6-13-2018

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 45578-2017

MARTIN C. GALVIN AND PATRICIA L. GALVIN,

Plaintiffs/Respondents,

v.

CITY OF MIDDLETON,

Defendant/Appellant,

RESPONDENTS' BRIEF

Appeal from the District Court of the Third Judicial District
of the State of Idaho, in and for the County of Canyon;
Honorable George A. Southworth, District Judge, Presiding
(District Court Case No. CV-2016-6062)

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I. STATEMENT OF THE CASE

A. Nature of the Case

Stemming from a Canyon County case, the City of Middleton (the "City") appealed the district court's grant of summary judgment quieting title to a prescriptive easement and for permanent injunction in favor of Patricia and Martin Galvin (collectively the "Galvins"). The district court found that the Galvins established a prescriptive easement commencing in 1949, have continuously used it for more than sixty (60) years and not only that the City acted without a reasonable basis in law or fact, but defended the matter frivolously. The district court awarded the Galvins attorney's fees and costs pursuant to I.C. § 12-117.

The City does not appeal the district court's findings that the Galvins had a prescriptive easement that commenced in 1949 and was established in the 1950s. The City, rather, only argues that the Galvins abandoned their easement in 1996-1998 when they filed an application to rezone their property to allow it to be used for a golf course and residential subdivision. Subsequently, the Galvins continuously used the property and easement and never took any steps to develop the land. Yet, the City argued that this rezone in and of itself constituted an abandonment of the easement, which made summary judgment improper for the Galvins.

B. Course of Proceedings

1. Initial Pleadings.

On June 28, 2016, the Galvins filed their *Complaint for Declaratory Relief and to Quiet Title*, seeking title to a prescriptive easement on a dirt road that sits on a section line that runs parallel to their irrigation drainage ditch on their property. R. 12-20; *see also* Exhibit A attached hereto, R. 20.

On July 27, 2016, the City filed its *Answer* denying the Galvins' right to any prescriptive easement and the allegations contained therein—asserting 16 affirmative defenses. R. 21-29.

2. Galvins' Motion for Summary Judgment.

The instant case had an initial round of filings, briefings and oral argument, and then continued the matter for any additional filings, briefings and a second oral argument.

a. *Initial Filings and Briefings*

On November 23, 2016, the Galvins filed their *Motion for Summary Judgment* and accompanying memorandum, declarations, affidavits and exhibits in support thereof. R. 30-113. On December 2, 2016, pursuant to the City's request, the parties filed a stipulation to vacate and re-calendar the summary judgment hearing. R. 116-119. On January 5, 2017, the City filed its *Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment*, *Affidavit of Victor Villegas in Support of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment* and exhibits in support thereof. R. 123-213. On January 20, 2017, the Galvins filed its *Reply Memorandum in Support of Motion for Summary Judgment*, *Supplemental Declaration of Martin C. Galvin in Reply to Opposition of Motion for Summary Judgment* and *Supplemental Declaration of Scott A. Magnuson in Reply to Opposition to Motion for Summary Judgment*. R. 214-223, 224-227 and 228-232.

b. *Oral Argument (January 18, 2017)*

On January 18, 2017, the district court heard oral argument on the Galvins' *Motion for Summary Judgment*. Tr., p. 5.

During oral argument the district court stated:

> Well, it appears from the fact present before the Court now that the City of Middleton didn't present any facts to contest the claim of prescriptive easement...

Tr., p. 13, ll. 14-17. The district court further explained its one issue:

> 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, ll. 11-15.

During oral argument, the parties further discussed how to proceed and the district court's reservations concerning the issue of abandonment, which is the issue appealed by the City. During the exchange, the district court explained:

