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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF:)
RUTH BIRCH,)
)
Deceased,)
)
_____)

Supreme Court No. 45451
Case No. CV-2011-7613

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

Honorable Bruce L. Pickett, District Judge presiding.

Michael Moscrip

Residing at Fruitland, Idaho, for Appellant

B.J. Driscoll

Residing at Idaho Falls, Idaho, for Respondent.

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS..... i

II. TABLE OF CASES AND AUTHORITIES..... ii

III. CORRECTION AND CLARIFICATION OF RESPONDENT’S FACTUAL REPRESENTATIONS..... 1

IV. COMMENTS ON BAILEY’S STANDARD OF REVIEW..... 2

V. COMMENTS ON BAILEY’S ATTORNEY’S FEES ON APPEAL..... 3

VI. ARGUMENT..... 4

VII. COMMENTS ON BAILEY’S USE OF IDAHO CODE § 12-121..... 7

VIII. ASSESSMENT OF BAILEY’S OVERALL RESPONDENT’S BRIEF.... 10

IX. ATTORNEY FEES..... 11

II. TABLE OF CASES AND AUTHORITIES

CASES:

<u><i>Athay v. Stacey</i></u>	4
146 Idaho 407, 196 P.3d 325, (2008)	
<u><i>Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust</i></u>	4
147 Idaho 117, 206 P.3d 481, (2009)	
<u><i>Bremer, LLC v. East Greenacres</i></u>	10
155 Idaho 736, 316 P.3d 652 (2014)	
<u><i>Gem State Ins. Co. v. Hutchison</i></u>	10
145 Idaho 10, 175 P.3d 172 (2007)	
<u><i>Hurtado v. Land O'Lakes, Inc.</i></u>	10
153 Idaho 13, 278 P.3d 415 (2012)	
<u><i>Indian Springs LLC v. Indian Springs Land Inv.</i></u>	3
147 Idaho 737, 215 P.3d 457 (2009)	
<u><i>Operating Engineers Local Union 276 et. Al. v. Goodwin Construction Co. Of Blackfoot</i></u>	
104 Idaho 83, 656 P.2d 145 (1982).....	8
<u><i>Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC</i></u>	10
339 P.3d 1136, (2014)	
<u><i>PriceCo, Inc. V. Youngstrom</i></u>	7
117 Idaho 213, 786 P.2d 606 (App. 1990)	
<u><i>Sanchez v. Galey</i></u>	2, 3
112 Idaho 609, 733 P.2d 1234 (1986)	
<u><i>Telford Lands LLC v. Cain</i></u>	10
303 P.3d 1237, 1249, 154 Idaho 981, 993 (Idaho 2013)	
<u><i>United States Nat'l Bank of Oregon v. Cox</i></u>	3
126 Idaho 733, 889 P.2d 1123 (Ct. App. 1995)	

AUTHORITIES:

Idaho Appellate Rule 19(c) 6

Idaho Appellate Rule 30 6

Idaho Appellate Rule 40 4

Idaho Appellate Rule 41 4

Idaho Code § 12-121 7, 8, 9, 10, 11

Idaho Code § 12-123 11

Idaho Code § 15-8-201 3

Idaho Code § 15-8-203 3

Idaho Code § 15-8-208 3, 11

Idaho Rules of Civil Procedure Rule 59(a)(5) 3

III. Correction and Clarification of Respondent's Factual Representations

1. To What Activities Does Bailey Refer

Bailey asserts, “[b]ecause Birch’s activities unnecessarily increased the estate’s expenses Bailey sought an unequal distribution of the estate and an assessment against Birch based on those expenses.” *Respondent’s Brief, Page 3, Paragraph 2*. This assertion has no bearing on this issues now before this Court. It is unsubstantiated in any way and could be intended only to detract from the issues now on appeal.

