive trust claim was frivolous, unreasonable, and made without foundation.

Lujan does not deny that his constructive trust claim was premised on fraud. He does not deny that, in order to prevail on this claim, he was required to allege and prove fraud. He does not deny that the district court found his complaint *failed to properly allege a single required element of a claim for fraud*. **R. Vol. I, p. 151**. He does not deny that the district court found that he failed to come forward with a single genuine issue for fact for trial in opposition to Junior's motion for summary judgment. *Id.* He does not deny that his defense to summary judgment impermissibly relied on the insufficient allegations in his Complaint. He does not deny that his constructive trust claim was dismissed on summary judgment because his complaint only made general, conclusory, and inadmissibly speculative allegations of fraud. *Id.* He offers no explanation as to how this claim was not frivolous, unreasonable, or lacking in foundation. He simply argues that it was not

bad faith to assert it. However, even if this claim was brought in good faith, which Junior disputes, it cannot be said that this claim had any basis in fact when it was dismissed by the district court for the failure to allege or support a single required element.

Having determined that Lujan's constructive trust claim lacked any factual support, the district court should have apportioned fees to Junior incurred in its defense under I.C. § 12-121 unless, when viewing the case as a whole, it determined that the other issues raised by Lujan were made in good faith or with a reasonable basis in fact or law. Junior has already demonstrated how Lujan's breach of contract claim, his action for a declaratory judgment, and his constructive trust claim all lacked a basis in fact. The only remaining issue, then, is the UVTA claim.

If the district court refused to award fees to Junior because it determined there was some legitimacy to Lujan's UVTA claim, that reasoning is not evident from the record. There was no suggestion that the district court believed this to be the case in any written decision or in any part of the transcripts. Lujan offers no citation to the record or other argument to support his assertion that the district court's reasoning for denying fees is apparent from the record with respect to the UVTA claim. Instead, he states as a matter of fact that the question of whether he "reasonably should have known of the subject transaction sooner than he did" was a legitimate, triable issue of fact that necessitated the litigation. *Appellant's Response Brief*, p. 6. However, the district court never made this finding and this argument is not supported by the record.

Moreover, the existence of a single legitimate issue of fact cannot insulate a party from an award of fees under I.C. § 12-121. *Fitzpatrick*, 166 Idaho 365, 458 P.3d at 951 (It is no longer enough for non-prevailing party to have raised a single legitimate issue in order to be immunized

from attorney fees under Idaho Code section 12-121). Thus, if Lujan's assertion is correct, that the district court considered the question of whether he "reasonably should have known of the subject transaction sooner than he did," a legitimate, triable issue, that single issue is nevertheless insufficient to shield Lujan from an award of fees under I.C. § 12-121.

Finally, even if Lujan was able to demonstrate that his UVTA claim was timely, or that the timeliness of his claim involved a legitimate issue of fact, that does not end the inquiry as to whether that claim was frivolous, unreasonable, or without foundation. Junior argued that even if Lujan survived summary judgment on this issue, he would then be required to prove Junior committed an act of fraud in order to prevail on this claim. *Respondent's Reply Brief and Cross-Appeal*, p. 30 Lujan never responded to this argument. The record shows that Lujan was unable to allege or support a single element of fraud sufficient to support his constructive trust claim. For this reason, he would not have been able provide the necessary factual support for his UVTA claim. Therefore, even if Lujan had prevailed on summary judgment, or convinced the district court that the timeliness of Lujan's UVTA claim presented a legitimate issue, there is no evidence of fraud in the record to support this claim and its assertion and defense of the claim was frivolous, unreasonable, and lacking in foundation.

For these reasons, this Court should find that the district court abused its discretion in declining to award fees to Junior. It should find that the district court failed to correctly perceive the issue of whether to apportion fees to Junior as a matter within its discretion. It should also find that the district court did not act consistently with the legal standards applicable to the specific choices available to it or reach its decision by an exercise of reason. This Court should find that

Lujan's claims were brought and defended frivolously, unreasonably, and without foundation and remand the case back to the district court to make an appropriate award of fees pursuant to I.C. § 12-121.

Finally, if Junior prevails Junior on this cross-appeal, it should award fees on appeal to Junior under I.C. § 12-121. Lujan's response brief simply advanced a number of conclusory allegations that are not supported by adequate citation to the record or legal authority. His defense of these issues was frivolous, unreasonable, and lacking in foundation.

DATED this 25<sup>th</sup> day of February, 2021.

Berg, McLaughlin, & Nelson, CHTD

/s/Josh Hickey  
Josh Hickey  
Attorney at Law

**CERTIFICATE OF SERVICE**

I hereby certify that on the February 25, 2021, I served a true and correct copy of the foregoing RESPONDENT’S BRIEF and CROSS-APPEAL by the method indicated below, and addressed to the following:

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*/s/ Andra Nelson*  
Andra Nelson