> THE COURT: Well, I don't know that the issue of fact on the issue of intent for abandonment, the mere fact of applying for a zoning change, and so it could be used for potential development of a golf course surrounded by residences, I don't know that that alone constitutes abandonment.
>
> MR. VILLEGAS: Well, it wasn't just the application. As we – Your Honor, I'm just going to rest on our arguments because I know we've already had time so I'm going to respect that. But I've explained in there that it's not just the application. I mean, the Court itself has –
>
> THE COURT: So you don't feel like the City of Middleton is prepared to present any additional affidavits?
>
> MR. VILLEGAS: Affidavits as to what, though, Your Honor?
>
> THE COURT: Well, all of the issues surrounding the abandonment, that there was an intent to abandon. That was – I see here and understand your claim that the application for changes in zoning might express an intent for abandonment, but that has to be accompanied with clear and decisive acts. It would seem like they would have to –
>
> MR. VILLEGAS: They got the rezone.
>
> THE COURT: -- quit using it. What?
>
> MR. VILLEGAS: They were able to get – their application went through. They got the rezone.
>
> THE COURT: Yeah, but what were the acts by the plaintiffs to demonstrate clear and decisive intent to abandon that during that?
>
> MR. VILLEGAS: Your Honor, it's going to be the hearings, the testimony. Certainly I guess I can go back and see if there's meeting minutes as well as any recordings, if that would help, but certainly the other issue I think here is what they did after the –

Tr., p. 26, l. 4-p. 27, l. 10.

The district court decided to continue the hearing on summary judgment, allowing the parties to submit any and all additional evidence and argument through February 10, 2017. Tr., p. 29, ll. 3-10.

c. Supplemental Filings and Briefings (February 3-16, 2017)

On February 3, 2017, the City submitted its *Supplemental Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment*. R. 237. The City did not submit any additional evidence. On February 8, 2017, the Galvins submitted *Plaintiffs' Supplemental Brief in Support of Motion for Summary Judgment, Third Supplemental Declaration of Martin Galvin* and *Affidavit of Cathy Skidmore*. R. 245-278. On February 10, 2017, the Galvins filed *Plaintiffs' Opposition to Defendant's Supplemental Memorandum*. R. 279-286. On February 16, 2017, the City filed its *Supplemental Reply Brief in Opposition to Plaintiffs' Motion for Summary Judgment.* R. 287-294.

No additional evidence, declarations or affidavits were supplied by the City.

d. *Final Oral Argument (February 23, 2017)*

On February 23, 2017, the district court heard the continued oral argument on the Galvins' *Motion for Summary Judgment*. Tr., p. 31. The district court stated that it was "clear from the evidence there's no real disputes of fact that a prescriptive easement was established prior to the application for zoning change. I think that's quite clear from the record." Tr., p. 40, ll. 11-15. The district court further stated that it was not sure whether the act of asking for a zoning change was sufficient to meet the requirements of abandonment, and that was where the district court would focus its decision. Tr., pp. 40-41. The district court took the matter under advisement.

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e. *Order Granting Plaintiff's Motion for Summary Judgment (March 6, 2017)*

On March 6, 2017, the district court issued its written *Order Granting Plaintiff's Motion for Summary Judgment*. R. 295-305. The district court then entered its *Judgment*. R. 306.

The district court granted the Galvins' *Motion for Summary Judgment* for a prescriptive easement and permanent injunction. R. 295-305. The district court found that there was never any change in the use of the Galvins' farming property and that they had continued to use the prescriptive easement as they had done since 1949. R. 301. As to abandonment, the district court stated that "[t]he 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." *Id.* The district court concluded that the City acted without a reasonable basis in law or fact and awarded the Galvins attorney's fees and costs pursuant to I.C. § 12-117. R. 302, 304.

3. The City's *Motion for Reconsideration* and Galvins' *Motion to Alter or Amend the Judgment*.

On March 20, 2017, the City filed its *Motion for Reconsideration* and *Memorandum in Support of Motion for Reconsideration re: (1) Attorney Fees; (2) Summary Judgment*. R. 308-309. In its Memorandum, the City argued: 1) the awarding of attorney's fees and costs were improper because there was a reasonable basis in law and fact for the City's defense; and 2) that summary judgment should have been denied because there were disputed material facts concerning abandonment and the easement's legal description. R. 310. The City did not present any new facts or evidence to support its position. R. 310-321.

On March 20, 2017, the Galvins filed a *Motion to Alter or Amend Judgment*, asking the district court to include the description of the easement with particularity, including width and

length. R. 340. The Galvins submitted an *Amended Judgment* with a survey attached from Eagle Land Surveying, LLC, and a legal description of the 20-foot easement width. R. 367-371.

a. *Oral Argument (April 27, 2017)*

The parties convened with the district court on April 27, 2017, for oral argument on the City's *Motion for Reconsideration* and the Galvins' *Motion to Alter or Amend Judgment*. Tr., pp. 42-62.

