5-15-2018

Galvin v. City of Middleton Appellant's Brief Dckt. 45578

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARTIN C. GALVIN AND PATRICIA L. GALVIN, Plaintiffs/Respondents, vs. CITY OF MIDDLETON, Defendant/Appellant.	Supreme Court No. 45578-2017 District Case No. CV-2016-6062

DEFENDANT/APPELLANT'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THIRD JUDICIAL

DISTRICT AND FOR THE COUNTY OF CANYON

HONORABLE GEORGE SOUTHWORTH, DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

(i) Nature of the Case:

This is a quiet title action involving a question whether Respondents, Martin and Patricia Galvin (the "Galvins"), established a prescriptive easement prior to Appellant, City of Middleton (the "City"), taking ownership of the disputed parcel. The District Court granted the Galvins' motion for summary judgment finding that a prescriptive easement had been established and awarded attorney fees to the Galvins. The City now appeals.

(ii) Statement of Facts:

Respondents Martin and Patricia Galvin (the "Galvins"), and Mr. Galvin's forebears, have owned a parcel of land situated in Canyon County, Idaho, identified by the Canyon County Assessor's Office as "Parcel Number 33877000 0", and legally described by the Canyon County Assessor's Office as Section 5 T4N R2W, NW LT 4, SWNW, W 1/2 SENW,W 24' OF E 1/2 SENW LS TX 02805 & LS RD ON W (the "Galvin Property"), since at least 1949. *See* R. 13, 20, and 66. Along the northern border of the Galvin Property is a drainage ditch that permitted excess

irrigation water to drain from the Galvin Property. *See* R. 66, ¶ 7. Directly to the north of the drainage ditch on the Galvin Property is a farm irrigation road (the "Dirt Road") that borders the Galvin Property, which is not owned by the Galvins. *See* R. 12–20, 67, and 98. The Dirt Road is currently owned by the City and forms the basis of this lawsuit. *See* R. 46–50.

Prior to the City owning the Dirt Road, Mr. Galvin claims that his family had used it continuously since 1949 for the purposes of checking water in his drainage ditch. *See* R. 66, ¶6. Mr. Galvin does not make clear who owned the Dirt Road at that time, or whether any other person in his family had ever asked for permission to use the Dirt Road from its owners, but only asserts that "[he] never got any permission for [his] use [of the Dirt Road]." *Id.*

The first owners identified by the Galvins were Delno and Hazel Robinson (the "Robinsons") who first obtained ownership of the Dirt Road in the early 1960s. *See* R. 66, ¶ 8. According to the Galvins, the Robinsons were "not farmer[s]," but would occasionally irrigate their land in the evenings. *See Id.* The Robinsons did not build a home on their property until 1967 or 1968, and raised the elevation of their homebuilding site by taking dirt from the Dirt Road on their property. *See* R. 67, ¶ 9. The Galvins have stated that the Robinsons fairly ruined his ability to use the Dirt Road by building their home. *See Id.* The Galvins did not claim that they had any dispute with the Robinsons regarding the destruction of the Dirt Road at that time, but only claim to have built up the Dirt Road and continued to maintain it since 1968. *See* R. 67, ¶ 10.

The first potential dispute over access to the Dirt Road asserted by the Galvins did not arise until 1972. *See* R. 67, ¶ 11. The Galvins state that the Robinsons wanted to plant raspberry bushes on the south side of the Dirt Road on the Galvin Property that would have "cut off access to the

[Dirt Road] and [his] ditch, and therefore, [the Robinsons] did not have a right to do that." *See Id.* According to the Galvins, the only other dispute he had with the Robinsons regarding the Dirt Road was when Hazel Robinson would be upset with wheat trucks driving on it. *See* R. 67, ¶ 12. The Galvins did not ascribe any particular time frame for the date of the alleged disputes with Hazel Robinson, but rather have claimed that she would get upset "over the years." *Id.* However, from the interactions described by the Galvins, the relationship between the Robinsons and the Galvins was a neighborly one. *See* R. 67, ¶¶ 13–15. In fact, the Galvins stated that they assisted Hazel when her husband passed away in January of 1977, and that their son-in-law farmed the Robinson property for a number of years. *See Id.* (describing helpful actions taken by Martin Galvin); *see also*, R. 90, ¶ 6 (stating that Howard Randolph Powell, the Galvins' son-in-law, had farmed the Robinson land between 2003 and 2008, until Hazel passed away in 2009).

Beginning around the mid-1990s, Mike Wagner began farming the Galvin Property, and the Galvins stopped personally farming. *See* R. 70, ¶ 25 (from the *Declaration of Martin C. Galvin in Support of Motion for Summary Judgment*, stating that "Mike Wagner has farmed [the Galvin Property] since sometime in the 1990s."); *see also*, R. 121, ¶¶ 6–7 (from the *Declaration of Mike Wagner* stating that Mike Wagner and his employees have farmed the Galvin Property during the 1990s and 2000s); *but compare* R. 225, ¶¶ 6–7 (from the *Supplemental Declaration of Martin C. Galvin*, stating that both Mike Wagner and Martin Galvin were farming the Galvin Property under some kind of "sharecropping arrangement," but that Mr. Galvin "performed many of the same tasks in conjunction with Mr. Wagner"), *and also compare* R. 271, ¶ 5 (from the *Third Supplemental Declaration of Martin C. Galvin*, clarifying that only Mike Wagner and his

employees have been actually farming the land since the mid-1990s). Mike Wagner and his employees "have used the [Dirt Road]. . . when farming the [Galvin Property] for general farming practices. . . ." R. 121, ¶ 7. The record does not reflect how often Mike Wagner or his employees would use the Dirt Road for the purposes of "haul[ing] equipment and crops in and out every year," nor does it identify the type of equipment that was used on the Dirt Road. *See* R. 120–121.

In 1996, around the time when Mike Wagner first began farming the Galvin Property and Martin Galvin had personally stopped, the Galvins submitted an Applicant Intent Form to the Canyon County Planning and Zoning Commission ("PNZ") to begin the process of rezoning the Galvin Property from having two zoning categories of "Agricultural" and "Rural Residential" to having all of the property zoned as only "Rural Residential." *See* R. 153–170. The Galvins wanted to change the zoning and use of the Galvin Property "with the intent of developing a mixed use of golf course, rural residential lots, and perhaps potential hobby farms." R. 225, ¶ 4 (underlining added). In their Applicant Intent Form submitted in 1996, the Galvins expressed their clear intent to cease all farming operations on the Galvin Property in their answer to a question asking about changes to the use of the land. *See* R. 155, ¶ 9 (stating "[a]ll farm operations will stop and land will be converted to residential use.").

In a further attempt to assure the PNZ that they were in earnest with their plans, in January of 1997, the Galvins sent a letter to Jerry Jones at the PNZ expressing their intent for the Galvin Property. *See* R. 183. In that letter the Galvins stated that they had farmed the Galvin Property for "approximately 50 years" and that "due to health and age [he] no longer [had] the desire to farm." *Id.* In the same communication, Mr. Galvin represented that their "intent" was to convert the

Galvin Property from "260 acres of agriculture and dry grazing ground ... to approximately 120 lots and a [sic] 18 hole golf course." *Id.*

After the submission of the appropriate documents to the PNZ, the Galvins appeared at a number of hearings between December of 1997 and March of 1998 to get the Galvin Property rezoned. *See* R. 188–189. During these hearings, Patricia Galvin, one of the Respondents, was a Member of the Board of Canyon County Commissioners. *See* R. 191, 202, and 205. Patricia Galvin did not vote during the proceedings but had a clear understanding of the legal effect of her application for and subsequent granting of the Galvins' desired rezoning efforts. *See Id.* These hearings included at least four separate public hearings where the PNZ met with the Galvins and received testimony, requested additional information, or obtained additional information from the Galvins. *See* R. 188–191. Based largely upon the applications, forms, testimony, plans, and other items provided by the Galvins, the PNZ voted to "approve the requested comprehensive plan change (amendment), rezone and amendment to Canyon County Zoning Ordinance No. 97-001." R. 191.