2. Both Bailey and Birch Prevailed on Motions

Bailey asserts as fact that: “Bailey successfully defended against the repeated litigious attacks of her brother, appellant” *Respondent’s Brief, Page 3, Paragraph 2*. This is not a fact but an incomplete statement. Birch has successfully argued motions at each court in these proceedings. In the magistrate court, a prime example is found in the ROA Report, *R. Vol. I, p. 7*, on August 8, 2016 the magistrate court filed an “*Order Granting in Substantial Part the Personal Representative’s Petition for Orders Filed 5/17/2016*.” This shows that Birch successfully argued the exclusion of part of Bailey’s Petition. Another such example at the magistrate level is Birch’s *Motion To Set Aside Sale of Real Property* which was granted by the Magistrate on April 7, 2016. *R. Vol. I, p. 5*. Birch on appeal to the District Court from the Magistrates final order was partially successful, *Opinion and Order on Appeal. R. Vol. I, p. 30-37*.

3. No Memorandum of Costs Was Filed in This Case

“. . . Bailey filed a memorandum of costs seeking an additional award of fees and costs

against Birch. . .” *Respondent’s Brief, Page 3-4*. This is a misrepresentation for at no time was a “memorandum of costs” filed in this case. *R. Vol. I, p. 2-10*.

4. There was No Award of Fees or Costs

Bailey further alleged that “The magistrate court awarded the additional fees and costs against Birch.” *Respondent’s Brief, Page 4, Paragraph 1*. This assertion is false and misleading. The magistrate, in error, equitably assessed legal fees against Birch but made no award of fees and costs as those terms are defined by the Idaho Code, the Idaho Rules of Civil Procedure or by Idaho case law.

5. Opinion Presented as Fact

Bailey states as fact that Birch was “[s]till not satisfied”, *Respondent’s Brief Page 4, Paragraph 2*, with the findings of the District Court on appeal. Such a statement is not a fact, but is instead an exaggeration of their opinion. The fact should read, “Birch exercised his rights, as allowed by the laws of the State of Idaho, and appealed the District Court’s decision in its *Opinion and Order on Appeal* to the Idaho Supreme Court.”

IV. COMMENTS ON BAILEY’S STANDARD OF REVIEW

Bailey has cited *Sanchez v. Galey* 112 Idaho 609, a personal injury case, as the relevant standard of review. Bailey cites in *Sanchez*, “This is a particularly heavy burden in those cases where the issue to be reviewed on appeal is whether the trial court abused its discretion. . .” the omitted section of the sentence reads, “. . . which is the standard involved in reviewing the trial

judge's action on a motion for a new trial under Rule 59(a)(5).” *Sanchez v. Galey*, 112 Idaho 609, 628 (1986). As Rule 59(a)(5) is not an issue in this case. Birch therefore, puts forward *United States Natl Bank of Oregon v. Cox* and *Indian Springs LLC v. Indian Springs Land Inv.* as relevant and on point with the issues before this Court and as such is the correct standard of review.

V. COMMENTS ON BAILEY’S ATTORNEY’S FEES ON APPEAL

1. Bailey is Not Entitled to Attorney Fees Pursuant to Idaho Code § 15-8-208

Bailey is asking for Attorney’s fees on appeal under Idaho Code Section 15-8-208(1).

The overall purpose of the Trust and Estate Dispute Resolution Act is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under title 15, Idaho CodeThe provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in title 15, Idaho Code, or other Idaho law.” *Idaho Code § 15-8-201 (2)*.

This ongoing estate action has never before been classified or declared to be a TEDRA action, for these reasons attorney fees cannot to be awarded under this statute. Even if this case were considered to be governed by TEDRA, its provisions regarding attorney fees cannot be viewed in isolation from the Idaho Rules of Civil Procedure or other Idaho statutes. Idaho Code § 15-8-203 states: “The Idaho Rules of Civil Procedure shall apply to all proceedings under part 2 of this chapter.” Bailey’s argument is nothing more than a bare assertion. She fails to identify any rule of procedure, any other statute or any case law in support of this assertion. Bailey is not entitled to an award of fees and costs on appeal pursuant to Idaho Code § 15-8-208.

2. Idaho Appellate Rule 40 and 41 Do Not Provide a Substantive Basis for Awarding Fees

Bailey is not entitled to attorney fees or costs under either Idaho Appellate Rule 40 or 41. This Court stated in *Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust*, 147 Idaho 117, 206 P.3d 481, (2009) that a “[party] is not entitled to fees under Rules 40 and 41 since those rules do not provide a substantive basis for awarding fees. See *Athay*, 146 Idaho at 422, 196 P.3d at 340).”