The district court denied the motion to reconsider the court's grant of summary judgment on the issue of whether or not there was an easement. Tr., p. 57, ll. 19-21. The district court further denied the objection to attorney's fees and the motion to disallow costs and fees.

There was extensive conversation about the width of the easement and the legal metes and bounds description as provided in the *Amended Judgment*. Because the actual legal survey was not previously before the district court, the court decided to set a time for the City to object to the metes and bounds. Tr., p. 61, ll. 16-20.

When counsel asked the district court for clarification regarding the actual findings of a 20-foot width the court indicated that it made those findings, just not the survey's metes and bounds. The specific exchange was as follows:

> 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 –
>
> THE 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.
>
> MR. MAGNUSON: But I'm asking can the Court look back and make findings on what was presented at summary judgment, which was the combine was 16 feet, and we had two feet on each side, so it was 20 feet. The Court can make those findings as in it was 20 feet –
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> THE COURT: I think the Court has.

MR. MAGNUSON: Has made that decision.

THE COURT: Does in fact find that an easement 20 feet wide is necessary. But I can't address whether or not your description of that easement is appropriate.

MR. MAGNUSON: Of the metes and bounds, okay. Thank you for the clarification, Your Honor.

Tr. p. 61, ll. 11-25; p. 62, ll. 1-10.

On May 3, 2017, the district court denied the City's motion to reconsider. *Order on Defendant's Motion to Reconsider*, R. 435. The district court set a hearing to allow the City time to object to the metes and bounds and gave the City until June 8, 2017, to submit a *Notice of Intent to Dispute. Id.*

4. Telephonic Hearing to Vacate Hearing and for Clarification (June 8, 2017).

Counsel for the parties disagreed as to the scope of the district court's Order, and therefore agreed, with the court's permission, to have a telephonic status conference to discuss the matter on June 8, 2017.

At the hearing, the district court indicated that it was not its intent that the City be allowed to contest the width sufficient to take a machine with a 16-foot header down the easement, because the court found that that has historically been the use of the easement. Tr., p. 71, ll. 8-12. After further discussion, counsel for the City stated that it was the City's intent to provide evidence to contest whether 20 feet is what the width of the easement is going to be or should be. Tr., p. 72, ll. 1-3. The district court indicated that the City could submit its objections and affidavits and it would address them with further findings, not knowing what the evidence will be. Tr., p. 73, ll. 9-17. The district court vacated the June hearing date, and counsel agreed to coordinate with one another regarding calendaring a future hearing date, depending upon the submissions by the City. Tr., p. 67, ll. 2-24.

5. Notice of Intent to Dispute Legal Description.

On June 8, 2017, the City filed its *Notice of Intent to Dispute Legal Description.* R. 446-448. The City did not actually provide any evidence and merely stated that the City maintained that no easement existed, but that if it did, the City "intends to proceed with an evidentiary hearing and call witnesses, cross examine the Plaintiff, and to offer exhibits and evidence that demonstrate a dispute of fact regarding the legal description proposed by the Plaintiff." R. 447.

More importantly, the City stated that Mayor Darin Taylor would testify that Mr. Galvin described the disputed easement as being 16 feet wide at the City Council meeting on March 4, 2015, and further that the surveyor, Mr. Gray, had prepared an exhibit for the City's proposed 16-foot-wide easement. R. 447.

Although this was not *evidence*, this was important for a number of reasons. First, the City acknowledged that the Galvins brought this issue to the City on March 4, 2015 (although the minutes do not reflect a discussion of 16 feet, *see* R. 464) and for the first time the City was proposing a resolution of a width of 16 feet, albeit still maintaining there was no prescriptive easement.

6. Motion to Enter Second Amended Judgment.

After years of litigation over these issues, including successfully defending against a misdemeanor trespass charge for using their easement, the Galvins were willing to accept the City's description to allow the dispute to come to an end.

On June 9, 2017, counsel for the Galvins inquired about the legal description that was prepared by Mr. Gray. R. 454. After reviewing the same, the attorneys met and conferred, telephonically, whereby counsel for the Galvins indicated that the Galvins would likely stipulate to the City's dimensions. R. 455. On June 16, 2017, the City provided the official stamped copy

of its proposed survey and indicated the City would be agreeable to stipulate to its own exhibit. R. 454. Unfortunately, the City recanted and was not willing to stipulate to its own legal description or proposed exhibit. R. 512.