On March 20, 1998, Canyon County Board of County Commissioners adopted and approved Ordinance No. 98-002 (the "Ordinance") per the Galvins' request and application, which amended Canyon County Zoning Ordinance No. 97-001. R. 204–213. The Ordinance went into effect on March 26, 1998. R. 205.

The passing of the Ordinance in March of 1998 was optimal for the Galvins and their planned development because it was prior to the actual irrigation season, which ran from "roughly April to October." *Compare* R. 225, ¶¶ 4–5, *with* R. 66, ¶ 6. After the economy and the Galvins'

financial situation did not permit them to immediately start development, the Galvins had sufficient time to hedge against potential financial loss by continuing the "sharecropping arrangement" with Mike Wagner, who continued to farm the Galvin Property. *Compare* R. 225, ¶¶ 4–5, *with* R. 121, ¶¶ 6–7.

While Mike Wagner farmed the Galvin Property under the purported "sharecropping arrangement" during the early 2000s, Hazel Robinson rented her land to various parties who used the Dirt Road for farming purposes. *See* R. 68, ¶ 14; *see also*, R. 90, ¶ 6. After Hazel Robinson's death in 2009, her property and the Dirt Road passed to Rand Sargent, her nephew, because her son had predeceased her. *See* R. 68, ¶ 15.

In late 2011 or early 2012, Phil and Michelle Allaire (the "Allaires") bought the Robinson land and the Dirt Road. *See Id.* at ¶ 16. Not long after the Allaires obtained ownership of the Dirt Road, the Allaires and the Galvins had a dispute regarding access to the Galvin Property including the Allaires filing criminal trespass charges. *See* R. 69, ¶¶ 18–20. As a result of the dispute, the Allaires put up a fence blocking access to the Dirt Road, preventing either the Galvins or Mike Wagner and his employees from using the Dirt Road. *See Id.* at ¶ 19; *see also* R. 121, ¶ 7. The Galvins did not file a lawsuit at that time asserting rights in the Dirt Road, but rather hired a surveyor to look at "ways to possibly move the drain ditch" that was located on the Galvin Property. *See* R. 69, ¶ 20.

The City came into possession of the Dirt Road when, in August of 2014, the Allaires gifted, via Warranty Deed, a fifty (50) foot strip of land which will be used by the City as a public right-of-way for future extension of the existing public road known as Willis Road. *See* R. 142–

143. Although the land was under the ownership of the City, the Allaires and their neighbors, Desiree and Nicholas Masterson (the "Mastersons"), entered into a license agreement which provides that the 50-foot strip of land will be used as a driveway and service road by the City, Allaires and Mastersons until construction of Willis Road is commenced. *See* R. 145–151.

(iii) Course of Proceedings:

Initial Pleadings

On June 28, 2016, the Galvins filed their Complaint claiming a prescriptive easement in a Dirt Road that came under ownership of the City. *See* R. 12–20. On July 27, 2016, the City filed its Answer denying the allegations contained in the Galvins' Complaint. *See* R. 21–29. Discovery between the parties commenced, wherein the City produced its documentation related to the rezoning application to the Galvins and which contained the statements made by the Galvins that they intended to cease all farming operations.

Summary Judgment Round One

On November 23, 2016, the Galvins filed their Motion for Summary Judgment, and provided their memorandum in support, and accompanying declarations and/or affidavits in support. *See* R. 30–95, 120–122. On motion for summary judgment, the Galvins argued that through the affidavits submitted to the court had satisfied all of the elements to obtain a prescriptive easement. The Galvins claimed that the use of the Dirt Road was open and notorious because the Galvins had disputes with the Robinsons regarding raspberry bushes that were to be planted on the Galvins' land, and the fact that they had used the Dirt Road. *See* R. 103–104. The Galvins further asserted that it was open and notorious because their friends and children always thought the road

was theirs. *See* R. 104. The Galvins claimed that their use was continuous and uninterrupted by using the road since 1949 to cut puncture vine, spraying, burning, trapping gophers, and repairing the road. *See Id.* The Galvins also argued that they built and maintained the Dirt Road. *See* R. 104–105.

The City filed its *Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment* on January 25, 2017. R. 123–136. The City argued among other things (1) that there was a material issue of fact as to whether the Galvins had abandoned any alleged prescriptive easement. *See* R. 128–130; (2) that the Galvins had not addressed the issue of whether they or their agents had reasserted any prescriptive rights post-1998. *See* R. 130–133; and (3) that the Galvins had failed to provide any evidence sufficient to establish a metes and bounds dimension for any alleged prescriptive easement in the Dirt Road. *See* R. 133.

In response to the City's objections raised in its opposition to summary judgment, the Galvins provided a reply memorandum, and provided additional affidavits from the Galvins and their attorney. *See* R. 214–232.

Oral Arguments on Summary Judgment Round 1

On January 18, 2017, the parties provided oral arguments to the court on the Galvins' Motion for Summary Judgment. In that hearing the Court acknowledged its concerns regarding the abandonment issue, whether the Galvins made any effort to re-obtain a prescriptive easement prior to the statutory change, and then further added concerns about the fact that the affidavits from the Galvins did not provide clear dates regarding farming or not farming. *See* Tr. pp. 19–21. The Court stated that "I am not willing or in a position to grant summary judgment because of that at

this time." Tr. p. 20, L. 23–24. The district court concluded that it was "concerned about the abandonment issue, [and] facts surrounding the abandonment issue." Tr. p. 29, L. 22–24.

Summary Judgment Round 2

Pursuant to the first oral arguments, on February 3, 2017, the City submitted its *Supplemental Memorandum in Opposition to Summary Judgment* pointing to at least eleven (11) distinct acts related to the rezoning of their property that could individually or collectively be sufficient to establish abandonment. *See* R. 237–241. Additionally, the City argued that no facts existed as it relates to potentially restarting the prescriptive easement period after the 1998 rezoning ordinance enacted at the Galvins' request. *See* R. 241–243.

On February 8, 2017, the Galvins submitted their *Supplemental Brief in Support of Motion for Summary Judgment*, accompanied by affidavits of Cathy Skidmore and a *Third Supplemental Declaration of Martin Galvin*. *See* R. 245–278. The Galvins' brief argued that the burden was on the City to support the affirmative defense, and that the City had only alleged one fact (that the Galvins had "applied for and obtained approval to rezone their property to construct a 120-lot subdivision and golf course"). *See* R. 249. The Galvin argument pointed to the third affidavit of Martin Galvin and stated there was no intent to abandon the easement. *See* R. 250. The Galvins' brief further argued that there were no acts to show abandonment because the land continued to be irrigated, Mike Wagner continued to farm the land, and that the Galvins continued to use and maintain the ditch for repair purposes. *See* R. 250–251. Finally, the Galvins argued that their affidavit statements were sufficient to provide a metes and bounds for the scope of the easement. *See* R. 252. Interestingly, Mr. Galvin's third affidavit was the first introduction of any facts even

remotely related to the dimensions (i.e. width) of the alleged prescriptive easement in the Dirt Road. *See Id.*

On February 10, 2017, the Galvins provided additional opposition briefing. *See* R. 279–286. On February 16, 2017, the City provided supplemental questions of fact regarding the easement based upon the affidavits provided by the Galvins on February 8, 2017. *See* R. 287–294. The City objected to the inaccurate burden shifting and standard that the Galvins were arguing while on Summary Judgment. *See* R. 289–290. The City also argued that the additional affidavits submitted raised questions of fact as to whether C&G Inc. or the Galvins owned the Galvin Property during the alleged prescriptive period. *See* R. 292. The City argued that intent to stop farming was conceded by the Galvins in their briefing (and third supplemental declaration of Galvin), and that a trial was necessary for the sake of cross-examining, establishing credibility of witnesses, and to give the City its day in court. *See* R. 292–293.