3. Admission By Bailey That Birch Has Not Acted Frivolously, Unreasonably, or Without Foundation

Bailey has admitted that the Magistrate Court erred in asking that, “. . . [T]he Court should affirm the district court’s opinion and order on appeal. . .” *Respondent’s Brief, Page 5*. Such an admission shows that Birch was justified in his filing of that appeal, and his reasons for prosecuting this case were neither frivolous, nor unreasonable, nor without foundation, including Bailey’s ongoing assertions below and on appeal.

VI. ARGUMENT

1. Bailey Admission of District Court Error

In the District Court’s *Opinion and Order on Appeal, R. Vol I pp 35*, the Court concluded: “[Birch] did not timely object to the memorandum of costs by filing a motion to disallow all or part of the fees and has thus waived his objection to those costs. . . Accordingly, Judge Redditch’s award of \$11,559.05 is affirmed.” The District Court affirmed the Magistrate Court’s decision solely upon Birch’s failure to object to Bailey’s “memorandum of costs” in a timely manner. Bailey acknowledges that the District Court erred. “Bailey acknowledges that

Birch's waiver of any objections to her memorandum of costs does not require the magistrate to automatically award the amounts sought." *Respondent's Brief Page 8 Paragraph 2*. It is important to note that the Magistrate did not, at any time, award fees and costs. Having implicitly admitted that the District Court erred as a matter of law, Bailey continues to oppose this appeal, opposition that is unreasonable and frivolous.

2. Bailey is Responsible for Preserving Those Documents Required for His Arguments

A. Birch Preserved Those Documents He Required For His Appeal

Respondent argues that Birch has failed to meet his burden of presenting a sufficient record to prove the trial court abused its discretion. Appellant's Brief clearly demonstrates to this Court how the Magistrate and District Judge reached their conclusions, as stated in the *Estate Closing Order and Order of Distribution and Orders and Opinions on Appeal*, and how such conclusions were in error. There exists sufficient documentation in the Reporter's Transcript in which Birch was able to present his case before this Court as required under the Idaho Rules of Civil Procedure and the Idaho Appellate Rules.

B. Bailey Has A Duty to Preserve Documents Necessary to His Argument

In Respondent's Brief Bailey has stated that, ". . . this also makes Bailey's response similarly difficult because Bailey cannot cite to or rely on matters not in the record to refute Birch's arguments." *Respondent's Brief, Page 7, Paragraph 3*. Bailey was provided with a Notice of Appeal, *R. Vol. I, p. 38*, on which Birch presented his grounds for appeal. The Recorder presented both parties with a proposed copy of the Reporter's Transcript, *R. Vol. I, p.*

41-44. Bailey had the first opportunity to request that additional documents be added to the Reporter's Transcript before it had been filed with the Supreme Court under Idaho Appellate Rule 19(c). Instead of adding additional documents Bailey filed an *Objection to Clerk's Record and Motion to Strike* on February 1, 2018. *R. Vol. I, p. 45-48*. "[Bailey] objects to the inclusion of these unrequested additional records and moves to strike all of them from the Clerk's Record. A few examples of such additional records include . . . Memorandum of Attorney's Fees and Costs (R.21), . . ." *R. Vol. I, p. 46*.

Either party could move to augment the record after the Reporter's Transcript had been filed pursuant to Idaho Appellate Rule 30. Instead of moving for the addition of those materials needed "to refute Birch's arguments," *Respondent's Brief, Page 7*, Bailey remains silent and fails in her duty to produce that needed to advocate her position. Bailey having had ample opportunity before filing her Respondent's Brief to add or augment the record before this Court, and having failed to do so can only be seen as intentional on her part. To now complain of a lack of materials to adequately argue her case is without basis.