On August 3, 2017, the Galvins filed a *Motion to Enter Order Regarding Legal Description of Easement and Enter Second Amended Judgment*, stipulating to accept the City's legal description, which changed the width of the easement to 16 feet, in order to end litigation. R. 450-451. On August 17, 2017, the City filed another opposition, arguing that it would not stipulate to its own legal description unless the district court conceded that its prior judgment was in error because there was at least one material fact in dispute – disallowing attorney fees. R. 475. On August 22, 2017, the Galvins filed a reply. R. 478.

On August 24, 2017, the district court held another hearing whereby the City argued for a trial to establish the dimensions. Tr., p. 79. The district court determined the dimensions were established by the City and the Galvins' stipulation, and concluded the City frivolously defended the matter. Tr., p. 91, ll. 3-4. The district court again granted summary judgment and, upon the City's objection, allowed the parties additional time to brief the issue of attorney's fees. Tr., p. 94, ll. 12-19.

7. Memorandum Decision and Order Regarding Costs and Attorney's Fees.

On September 8, 2017, the City filed its memorandum regarding costs and fees. R. 483. It argued that it put forth at least one legitimate triable issue pursuant to its *Notice of Objection.* R. 487. On September 20, 2017, the Galvins filed its *Opposition to Defendant's Memorandum Regarding Costs and Attorney Fees*. R. 489-497.

The district court noted that the City made its argument under the frivolous standard of I.C. § 12-121, instead of presenting argument based upon I.C. § 12-117, which was what the

court awarded fees upon in the first place. R. 515. The district court indulged the City's argument and held that even if the court awarded the fees pursuant to I.C. § 12-121, the City's argument fails. R. 515. The district court concluded that the City frivolously defended this case because it: (1) failed to acknowledge evidence of historical use and notice of the easement prior to the action; (2) failed to acknowledge evidence of the Galvins' continuous use while arguing abandonment; (3) failed to present any evidence of the easement's dimensions prior to or at the summary judgment stage in spite of the Galvins' request for 20 feet to accommodate a combine header; and (4) offered the Galvins a description including 16-foot width instead of 20, then refused to allow the Galvins to stipulate to such. R. 518.

The district court further concluded that the City perfectly exemplified the dual purposes of I.C. § 12-117, which is (1) to deter groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne an unfair and unjustified financial burden to correct mistakes that never should have been made. R. 518.

8. Order for Attorney's Fees and Costs; Judgment on Award of Attorney's Fees.

After multiple memorandums of costs and fees and motions to disallow, on November 21, 2017, the district court entered its *Order for Attorney Fees and Costs* and entered its *Judgment* for costs and reasonable attorney's fees to the Galvins in the amount $50,124.72. R. 554-563 and 564-565. In its Order, the district court found that most hours were reasonable, however, made an adjustment for the Galvins' erroneous legal description that inadvertently extended the easement into the public road. R. 561.

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C. Statement of Pertinent Facts

1. Marty Galvin was eighty-three (83) years old when this action was filed and has been using the farm irrigation road that is in dispute ever since the irrigation system began delivering water to his land in 1949. R. 65, ¶ 2; R. 66, ¶ 5.

2. This particular farm road (known as Willis Road) sits to the north of the Galvins' property between the Galvin property and an adjacent landowner. *See* Exhibit A attached herewith, R. 20. The Farm Road, Willis Road, is located on a section line. For future planning and growth, it has always been identified as a roadway that would eventually be expanded to the east as a public road. R. 69.

3. On appeal, the City has conceded the district court's findings that the Galvins had a prescriptive easement exist, commencing in 1949 and established in the 1950s.

4. The present conflict commenced in or about 2012, when the Allaires bought the adjacent land. R. 68, ¶ 16. Initially, the Allaires indicated that they understood and would respect the Galvins' continued use of the property. *Id.*, ¶ 17.

5. There was some animosity from the Allaires, and by early spring 2014, they had started to take steps to put up a fence and change the Galvins' access. R. 69, ¶ 19.

6. Galvin hired a surveyor and looked into moving the ditch and road, however when he was meeting with the surveyor on Galvins' property, Mr. Allaire threatened to shoot the eighty-three (83) year old with the gun he was carrying. R. 69, ¶ 20.