Oral Arguments on Summary Judgment Round 2

On February 23, 2017, the district court continued the summary judgment hearing from January. *See* Tr. pp. 31–41. The Galvins summarily dismissed the requirement of the Galvins to prove successor in interest questions, and the district court did not address it. *See* Tr. pp. 31–33. The City argued that, in fact, issues raised in prior briefing had not been adequately put to rest, and that it should have its day in court. *See* Tr. pp. 34–38. After oral arguments concluded, the district court stated, "I'm not sure whether [the act of asking for a zoning change] is sufficient to meet the requirements of abandonment." Tr. p. 41. The district court took the matter under advisement. *See Id.*

Written Order on Summary Judgment

On March 6, 2017, the district court issued its written Order Granting Plaintiff's Motion for Summary Judgment. *See* R. 295–305. In that decision, the district court cited to case law which says that abandonment is a question of intent coupled with corresponding conduct. *See* R. 301. The district court then weighed the evidence and concluded that there was "no abandonment of the easement." *Id.* The district court, despite having concerns during both oral argument hearings regarding the question of abandonment, granted attorneys' fees and costs under I.C. § 12-117, finding that the City had acted "without a reasonable basis in law or fact." *See* R. 303–304. The district court did not provide an analysis as why the City's defense of abandonment was frivolous other than to point to the fact that it had weighed the factual evidence surrounding the abandonment analysis and found that no abandonment had occurred. *See* R. 300–301 (referencing R. 298). The district court's order did not address the physical metes and bounds of the prescriptive easement. *See* R. 295–305.

On March 6, 2017, the district court also issued its initial Judgment in this matter, quieting title in "the road." *See* R. 306–307. The Judgment lacked any description or physical delineation of metes or bounds. *See Id.*

Motion to Reconsider & Attorneys Fees/Motion to Disallow Costs First Motion to Amend Judgment

On March 20, 2017, the parties filed multiple pleadings. The City filed its motion for reconsideration and supporting memorandum arguing that the district court's entry of attorneys' fees was not supported by the record. *See* R. 308–321. The City's motion also requested

reconsideration whether material issues of fact existed regarding abandonment and whether there was sufficient evidence in the record to fix the dimensions of the prescriptive easement. *See* R. 312–317.

Also, on March 20, 2017, the Galvins submitted their affidavit of costs for attorneys' fees and a *Motion to Alter or Amend Judgment*, R. 340 and a proposed judgment seeking to include a survey of the prescriptive easement area. R. 367. Without giving the City an opportunity to be heard, the district court signed the Amended Judgment on March 21, 2017. R. 367–371. On April 13, 2017, the City filed its opposition to the Galvins' motion to amend the judgment arguing that the entry of the amended judgment violated its due process rights, and pointing out that the legal description was not in evidence during summary judgment. *See* R. 372–376.

On April 25, 2017, the Galvins filed a reply brief in support of the Motion to Alter or Amend Judgment, arguing that the City was not prejudiced by the entry of the post-judgment legal description, and that the district court had sufficient evidence before it, but may have forgotten the technicalities of a description. *See* R. 399–405.

On April 27, 2017 a hearing was held on the City's motion for reconsideration and disallowing of costs and attorneys' fees and further addressed the Galvins' *Amended Judgment*. *See* Tr. pp. 42–62. During that the district court denied the City's motion reaffirming its decision that the Galvins had a prescriptive easement, but recognizing that the court did not have sufficient evidence to set forth the character width and location of the easement:

> **Court**: Now, Mr. Villegas, I do think and given the case law that's cited once I found there's an easement, I needed to find evidence with regard to the extent of that easement and how wide, how long, where it began, where it ended. I think that is necessary to be put on

there. I did sign the amended judgment on the basis of plaintiff's submission to the Court on that. However, I think that there was not evidence for the Court to reach that presented during the summary judgment arguments, and I think that the [City] may very well have a right to contest the metes and bounds description of that.

See April 27, 2017 hearing, Tr. p. 57, L. 22 thru p. 58, L. 9 (underlining added). In a discussion between the Galvins' attorney and the district court regarding whether the Galvins evidence on summary judgment was sufficient to allow the survey in, the district court explained:

> **Court**: The problem the Court runs into is I did an amended judgment incorporating that when there was no evidence on it, and I do think that was probably not the right thing to do. I mean, there is evidence on what was basically needed, but the city never got a chance to address that evidence. And that's the extent.
>
> **Mr. Magnuson**: Well, the evidence -- so I guess my motion to alter or amend was basically saying that all the evidence was actually before the Court on summary judgment, and I think if you look at the affidavits, there was --
>
> **Court**: But the metes and bounds description wasn't. This Court is certainly not an expert in determining metes or bounds. I'm giving the city a chance to object to that and present it if they feel it was inappropriate.

See April 27, 2017 hearing, Tr. p. 61 L. 4–20.

The district court gave the City an opportunity to challenge the legal survey attached to the Galvins' amended judgment. The City filed its *Defendant's Notice of Intent to Dispute Legal Description* on June 8, 2017, R. 446, disputing the length and the width of the easement that the Galvins' survey provided. Although the Galvins ultimately chose to accept the City's dimensions by filing a *Motion to Enter Order Regarding Legal Description of Easement and Enter Second Amended Judgment*, R. 450, this did not eliminate the fact that the City presented a triable issue of fact for trial. In fact, the Galvins' attorney stated that the Galvins were not conceding or agreeing that the City's dimensions were correct. *See* Tr. p. 94, L. 9–11.

Second Motion to Amend Judgment

On August 3, 2017, the Galvins filed a motion to enter an order on dimensions and to provide a second amended judgment with accompanying survey. The Galvins submitted a declaration from their attorney in support of the motion. *See* R. 450–470. The Galvins also provided a notice of the hearing on the same date. *See* R. 471–472.

On August 17, 2017, the City responded to the Galvins' motion by arguing that if the Galvins were willing to accept the City's proposed dimensions and acknowledge that there was a genuinely triable fact before the district court, then no evidentiary hearing would be required. The City did so because it was relevant to the issue of whether the City defended this case frivolously *See* R. 473–477.

On August 22, 2017, the Galvins filed a Reply to the City's opposition on legal description, and stipulated to the City's survey, despite previously asserting they would adamantly oppose any attempt by the City to refute the twenty feet width from the affidavits they had provided. *Compare* R. 478–482, *with* Tr. pp. 73–74.

On August 24, 2017, the parties attended a hearing to address the issue of the dimensions of the easement found by the district court. *See* Tr. pp. 79–95. At the hearing the Galvins conceded the dimensions per the City's proposed description. *See* Tr. pp. 85–86. The City argued that even though the Galvins were willing to accept the City's proposed dimensions, it did not change the fact that there was a genuine issue of material fact that was disputed prior to the court ruling on summary judgment. The City pointed out that but for the City's objection, the district court would have signed off on an easement that (as a matter of law) could not exist because it extended into a

public roadway. *See* Tr. p. 87, L. 18 thru p. 88, L. 19. Based upon the statements of the parties in briefing and oral arguments, the district court entered a finding regarding the dimensions of the easement. *See* Tr. pp. 83–89. The Galvins stated for the record that while they were "agreeable to enter into the dimensions," they did not "agree that [the City] [was] right on their dimensions." *See* Tr. p. 94. Importantly, the court stated "I do find that the case was frivolously defended, at least to certain aspects. It certainly was not frivolously defended as to the dimensions of the easement." Tr. p. 91, L. 3–6. The district court then gave the City and the Galvins the opportunity to brief the question as to attorney fees. *See* Tr. pp. 93–94.