Bailey has erroneously attempted to shift the responsibility of submitting records before this Court, that advocates her position, on to Birch. First, Bailey actively removed documents from the Reporter's Transcript. Second, Bailey was afforded ample opportunity to request and move for the addition of any materials needed to advocate her position. Third, Bailey, through her own actions, has shaped the record before this Court to that which she intended. Therefore, Bailey's complaints to the record being insufficient is frivolous, unreasonable, and without foundation as the Record is exactly what she intended it to be.

C. PriceCo Inc. V. Youngstrom is Irrelevant to the Case Presently Before the Court

In asserting Birch's responsibility to provide documents to the Reporter's Transcript Bailey relies upon *PriceCo, Inc. V. Youngstrom*, 117 Idaho 213 (ct. App. 1990) a case which has no relevance to the present appeal before the Court. First, *PriceCo, Inc. V. Youngstrom* was based upon a default judgment that decided "whether--and under what circumstances--an officer of a corporation may be personally liable for a debt incurred while the corporation's charter is in forfeiture." *Id. at 213*. The case before this Court had been argued before both a Magistrate and District Judge.

Second, *PriceCo, Inc. V. Youngstrom* found that, "[in order to determine what competing considerations the magistrate might have weighed in exercising such discretion, it would be essential for us to review transcripts of the proceedings in which the default and discovery issues were argued to the magistrate." *Id. at 215*. The "Estate Closing Order and Decree of Distribution" and "Opinion and Order on Appeal" provide sufficient record in which this Court can ascertain the "competing considerations the magistrate might have weighed in exercising such discretion."

Therefore, having argued the case and having a record of the reasoning for the Magistrate and District Judge's findings of fact and conclusions, the *PriceCo, Inc. V. Youngstrom* case is irrelevant in regards to the case presently before this Court.

VII. COMMENTS ON BAILEY'S USE OF IDAHO CODE § 12-121

1. Bailey States Facts Not in the Record

Bailey states, "Bailey filed her memorandum of costs pursuant to Idaho Code Section 12-121." *Respondent's Brief Page 8, Section C*. This assertion is inappropriate as it references

documents not in the record. Second, as addressed above, Bailey had the opportunity to have the Memorandum of Attorney's Fees and Costs made a part of the Reporter's Transcript and rely upon the document for her arguments. However, Bailey instead wilfully and intentionally had this document stricken from the Reporter's Transcript, *see argument above Page 7*. Therefore, by striking the Memorandum of Attorney's Fees and Costs from the Reporter's Transcript Bailey is now barred from either declaring the contents thereof, hearsay, or using the document in these proceedings.

2. Bailey is Attempting to Interject a New Argument to the Case

Respondent's Brief argues that the "Magistrate did not abuse his discretion." Yet, the issue is not whether the Magistrate abused his discretion but whether the "District Court Judge" acting in an appellate capacity erred as a matter of law. "These findings, limited as they are, support the magistrate's Second Award under Idaho Code Section 12-121." *Respondent's Brief Page 8 Paragraph 2*. Bailey bases her arguments, in part, upon documents not in the record. "Bailey filed her memorandum of costs pursuant to Idaho Code Section 12-121." *Respondent's Brief Page 8, Paragraph 2*. The "memorandum of costs" is not a part of the record, as Bailey demanded in her *Objection to Clerk's Record and Motion to Strike*. As Bailey herself stated in her Respondent's Brief, ". . . [she] cannot cite to or rely on matters not in the record. . . ." *Respondent's Brief Page 7, Paragraph 3*. Bailey knowingly, wilfully, and intentionally attempts to put documents not in the record before this Court. These statements should be disregarded.

Bailey argued to the District Court that Birch did not object to her memorandum of fees and costs and that his waiver constituted an entitlement to fees and costs. In *Operating Engineers Local Union 276 et. Al. v. Goodwin Construction Co. Of Blackfoot*, the Court

addressed the effect of a party's failure to object. The Court stated, "[such awards [of attorney fees] do not become automatic simply because they are claimed and the opposing party fails to object." *Operating Engineers Local Union 276 et. Al. v. Goodwin Construction Co. Of Blackfoot*, 104 Idaho 83, 656 P.2d 145 (1982). The Court then stated: "the waiver of objections does not detract from the trial court's responsibility to exercise sound discretion in ruling upon requests for attorney fees. . ." *Id.* at 85. Bailey has abandoned this argument and now asserts that the Magistrate did not abuse his discretion when in fact the Magistrate did not exercise any discretion. He equitably assessed fees but did not award fees using correct legal principles.