7. In or about 2015, the City purchased that portion of Willis Road, the Farm Road, and entered into an *Exclusive* License Agreement with the Allaires for use of the Farm Road, purporting to exclude the Galvins from the Farm Road. R. 52-58.

8. Prior to the City's purchase and transaction of the Farm Road, the City was aware of the legal rights and claims made by Galvins to the right to an easement over the Farm Road. R. 69, ¶ 22; R. 464.

9. On or about October 3, 2015, Mr. Galvin was using the Farm Road with his daughters to access the ditch for general maintenance when they were cited for trespass based on a complaint by Allaires. R. 70, ¶ 24.

10. The case was eventually dismissed and the matter was communicated by the prosecutor to the City's representatives. R. 64.

11. In March 2015, the Galvins approached the City and detailed the history of the road, and requested that it respect its rights on the Farm Road. R. 69, ¶ 22; R. 264.

12. In August 1996 through March 1998, the Galvins submitted an application for zoning (or rezoning), and/or a conditional use permit, and obtained approval to rezone their property with the idea that they were going to build a golf course and subdivision. R. 137-213, 225.

13. The Galvins never intended nor expressed any intent to abandon the road, easements and/or ditch during the application for zoning change process. R. 137-213; R. 271, ¶ 6.

14. The zoning change does not require abandonment of the easement. To the contrary, the legal description attached to the zoning ordinance specifically states it did not represent existing or future property, right-of-ways or easements. R. 206, 208 and 210.

15. The golf course, rural residential lots and development plan were never implemented nor developed. R. 271, ¶ 4. The land has been continuously farmed since the

zoning change, and the road has been continuously used by the Galvins and the custom farmers farming the property. R. 270, ¶ 3; R. 271, ¶¶ 4-5

16. The Galvins have always utilized, repaired and maintained the road and easement continuously from 1949 through present day, including from 1996 through 1998. R. 66, ¶ 6; R. 270, ¶ 3. This was in conjunction with the Galvins' irrigating and farming practices, which were also continuous from 1949 through present day, including from 1996 through 1998. *Id.*

17. There has never been any cessation or period of non-use of the roadway, irrigation drainage ditch, easement and secondary easements. *Id.*

II. ATTORNEY'S FEES ON APPEAL

In conformance with I.A.R. 35(b)(5), the Galvins seek an award of their attorney's fees and costs pursuant to I.C. § 12-117, I.A.R. 40 and 41 and any other applicable provisions of Idaho law.

III. ARGUMENT

A. Standard of Review

When this Court reviews a district court's ruling on a motion for summary judgment it employs the same standard properly employed by the district court when originally ruling on the motion. *Cherry v. Coregis Ins. Co.,* 146 Idaho 882, 884, 204 P.3d 522, 524 (2009) (citing *Farmers Ins. Co. of Idaho v. Talbot,* 133 Idaho 428, 431, 987 P.2d 1043, 1046 (1999)). Summary judgment is proper when there is no genuine issue of material fact and the only remaining questions are questions of law. *Id.* (citing *Harwood v. Talbert,* 136 Idaho 672, 677, 39 P.3d 612, 617 (2001); I.R.C.P. 56). 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).

The nonmoving party cannot rest upon mere speculation and must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Cantwell v. City of Boise,* 146 Idaho 127, 133, 191 P.3d 205, 211 (2008). A nonmoving party must come forward with evidence by way of affidavit, or otherwise, that contradicts the evidence submitted by the moving party and establishes the existence of a material issue of disputed fact. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007) (citations omitted). The nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment. *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (2009). A mere scintilla of evidence, or only slight doubt as to the facts, is not sufficient to create a genuine issue of material fact. *Finholt v. Cresto,* 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to the party's case. *Cantwell,* 146 Idaho at 133, 191 P.3d at 211. In the absence of genuine disputed issues of material fact, only questions of law remain and the Court exercises free review. *Stuard v. Jorgenson*, 150 Idaho 701 (2011).

When an action will be tried before a court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Barnes v. Jackson*, 163 Idaho 194, 408 P.3d 1266 (2018); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (*citing Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 650 P.2d 657 (1982)).

B. Introduction

Willis Road is an old farm road that sits on a section line in Middleton, Idaho. Plaintiffs, Martin (Mr. Galvin) and Pat Galvin (the "Galvins"), and the Galvin family have utilized this farm road for regular farming practices and have built, repaired and maintained the road for over sixty (60) years. In or about December 2011 or early 2012, the property where the road sits was purchased by a new owner, Mr. and Mrs. Allaire ("Allaires"). The Allaires ultimately erected a fence and attempted to exclude the Galvins from utilizing the farm road.