On October 3, 2017, the district court issued its written Memorandum Decision and Order Regarding Costs and Attorney's Fees. *See* R. 508–520. In that written order, the district court ignored its findings during the hearing of August 24, 2017 that it was "not frivolous" for the City to protest the dimensions of the easement, and also ignored the Galvins' statement that they did not agree that the City's dimensions were right. *Compare id.*, *with* Tr. p. 91, L. 3–6, *and* Tr. p. 94, L. 5–11.

On October 3, 2017, the district court entered its Second Amended Judgment attaching the City's survey and dimensions. *See* R. 521–525.

On November 14, 2017, the City filed its Notice of Appeal in this matter. *See* R. 546–553.

On November 21, 2017, the district court issued its Order for Attorney Fees and Costs, awarding the Galvins attorneys' fees based upon the frivolous standard of Idaho Code § 12-117. *See* R. 554–563. The district court concurrently issued a Judgment on Award of Attorney Fees in the amount of $50,124.72. *See* R. 564–565.

ISSUES PRESENTED ON APPEAL

A. Did the District Court err in finding that no material issue of fact existed regarding the issue of abandonment?

B. Did the District Court err in awarding attorney fees to the Plaintiffs?

C. Is the City entitled to an award of attorney fees on appeal?

ARGUMENT

I. Standard of Review

In an appeal from an order granting summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 578, 329 P.3d 356, 360 (2014). That is, all disputed facts are to be construed liberally in favor of the non-moving party, and likewise all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Id.* This Court exercises free review over questions of law. *Id.* Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

This Court liberally construes all disputed facts in favor of the nonmoving party and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

II. The District Court Erred In Granting Summary Judgment.

The district court granted the Galvins' motion for summary judgment finding that the Galvins did not abandon their prescriptive easement. *See* R. 297. The district court however erred by focusing its analysis on summary judgment whether the City presented evidence proving that the Galvins had in fact abandoned the easement. As the non-moving party on summary judgment, the City's burden was to establish that genuine issues of material facts existed that precluded summary judgment. The City was not required at the summary judgment phase to prove by clear and convincing evidence that the Galvins had in fact abandoned the easement.

Law Regarding Abandonment

The issue of abandonment goes to present intent to abandon, which is defined as an intent "...to leave, quit, renounce, resign, surrender, relinquish, vacate, discard. Abandon denotes the absolute giving up of an object, often with the further implication of its surrender to the mercy of something or someone else." *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009, 1011–12 (1944) *quoting* Webster's New Internat'l. Dictionary, 1941. "Whether abandonment has occurred is a question of fact." *Mortensen v. Berian*, 163 Idaho 47, 408 P.3d 45, 49 (2017). To show abandonment of a property right such as an easement, one must prove an intention to abandon and must be evidenced by a clear, unequivocal and decisive act of the party abandoning the property right. *Perry v. Reynolds,* 63 Idaho 457, 464, 122 P.2d 508, 510 (1942); *O'Brien v. Best*, 68 Idaho 348, 357, 194 P.2d 608, 613 (1948). "Abandonment is a matter of intent, coupled with corresponding conduct; thus a question of fact." *O'Brien v. Best*, 68 Idaho 348, 357, 194 P.2d 608, 613 (1948).

1. Material issues of fact exist regarding Galvins' "intent" to abandon which should have precluded summary judgment.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). "It is well established that the non-moving party is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts." *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991) *citing Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). In other words, all disputed facts are to be construed liberally in favor of the non-moving party opposing the motion, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Avila v. Wahlquist,* 126 Idaho 745, 747, 890 P.2d 331, 333 (1995); *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 578, 329 P.3d 356, 360 (2014). On appeal, this Court has likewise held that it "will construe the record in the light most favorable to the party opposing the motion for summary judgment, drawing all reasonable inferences in that party's favor." *Wesco Autobody Supply, Inc. v. Ernest*, 149 Idaho 881, 890, 243 P.3d 1069, 1078 (2010).

"The burden of the [non-moving party] when faced with a motion for summary judgment, is not to persuade the judge that an issue will be decided in his favor at trial. Rather, he simply must present sufficient materials to show that there is a triable issue." *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991) *quoting Earl v. Cryovac, a Div. of W.R. Grace*, 115 Idaho 1087, 1093, 772 P.2d 725, 731 (Ct.App.1989), citing 6 J. MOORE, W. TAGGART & J.

WICKER, MOORE'S FEDERAL PRACTICE § 56.11(3), at pp. 56–243 (2d ed. 1988). "If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied." *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991) *citing Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982); *Farmer's Ins. Co. of Idaho v. Brown*, 97 Idaho 380, 544 P.2d 1150 (1976).

In the *G & M Farms* case, a purchaser of irrigation equipment appealed the district court's partial grant of summary judgment against two co-defendants finding that the purchaser's intentional and negligent misrepresentation claims failed to establish a prima facie case supported by clear and convincing evidence. This Court reversed the district court's grant of summary judgment noting that "it is not the trial court's function to weigh the evidence, but to determine whether there is a genuine issue for trial." *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). The *G & M Farms* Court held that statements made by the merchant to the purchaser raised genuine issues of material fact as to whether the statements were false.

> In construing the evidence in the record most favorable to G & M Farms, and giving it the benefit of all favorable inferences which may be drawn therefrom, there is ample evidence for summary judgment purposes to support each element of the prima facie case necessary for the theory of intentional misrepresentation. In our view of the record, reasonable minds could easily differ regarding these factual issues. We conclude that genuine issues of material fact exist regarding G & M Farms' claim that Lindsay Manufacturing and DeKalb Agresearch failed to disclose material information regarding the Generation II lateral move irrigation system prior to the purchase of the system by G & M Farms. We reverse the trial court's grant of summary judgment against the defendants Lindsay Manufacturing and DeKalb Agresearch on this issue and remand for trial.

G & M Farms v. Funk Irr. Co., 119 Idaho 514, 525, 808 P.2d 851, 862 (1991)

In this case, the City argued on summary judgment that material issues of fact existed

whether the Galvins intended to abandon the prescriptive easement when the Galvins sought to rezone their property from agricultural to a subdivision and golf course. The district court held:

> It is uncontested that when applying for a rezone of the property to Rural Residential in 1996-1997 the Galvins indicated that due to their advancing age they wished to develop their farming property into a golf course and residential community. They sought authority to develop it by seeking a zoning change to classify the property as "rural residential." They ultimately were successful in obtaining a change in zoning. However, they never committed any further act to proceed with the development of the property.
>
> At most, the act of applying for a zoning change indicated that Galvins had a plan for future changes in the use of their property which could potentially end their use of the easement. There was never any change in the use of their farming property and they continued to use the Road as they had done since 1949. The request for a zoning change of their farming property, in and of itself, does not demonstrate an intent to immediately abandon the appurtenant easement. They likewise failed to engage in any act demonstrating abandonment. The Court finds there was no abandonment of the easement.

Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment, pg. 7; (R. 297) (underlining added).