What Bailey now characterizes as a second award of attorney fees was nothing more than the Magistrate's ongoing exercise of his claimed equitable authority to assess legal fees against Birch's interest in the estate, authority the Magistrate later acknowledged he did not have.

3. Addressing Bailey's Argument Regarding Idaho Code § 12-121

Bailey now puts forward the argument that she is entitled to attorney fees and costs under Idaho Code § 12-121. The time for asserting grounds in support of the Magistrates erroneous orders has passed. The Magistrate and District Courts were presented with and heard arguments put forward by both Birch and Bailey. After hearing these arguments both Judge's then issued their Orders, making findings of fact and citing their authority for doing so. Bailey is now asking this Court to now consider and make findings to justify their assertion of being entitled to attorneys fees under Idaho Code Section 12-121.

To the contrary, the only reference in the record in point is that the magistrate found that Birch had made "multiple unsuccessful attempts ... resulting in significant attorney fees" and engaged in "unnecessary or excessive litigation." These findings, limited as they are, support the magistrate's Second Award under Idaho Code Section 12-121.

-Respondent's Brief page 8 paragraph 2.

The Idaho Rules of Civil Procedure limit an award under § 12-121 to cases where the party against whom the award of fees is has “pursued or defended [a claim or appeal] frivolously, unreasonably, or without foundation.” *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1249, 154 Idaho 981, 993 (Idaho 2013). Importantly, attorney fees under this statute are only available when the *entirety* of a party’s claim or defense is deemed frivolous or without foundation. *Bremer, LLC v. East Greenacres*, 316 P.3d 652, 661, 155 Idaho 736, 745 (2014). This limitation also holds true for cases on appeal. *Id.* If a party presents even one legitimate issue—even when nestled among several unreasonable arguments—an award under Idaho Code section 12-121 is improper. *Id.*

-Ingrid Bate, Comment, *Attorney Fee Awards in Idaho: A Handbook*, 52 IDAHO L. REV. 583 (2016).
(Citations added)

As argued since his first appearance, Birch has zealously advocated for his interests, basing his arguments on legitimate issues and in accordance with acceptable legal standards. Having prevailed on several motions, as shown above on Page 1, this negates Bailey’s assertion that she is entitled to an award of attorney fees and costs under Idaho Code § 12-121.

VIII. Assessment of Bailey’s Overall Respondent’s Brief

Bailey has failed to refute any of the arguments put forward by Birch in his Appellant’s Brief. “This Court has ” consistently stated that if 'issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered. . . . A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.'” *Hurtado*, 153 Idaho at 17, 278 P.3d at 419 (quoting *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007) (alteration in original)). *Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC*, 339 P.3d 1136, (2014). Having cited no statute, case, or rule in opposition to those presented in the Appellant’s Brief, Bailey is conceding the accuracy and

relevancy of the arguments as true and valid. Therefore, having failed to put forward any authority or argument Bailey, has conceded the validity of Birch's arguments and legal citations.

IX. ATTORNEY FEES

Appellant Requests Attorney Fees Pursuant to Idaho Code §12-121 and §12-123

Birch is entitled to attorney fees and costs under Code §12-121 and Idaho Code §12-123. Bailey, through her counsel, has asserted claims and defenses which are not supported in fact or warranted under existing law, claims and defenses which cannot be supported by a good faith argument.

As shown in this Reply Brief, Bailey has failed to respond to, argue against or rebut the issues addressed in Appellant's Brief. Bailey's Respondent Brief cites one case and it was not cited to address or refute those issues presented by Birch. Respondent's Brief cites two statutes, Idaho Code §12-121 and Idaho Code § 15-8-208. These statutes were not argued before the Magistrate court or the District Court on appeal and are not applicable in this appellate setting. As such Bailey has frivolously, unreasonably, and without foundation perpetuated this appeal in bad faith.

Respectfully submitted this ____ day of June, 2018.

Michael Moscrip
Attorney for Appellant