During this time, the City was looking at purchasing the farm road in exchange for other rights and because the road would eventually be expanded. The Galvins attended the City Council meetings, and urged support for the acquisition, and further detailed the long use by the Galvin family and requested that the City recognize their easement rights. R. 464-465. Without the Galvins knowledge, and behind closed doors, the City of Middleton entered into an exclusive use agreement for the road with the Allaires, to the exclusion of the public and the Galvins. R. 145-150. Soon after, an 83-year-old Mr. Galvin, with the help of his daughters, were exercising their rights on the easement, and further maintaining the same, when they were cited for trespass. That matter was ultimately dismissed and the dismissal was communicated to the City by the prosecutor. R. 69, ¶¶ 23, 24 and 64.

The Galvins have tried different avenues to amicably resolve the matter with the City but were eventually forced to file a complaint for declaratory relief, quiet title to prescriptive easement and permanent injunction. In response to the Complaint, the City denied that the Galvins had any easement.

Before the district court, the Galvins presented ample evidence in the form of exhibits, declarations, affidavits, Black Canyon District irrigation water records, etc., however, the City

would not recognize that they had a legal right to their easement. The only thing the City submitted to support its opposition were the documents associated with the Galvins' application to rezone their farming property in 1996-1998 so they could build a golf course and residential subdivision. R. 137-213. The City did not provide any other declaration or affidavit in support of its defense or opposition to the Galvins' prescriptive claims. The City's opposition has always been, first, there was no prescriptive right and second, if there was a prescriptive right, the application process and rezoning of the property constituted an abandonment of any prescriptive right. Only after the City lost on summary judgment did it try to refute the dimensions.

The first glaring problem with the City's argument is that the rezoning of the property did not affect the property rights or easements. In the legal description attached to the ordinance it even states, "[t]his description is for zoning use only, it does not necessarily represent existing or future property, right-of-ways or easement." R. 206, 208 and 210. The City's argument would likewise just be bad public policy. Second, and most importantly, it is irrefutable that the Galvins never stopped farming, using the easement and rights associated therewith, never built a golf course and never took any other act after the ordinance directing the rezone relating to the property, including stopping the use of the easement. R. 224-226 and 270-271. To the contrary, from 1949, throughout the time of the application process and up through this dispute, the Galvins continuously used and maintained the easement and farm road. *Id.*

It is uncertain why the City has taken the position it has or why it has been so adamant upon fighting the Galvins when it has not presented any reasonable evidence for its position.

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C. The District Court's Order Granting Plaintiffs' Motion for Summary Judgment Should be Affirmed

First and foremost, the City's defense was predicated on its denial that there was any prescriptive right—ever. *Answer*, R. 21. However, on appeal the City is not appealing the district court's findings of a prescriptive easement established in the 1950s. The City's argument on appeal strictly pertains to an alleged abandonment of the easement. *Brief*, p. 19.

The City argues that 1) there were material issues of fact regarding the "intent" to abandon which should have precluded summary judgment; and 2) that the Court erred in concluding that the grant of a Comprehensive Plan Amendment and Rezone were not sufficient to meet the "further acts" requirement of abandonment. *City Brief*, pp. 21 and 26.

1. Law Regarding Abandonment.

Abandonments and forfeitures are not favored. *Wagoner v. Jeffery*, 66 Idaho 455, 459-460, 162 P.2d 400, 402 (1945). Mere nonuse of an easement does not affect an abandonment. *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000) (overruled on other grounds by *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010) (*citing Kolouch v. Kramer*, 120 Idaho 65, 67, 813 P.2d 876, 878 (1991)). Abandonment of any right is dependent upon a finding of an intent to abandon evidenced by a clear, unequivocal and decisive act of the alleged abandoning party. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 249, 869 P.2d 554, 566 (1993) (*citing Wagoner v. Jeffery*, 66 Idaho 455, 460, 162 P.2d 400, 402 (1945)). The standard is truly heightened for abandonment. *Perry v. Reynolds* states:

> [i]t requires very convincing and satisfactory proofs to support a forfeiture by abandonment of a real property right. (*Welch v. Garrett*, 5 Idaho 639, 51 P. 405, followed and approved in *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 799, 51 P. 990.)