The district court erred by improperly shifting the burden of proof on summary judgment to the City to prove by clear and convincing evidence that the Galvins had in fact abandoned the easement. The district court made an ultimate conclusion of law in its *Memorandum Decision* regarding the Galvins' intent to abandon when the court concluded, "[t]he Court finds there was no abandonment of the easement," (R. 297). The district court repeated its legal conclusion in its discussion on attorney fees, "The Court has further found that the Galvins never abandoned the easement." (R. 299). Those conclusions demonstrate that the district court improperly weighed the evidence in contravention of this Court's holding in *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 808 P.2d 851 (1991), that a court is supposed to determine whether a genuine issue for trial exists.

The requirement that the City prove that the Galvins did not intend to abandon the easement is simply not the standard for the City to meet on summary judgment as the non-moving party.

For purposes of summary judgment, the City submitted sufficient evidence to establish the existence of material facts whether the Galvins abandoned the easement. It was not merely just the act of the Galvins applying for a rezone that raised material issues of fact, but rather it was the evidence the City submitted regarding the specific conduct the Galvins undertook to get the rezone approval over the course of two years culminating in a new protectable property right.

The Galvins initially submitted their Application for Zoning Amendment, dated August 19, 1996 requesting a conditional use permit and planned unit development. *See* **Exhibit D** to *Villegas Affd.* R. 171–179. Next, the Galvins submitted **a second** Application for Zoning Amendment or Conditional Use Permit seeking conditional use permit, comprehensive plan change and rezone which was received on or about April 23, 1997. *See* **Exhibit E** to *Villegas Affd.* R. 180-181. As part of the application process the Galvins also submitted a letter of intent dated January 14, 1997 to Jerry Jones at the Canyon County Planning and Zoning stating:

> Mr. Jerry Jones:
>
> My intent is to convert 260 acres of agriculture and dry grazing ground that borders the north boundary of the city limits of Middleton to approximately 120 lots and a 18 hole golf course.
>
> The lots could all be serviced by Middleton City sewer and water; the golf course could remain in Canyon County.
>
> This ground has been in my family for approximately 122 years I've farmed here for approximately fifty years and due to my health and age I no longer have the desire to farm and I feel this will be a good transition for the city of Middleton and the surrounding area.

R. 183 (underlining added). In addition to Mr. Galvin's letter to Canyon County, Galvins' *Applicant Intent Form* contained the following answer to a question:

> 9. What changes to the use of land are proposed?
>
> All farm operations will stop and land will be converted to residential use.

See **Exhibit C** to *Villegas Affd.* at p. 3, ¶ 9, R. 155 (underlining added). The record on summary judgment shows that Martin Galvin and Pat Galvin both testified at the public hearing on their application. *See* R. 187. The Galvins hired a surveyor, Mr. Pavelek of Tealy's Land Surveying who also testified in support of the Galvins' application. *See* ¶ 1 of *Findings*, R. 190.

The conduct identified above, viewed in the light most favorable to the City indicates that Mr. Galvin had the present intent to no longer farm his property and is the reason that persuaded Canyon County to make a specific finding of fact that "Martin Galvin has farmed the land for approximately fifty (50) years and is no longer able to farm the land." *See* **Exhibit G** to *Villegas Affd.*, R. 197. Based on Mr. Galvin's representations, Canyon County ultimately granted the Galvins: (1) a Comprehensive Plan amendment; (2) a rezone from agricultural to rural residential; and (3) a zoning ordinance amendment. R. 201.

Reasonable minds might reach different conclusions whether Mr. Galvin no longer needed the easement because he was giving up farming his land. This Court has held that "the acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been rendered impossible by some act of the owner thereof, or some other unequivocal act showing an intention to permanently abandon and give up the easement." *O'Brien v. Best*, 68 Idaho 348, 357–58, 194 P.2d 608, 613–14 (1948) (underlining added); *see also*

Chatham v. Blount Cty., 789 So. 2d 235, 241 (Ala. 2001) (Alabama Supreme Court held that owner of an express easement as a railroad right-of-way had abandoned easement when the owner sold the rails, crossties, and track material, rendering impossible the use of the easement as a railroad right-of-way or for railroad purposes).

Throughout this lawsuit, Mr. Galvin testified that he used the easement for "agricultural" pursuits such as hauling crops, clearing ditches and checking water. *See Galvin First Declaration* ¶ 6, R. 66, *Galvin Supplemental Declaration* ¶¶ *6-7,* R. 225. Converting his land to a golf course and 120 residential homes would certainly render the use of the easement for agricultural pursuits impossible. Viewed in a light most favorable to the City, the facts show that the Galvins, at the time of the rezone application, were ready to proceed with building the golf course and had no intention to continue farming. Mr. Galvin admitted in his *Supplemental Declaration* that he "intended" to develop a subdivision and golf course. *See Galvin Supplemental Declaration* ¶ 4, R. 225. Since a party's "intent" is a question of fact, the district court should have denied the Galvins' summary judgment.

2. The District Court erred in concluding that Canyon County's grant of Comprehensive Plan Amendment and Rezone were not sufficient to meet the "further acts" requirement of abandonment.

Without giving the City the benefit of all reasonable inferences on summary judgment regarding Galvins' acts during the rezone, the district court made a legal conclusion that the Galvins did not abandon the easement. R. 301. That legal conclusion was based on the court's finding that after the Galvins received approval to rezone their property they "never committed

any further act to proceed with the development of the property." *See Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment*, pg. 7; R. 301. As a result, the district court also concluded, "[The Galvins] likewise failed to engage in any act demonstrating abandonment. The Court finds there was no abandonment of the easement." *Id.*

The district court erroneously overlooked the significance of the grant/approval of the rezone and comprehensive plan amendment. It is the City's position that the Galvins' conduct discussed above detailing the purposeful steps they took to obtain zoning and comprehensive map approval not only speaks to raising questions of fact on their "intent" to abandon, it also raises a mixed question of fact and law that whether the "further acts" element was met once they received final approval. This Court has held that abandonment happens at the moment the act to abandon occurs. *See Weaver v. Stafford*, 134 Idaho 691, 8 P.3d 1234 (2000) (overruled on other grounds). On the date the requested Comprehensive Plan change/amendment and zoning ordinance was passed, the Galvins completed their clear, unequivocal and decisive act to abandon the easement.

In the *Weaver* case, the Idaho Supreme Court addressed whether respondent, Mr. Stafford, held a prescriptive easement to a dirt irrigation ditch that he had filled in, and was claiming a continuing prescriptive easement to. Mr. Stafford had filled in the ditch, and he was attempting to assert the legal argument that even though it had been filled in he should be able to re-excavate the original ditch based upon his own interpretation of the metes and bounds description in his warranty deed. *See Id.* at Idaho 698, P.3d 1242. Stafford claimed a prescriptive easement to an irrigation ditch because his property had historically used it for the purposes of irrigation where the ditch ran along the parties' property line. *See Id.* at Idaho 694–95, P.3d 1237–38.

Noting the findings of fact from the trial court, the *Weaver* Court noted that at some time between the fall of 1994 and the spring of 1995, Stafford had removed an existing fence and filled in the dirt ditch that had run along the property lines. *See Id.* at Idaho 694, P.3d 1237. Stafford then erected a new fence in the fall of 1995, and eventually in 1997 dug a new dirt ditch roughly following the line of the new fence. *See Id* at Idaho 695, P.3d 1238. On appeal, Stafford argued that he had a prescriptive easement in the original dirt ditch that ran along the property line. *See Id.* at Idaho 698, P.3d 1241. Reciting the findings relevant to prescriptive easement, the *Weaver* Court addressed Stafford's argument by first affirming the findings of the lower court, and further noting that the testimony provided by Stafford and others regarding the existence of a prescriptive easement were insufficient to establish a prescriptive easement. *See Id.* Then, the *Weaver* Court then analyzed the facts assuming that Stafford had, in fact, established a prescriptive easement to the ditch in the past. *See Id.* Upon consideration, the *Weaver* Court held that even if it were to assume that a prescriptive easement to the dirt ditch existed, there was evidence in the record that Mr. Stafford had "filled in the original dirt ditch in the fall of 1994." *Id.* The *Weaver* Court further concluded that "Stafford's act is sufficient to abandon any prescriptive easement which may have existed in the dirt ditch." *Id.* at Idaho 698, P.3d 1241.

It is notable that the Supreme Court in the *Weaver* case did not consider the subsequent acts that Stafford had taken, nor did it even consider what Stafford was intending to do in the future by digging a new ditch along the property line. The *Weaver* Court simply looked at the testimony of Stafford and determined that Stafford's act in 1994 was sufficient to establish the immediate abandonment of any assumed prescriptive easement. *See Id.* In other words, abandonment of a

prescriptive easement occurs the moment the holder of any prescriptive easement makes "a clear, unequivocal and decisive act." *See Id.* (citing *Perry v. Reynolds*, 63 Idaho 457, 464, 122 P.2d 508, 510 (1942) (citing *Sullivan Constr. Co. v. Twin Falls Amusement Co.*, 44 Idaho 520, 526–27, 258 P. 529, 530–31 (1927))).

There is a genuine issue of material fact as to whether the Galvins have abandoned their easement when they applied for and obtained approval to rezone of their property to construct a 120-lot subdivision and golf course. Just like Mr. Stafford in the *Weaver* case, Martin and Patricia Galvin took several "clear, unequivocal and decisive act[s]."

In this case, as soon as Canyon County amended its Comprehensive Plan and simultaneously amended its zoning ordinance to rezone the Galvins' property to rural residential analogous to Mr. Stafford filling in the ditch with dirt--evidencing a present immediate intent to abandon farming activities and thereby destroying the purpose for the easement.

It is undisputed that the Galvins submitted an application on April 23, 1997 to Canyon County seeking to rezone their property from Agricultural to Rural Residential. *See* **Exhibit E** to *Villegas Affd.*, R. 183. As part of the application process, Mr. Galvin wrote to the Canyon County Planning and Zoning stating that his intent is to "convert 260 acres of agricultural and dry grazing ground...to approximately 120 lots and a 18 hole golf course." *See* **Exhibit F** to *Villegas Affd.*, R. 183-186. Importantly, Mr. Galvin states in a letter to Canyon County, that he no longer desired to farm his land:

> This ground has been in my family for approximately 122 years I've farmed here for approximately fifty years and due to my health and age I no longer have the desire to farm and I feel this will be a good transition for the city of Middleton and the surrounding area.

Id. (underlining added). The Galvin application even stated that "[a]ll farm operations will stop and land will be converted to residential use." *See* **Exhibit C** to *Villegas Affd.* at p. 3, ¶ 9, R. 155. Canyon County entered its Findings of Fact and Conclusions of Law granting the rezone and conditional use permit for the golf course. In its Findings and Conclusions, Canyon County made a specific finding that "Martin Galvin has farmed the land for approximately fifty (50) years and is no longer able to farm the land." *See* **Exhibit G** to *Villegas Affd.*, R. 197.

The Galvins argued that the prescriptive easement they own is related to their farming operations (i.e. agricultural use). Martin Galvins' affidavit in support of summary judgment states that he used the disputed roadway to check water during irrigation. *See Galvin Affidavit* ¶ 6, R. 66. Mr. Galvin testifies that he drove his wheat trucks over the road that he calls his "agricultural right-of way road." *See Galvin Affidavit* ¶¶ 11-12, R. 67-68. Thus, when the Galvins applied for and received approval to rezone their agricultural use to a residential subdivision and golf course, this acted as an unequivocal act to abandon the prescriptive easement. The Galvins unequivocally stated that "[a]ll farm operations will stop and land will be converted to residential use." The Galvins actions are analogous to Mr. Stafford's filling in the ditch. However, the Galvins "filling in their ditch" took approximately two years to get their land rezoned. Viewing the facts in a light most favorable to the City, as the non-moving party, the Galvins two-year, purposeful actions to rezone their property from an agricultural use into a residential subdivision and golf course demonstrated their intentional act to abandon the prescriptive easement.

III. The District Court Erred Granting Attorney Fees.

The District Court awarded the Galvins' attorney fees and costs finding that the City's defense of this case was without basis in fact or law. R. 514. If this Court reverses the district court's grant of summary judgment, the issue of attorney fees would not be ripe as the determination of prevailing party would not be established yet. If, however, this Court affirms the district court's grant of summary judgment, the City submits that the district court erred in awarding attorney's fees and costs to the Galvins under Idaho Code § 12-117 because the City had both a reasonable basis in fact and a reasonable basis in law in defense of this lawsuit.

Under Idaho Code 12-117 attorney fees are awardable against a governmental entity if the prevailing party shows that the governmental entity acted without a reasonable basis in fact or law. I.C. § 12-117. Idaho appellate courts have equated the quoted language from § 12-117 to mean the same as the frivolous standard of Idaho Code § 12-121. "The standard for awarding attorney fees under Idaho Code section 12–121 is essentially the same as that under Idaho Code section 12–117." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 387 P.3d 761, 778–79 (2015). "This Court has stated that '[b]oth I.C. § 12–117 and § 12–121 permit the award of attorney's fees to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation.' *Nation v. State, Dep't of Correction,* 144 Idaho 177, 194, 158 P.3d 953, 970 (2007)." *Id.*

This Court reviews the district court's grant of attorney fees predicated on I.C. § 12–117 on an abuse of discretion standard. *Buckskin Properties, Inc. v. Valley Cty.*, 154 Idaho 486, 490, 300 P.3d 18, 22 (2013). "An award of attorney fees and costs is within the discretion of the trial

court and subject to an abuse of discretion standard of review." *Smith v. Mitton*, 140 Idaho 893, 901, 104 P.3d 367, 375 (2004). To determine whether the district court abused its discretion, this Court evaluates whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason. *Inclusion, Inc. v. Idaho Dep't of Health & Welfare*, 161 Idaho 239, 240, 385 P.3d 1, 2 (2016) *quoting Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003).

In this case, the district court awarded attorney fees against the City finding that the City acted without a basis in law or fact in three separate holdings; first in its *Order Granting Plaintiff's Motion for Summary Judgment* (R. 295), *Memorandum Decision and Order for Attorney Fees and Costs* (R. 518) and once lastly in its *Order for Attorney Fees and Costs* (R. 554). At the summary judgment level, the district court's reasoning for awarding attorney fees against the City focused on the fact that the City lost on summary judgment and because the City granted a license to the Allaires to use the road without granting a similar license to the Galvins:

> In this case, the Galvins have established by clear and convincing evidence that they long ago established a prescriptive easement in the Road, which they have continuously used for nearly seventy years. The Court has further found that the Galvins never abandoned the easement. The Court has found that the City purchased the land from an adjacent landowner, the Allaire family-and have deprived Plaintiffs of access to their easement. The City then granted the Allaires a license to continue using the Road, to the exclusion of the Plaintiffs. The City has also maintained a fence that blocks Plaintiffs from using the Road. In short, the City deprived Plaintiffs of their established right of access to the Road. While the City has asserted facts it believes support its claims, for the reasons stated above those claims are without merit. These facts have led the Court to conclude that the City acted without a reasonable basis in law or fact. Plaintiffs, who had to use the Court system to enforce their right to use the Road against the City, have borne an unfair and unjustified financial burden. Accordingly, this Court,

> in its discretion, will award Plaintiffs attorney fees pursuant to Idaho Code section 12-117.

Order Granting Plaintiff's Motion for Summary Judgment, R. 303–304. The district court also found that the City's defense was frivolous because the City:

> (1) failed to acknowledge evidence of historical use and notice of the easement prior to the action;
>
> (2) failed to acknowledge the evidence of the Galvins' continuous use while arguing abandonment;
>
> (3) failed to present any evidence of the easement's dimensions prior to or at summary judgment stage in spite of the Galvins' request for twenty feet to accommodate a combine header; and
>
> (4) offered the Galvins description including a sixteen-foot width instead of twenty, then refused to allow the Galvins to stipulate to such.

See Memorandum Decision and Order for Attorney Fees and Costs (R. 518) and *Order for Attorney Fees and Costs* (R. 559).

1. There was a reasonable basis in fact for the City's defense.

Based on the totality of the facts before it, the City could not just simply grant the Galvins an express easement over the road. The undisputed evidence presented during summary judgment showed that prior to the Allaires owning the property that contained the roadway, Delno and Hazel Robinson owned it. *See Declaration of Martin Galvin* ¶ 8 (R. 66). Delno and Hazel Robinson built their home on the subject property sometime in 1967/1968. *Id.* at ¶ 9 (R. 67). It was during the period of ownership by Delno and Hazel Robinson that Mr. Galvin asserted he began his prescriptive right against them. The problem for the City was Delno Robinson died in 1977 and Hazel Robinson died in 2009. *Id.* at ¶ 13 and ¶ 15 (R. 68). The Robinsons' son predeceased his

parents. *Id.* at ¶ 15 (R. 68). This lawsuit was filed in 2016, several years after Delno's and Hazel's death. Had the Robinsons been alive at the time the lawsuit was filed, the City could have taken steps to verify the Galvins' allegations, but unfortunately that was not the case.

It is undisputed that the Galvins had an argument with the Allaires over the use of the road. *See Galvin Affd.* ¶ 20, (R. 69). Yet, instead of filing an action against the Allaires to quiet title to establish a prescriptive easement, the Galvins hired a surveyor to look at "ways to possibly move the drain ditch" that was located on the Galvin Property. *Id.* Those facts above, coupled with Mr. Galvin's representations that he no longer desired to farm his land and the ultimate rezone of the property to turn it into a golf course, raised legitimate concerns with the City whether Galvin truly had established and maintained a prescriptive easement. This Court has held that "[p]rescription acts as a penalty against a landowner and thus the rights obtained by prescription should be closely scrutinized and limited by the courts." *Gibbens v. Weisshaupt*, 98 Idaho 633, 638, 570 P.2d 870, 875 (1977). Since the creation of a private easement by prescription is not favored under Idaho law, and since the City is the steward of the public's money and property, the City had no choice but to go through a judicial process whereby the Galvins would have to present clear and convincing evidence under oath that they established and currently maintained a prescriptive easement.

2. There was a reasonable basis in law for the City's defense.

a) The City's defense raising abandonment was not frivolous.

The City's defense of abandonment was not frivolous. Although the district court reached a

conclusion that there was no abandonment in this case, the City raised a legitimate defense of abandonment based on the conduct of the Galvins during their application and successful attempt to rezone their property to a golf course. Mr. Galvin wrote to the Canyon County Commissioners:

> This ground has been in my family for approximately 122 years I've farmed here for approximately fifty years and due to my health and age I no longer have the desire to farm and I feel this will be a good transition for the city of Middleton and the surrounding area.

See **Exhibit F** to *Affidavit of Victor Villegas In Support Of Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment* (R. 183). The Galvin application even stated that "[a]ll farm operations will stop and land will be converted to residential use." *See* **Exhibit C** to *Villegas Affd.* at p. 3, ¶ 9 (R. 155). The City's abandonment defense was certainly strong enough to cause concern for the district court, preventing it from granting summary judgment. The district court noted this concern on the record multiple times:

> **Court**: In the meantime, I'm just struggling with the abandonment issue. I think plaintiffs have clearly shown evidence that a prescriptive easement was established probably from the 1940s or early '50s through 1998 with the use of the property. I don't think there's any questions of fact with regard to that as the record sits here before me. And then I also have some concerns on the abandonment issue, but I'm not sure that where it does turn on intent, plaintiffs submitted an application where he indicated he intended to quit farming that land and develop it, there may be an issue there with regard to whether or not that was actually accomplished with a necessary intent coupled with clear and decisive acts are both present to constitute abandonment. (Tr. p. 19, L. 5-20).

...

> **Court**: I seriously considered whether or not to grant summary judgment to the plaintiffs because I think, even given the burden of proof on here, plaintiffs have made a fairly significant showing, but I do have the concerns about the abandonment. (Tr. p. 23, L. 11-15).

Whether the City could prevail on its affirmative defense of abandonment by clear and convincing evidence on summary judgment is not the standard for determining frivolousness. The district court did not give an adequate explanation or analysis why the City's defense of abandonment was frivolous and therefore it was an abuse of discretion. As this Court will see, the district court's *Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment* (R. 295), as well as the *Memorandum Decision and Order for Attorney Fees and Costs* (R. 518) and *Order for Attorney Fees and Costs* (R. 559) all fail to explain why the City's abandonment defense was frivolous. Therefore, attorneys fees should not have been awarded.

b) Defense regarding the dimensions of the easement was not frivolous.

The City also had a reasonable basis in fact and law (i.e., was not frivolous) to defend this case based on this Court's holdings that require a court to take evidence of a prescriptive easement's dimensions and ensure that the judgment contains an adequate description of the easement's dimensions. "A judgment determining the existence of an easement across the land of another must set forth the location, width, and length of the easement in order that conflicts between landowners may be avoided." *See Bedke v. Pickett Ranch & Sheep Co.*, 143 Idaho 36, 40, 137 P.3d 423, 427 (2006) (case remanded back to district court to make findings as to the precise location of an easement).

On summary judgment, one of the City's first arguments pointed out that material issues of fact existed regarding the Galvins' failure to put forth evidence of the dimensions of the easement. *See Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment* (R. 133). The Galvins submitted their *Reply Memorandum In Support of Motion for Summary Judgment* (R. 224)

and a *Supplemental Declaration of Martin C. Galvin In Reply to Opposition of Motion for Summary Judgment* (R. 224) but still failed to put forth evidence of the easement's dimensions. This is very important to take into consideration because the district court awarded attorney fees against the City based in part on the conclusion that the City "failed to present any evidence of the easement's dimensions prior to or at summary judgment stage in spite of the Galvins' request for twenty feet to accommodate a combine header." *See Memorandum Decision and Order for Attorney Fees and Costs* (R. 518) and *Order for Attorney Fees and Costs* (R. 559).

Oral argument on the Galvins' motion for summary judgment occurred on January 18, 2017. The Galvins' attorney on oral argument alleged that the dimensions of the easement were the entire portion of property purchased by the City. "It is our position that the whole use of the road which was purchased is already described in terms of what the city purchase from the [Allaires]. And our claim is for that whole portion." *See January 18, 2017 hearing* Tr. p. 8, L. 19–22. The problem with counsel's oral argument is just that, counsel's oral argument does not constitute testimonial evidence of the easement's dimensions nor could it be used by the district court. The district court expressed concerns over the City's defense of abandonment (*January 18, 2017 hearing* Tr. pp. 19-20) and ultimately directed the parties to submit additional briefing. *See January 18, 2017 hearing* Tr. pp. 21-29.

The only evidence of the easement's dimensions occurred during the supplemental briefing stage on the issue of abandonment. Mr. Galvin submitted a third affidavit generally describing what he believed the easement area to be:

7. The scope of the easement has always been the same. The length of it was from one end

> of my property all the way out to Middleton road. As for the width of the easement across that road, I believe I have always used and maintained approximately twenty feet. I have always used a truck, a *mule* or smaller farm vehicle, certain farming trailers and wheat trucks for hauling, and of course the largest piece of equipment, which was my combine. My combine had a sixteen (16) foot header on it, so I know when I drove it I took up that much road, but maintained at least another four feet.

See Third Supplemental Declaration of Martin C. Galvin (R. 271-272). Other than this affidavit, the Galvins did not submit evidence of a survey or other any related evidence sufficient to allow the district court to enter the necessary judgment in this case. This Court has held that "it is well settled under Idaho law that any judgment determining the existence of an easement must also specify the **character, width, length and location** of the easement." *Beckstead v. Price*, 146 Idaho 57, 66, 190 P.3d 876, 885 (2008) (underlining and bolding added); *see also Argosy Trust ex rel. Its Tr. v. Wininger*, 141 Idaho 570, 573, 114 P.3d 128, 131 (2005) (This Court explained why a judgment must fix the dimensions of an easement, "A judgment which affects the title or interest in real property must describe the lands specifically and with such certainty that the court's mandate in connection therewith may be executed, and such that rights and liabilities are clearly fixed and that all parties affected thereby may readily understand and comply with the requirements thereof.").

When the district court entered its *Order Granting Plaintiff's Motion for Summary Judgment* (R. 295), there was absolutely no evidence sufficient for the district court to fix a legal description for the easement. The City filed its *Motion for Reconsideration* (R. 308) and *Memorandum In Support of Reconsideration* (R. 310) on March 20, 2017 arguing in part, the lack of evidence of the dimensions of the easement. Recognizing the flaw in their case, the Galvins

attempted to correct their failure by filing a *Motion to Alter of Amend Judgment* (R. 340) and a proposed *Amended Judgment* (R. 367) that included a survey that was not submitted during summary judgment. A hearing was held on the City's motion for reconsideration on April 27, 2017 wherein the district court denied the City's motion reaffirming its decision that the Galvins had a prescriptive easement, but recognizing that the court did not have sufficient evidence to set forth the character width and location of the easement:

> **Court**: Now, Mr. Villegas, I do think and given the case law that's cited once I found there's an easement, I needed to find evidence with regard to the extent of that easement and how wide, how long, where it began, where it ended. I think that is necessary to be put on there. I did sign the amended judgment on the basis of plaintiff's submission to the Court on that. However, I think that there was not evidence for the Court to reach that presented during the summary judgment arguments, and I think that the [City] may very well have a right to contest the metes and bounds description of that.

See April 27, 2017 hearing, Tr. p. 57, L. 22, thru Tr. p. 58, L. 9 (underlining added). In a discussion between the Galvins' attorney and the district court regarding whether the Galvins evidence on summary judgment was sufficient to allow the survey in, the district court explained:

> **Court**: The problem the Court runs into is I did an amended judgment incorporating that when there was no evidence on it, and I do think that was probably not the right thing to do. I mean, there is evidence on what was basically needed, but the city never got a chance to address that evidence. And that's the extent.
>
> **Mr. Magnuson**: Well, the evidence -- so I guess my motion to alter or amend was basically saying that all the evidence was actually before the Court on summary judgment, and I think if you look at the affidavits, there was --
>
> **Court**: But the metes and bounds description wasn't. This Court is certainly not an expert in determining metes or bounds. I'm giving the city a chance to object to that and present it if they feel it was inappropriate.

See April 27, 2017 hearing, Tr. p. 61 L. 4-20.

The district court gave the City an opportunity to challenge the legal survey attached to the Galvins amended judgment. The City filed its *Defendant's Notice of Intent to Dispute Legal Description* (R. 446) disputing the length and the width of the easement that the Galvins' survey provided. Although the Galvins ultimately chose to accept the City's dimensions by filing a *Motion to Enter Order Regarding Legal Description of Easement and Enter Second Amended Judgment* (R. 450), this did not eliminate the fact that the City presented a triable issue of fact for trial. In fact, the Galvins' attorney stated that the Galvins were not conceding or agreeing that the City's dimensions were correct. *See* Tr. 94. L. 9–11.

The district court abused its discretion when it found that the City's defense was frivolous. Appellate court decisions analyzing the frivolous standard of § 12-121 hold that "[w]hen deciding whether attorney fees should be awarded under I.C. § 12–121, the entire course of the litigation must be taken into account **and if there is at least one legitimate issue presented**, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009) (underlining added and bolding); *Coward v. Hadley*, 150 Idaho 282, 289–90, 246 P.3d 391, 398–99 (2010); *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). "Thus, if there is a legitimate, **triable issue of fact**, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524–25, 20 P.3d 702, 708–09 (2001) (underlining and bolding added).

In this case, the Galvins failed to put forth evidence on summary judgment sufficient to fix

the dimensions of the prescriptive easement and the record still lacks sufficient evidence. The City's *Notice of Intent to Dispute Legal Description* raised triable issues of fact calling into question the Galvins' survey describing the length and width of the easement. Importantly, the court stated "I do find that the case was frivolously defended, at least to certain aspects. It certainly was not frivolously defended as to the dimensions of the easement." Tr. p. 91, L. 3–6. As discussed above, if there is a legitimate, triable issue of fact, attorney fees may not be awarded even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *Nampa & Meridian Irr. Dist. v. Washington Fed. Sav.*, 135 Idaho 518, 524–25, 20 P.3d 702, 708–09 (2001).

IV. Is The City Entitled To Attorney Fees On Appeal

In order to recover attorney fees on appeal in Idaho, one must make use of the procedural means to obtain them and demonstrate a substantive right to receive them. Idaho Appellate Rules, Rule 41 sets forth a process by which this Court can grant the City attorney fees on appeal, and the City expressly requests the recovery of all attorney fees and costs incurred on appeal. I.A.R. 41.

The City expressly requests attorney fees on appeal based on Idaho Code § 12-117, and in the alternative under Idaho Code § 12-121. Under Idaho Code § 12-117 attorney fees are awardable if "[I]n any ... civil judicial proceeding involving as adverse parties a ... political subdivision and a person, the ... court ... shall award the prevailing party reasonable attorney's fees, witness fees, and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117. Similarly, Idaho Code § 12-121 permits

an award of attorney fees to a prevailing party when a claim is pursued or defended frivolously, unreasonably or without merit. I.C. § 12-121, I.R.C.P. 54(e)(1). An award of attorney's fees under § 12-121 is discretionary on the court. *Chisholm v. Twin Falls County*, 139 Idaho 131, 136, 75 P.2d 185, 190 (2003).

In this case, attorney fees on appeal are awardable under I.C. §§ 12-117 and 12-121 because the Galvins will not be able to present any non-frivolous arguments that the defenses raised by the City regarding the issues of abandonment and of the dimensions of any alleged prescriptive easement were not genuine issues of material fact that should have been decided at a trial on these matters. Moreover, the Galvins will not be able to provide arguments on appeal that demonstrate, based upon the record below, that there was no triable issue of fact regarding the alleged prescriptive easement's dimensions. The City reserves the opportunity to respond to the Galvins' arguments in its *Appellant's Reply Brief.*

CONCLUSION

For the reasons stated above, the City respectfully requests that this Court reverse the district court's grant of summary judgment and award of attorney's fees.

DATED this 15 day of May, 2018.

BORTON-LAKEY LAW OFFICES

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CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of May, 2018, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

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