> Abandonment may be shown by the facts and circumstances, but clear proof is required to make out a case. (*Union Grain & E. Co. v. McCammon Ditch Co.*, 41 Idaho 216, 224, 240 P. 443.)
>
> It is elementary that an abandonment of any right is dependent upon an intention to abandon and must be evidenced by a clear, unequivocal and decisive act of the party." (*Sullivan C. Co. v. Twin Falls A. Co.*, 44 Idaho 520, 526, 258 P. 529.)
>
> Abandonment is a matter of intent, coupled with corresponding conduct; thus a question of fact." (*St. John Irr. Co. v. Danforth*, 50 Idaho 513, 516, 298 P. 365.) See, also, *Zezi v. Lightfoot*, 57 Idaho 707, 713, 68 P.2d 50.

Perry v. Reynolds, 63 Idaho 457, 464, 122 P.2d 508, 510-511 (1942).

"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) (*emphasis added*) (*quoting Northern Pac. Ry. Co. v. Tacoma Junk Co.*, 138 Wash. 116, 244 P. 117, 119 (1926)).

2. There were no Genuine Issues of Material Fact Regarding the Intent to Abandon, or Any Unequivocal Act Evidencing Abandonment.

The City's argument is that the application process for and ultimate granting of a zoning change, in and of itself, equated to abandonment of the prescriptive easement. The City argues, "[c]onverting his land to a golf course and 120 residential homes would certainly render the use of the easement for agricultural pursuits impossible." *City Brief*, p. 26. Of course, this claim is not true. Having a golf course that needs irrigation and drainage does not make the use of the easement to maintain the land and irrigation drainage "impossible," as the City contends. More importantly, the City ignores the undisputed fact that the land, farming operations and use of the easement was continuous and unchanged throughout the entire application period and has been the same for the twenty (20) years thereafter. R. 270-271.

The district court found that, "[a]lthough the parties have emphasized different facts, there does not appear to be an actual dispute as to the facts in this case. Because there is no genuine dispute of any material fact before the Court, it is appropriate for this Court to enter judgment as a matter of law..." R. 299. Summary judgment is proper when there is no genuine issue of material fact and the only remaining questions are questions of law. *Cherry v. Coregis Ins. Co.,* 146 Idaho 882, 884, 204 P.3d 522, 524 (2009) (citing *Harwood v. Talbert,* 136 Idaho 672, 677, 39 P.3d 612, 617 (2001); I.R.C.P. 56). A material issue of fact, for summary judgment purposes, is one that is relevant to an element of the claim or defense and whose existence might affect the outcome of the case. *State v. Hudson*, 162 Idaho 888, 892, 407 P.3d 202, 208 (2017).

The City contends that the district court applied the wrong standard, however the City fails to recognize that the court applied its standard, but even liberally construing the facts there was no evidence to reasonably support any elements for the affirmative defense of abandonment. Furthermore, the nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment. *Chandler v. Hayden*, 147 Idaho 765, 215 P.3d 485 (2009).

The City ignores the standard that when a matter will be tried before a court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary fact. *Barnes v. Jackson*, 163 Idaho 194, 408 P.3d 1266 (2018); *see also Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (*citing Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 650 P.2d 657 (1982). "Where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the

court alone will be responsible for resolving the conflict between those inferences." *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982) (*citing Pierson v. Jones,* 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981); *Hollandsworth v. Cottonwood Elevator Co.,* 95 Idaho 468, 471, 511 P.2d 285, 288 (1973); *Angleton v. Angleton,* 84 Idaho 184, 198, 370 P.2d 788, 796 (1962)); *see also Med. Recovery Servs., LLC v. Neumeier*, 163 Idaho 504, 415 P.3d 372, 376 (2018). The parties acknowledged early in the proceedings that this was a matter to be tried to the court. Tr., p. 18, ll. 18-23.

The Galvins did not contest that they applied to rezone their property because they wished to develop their farming property into a golf course and residential community. R. 225, ¶ 4. The application process is what the City is relying upon for an act of abandonment of the easement, and for its intent, however this conclusion is not supported. The City does not present any evidence that supports any elements of abandonment.

The City's arguments fail for a number of reasons. The application for rezoning or conditional use permit does not say anything about abandoning or nonuse of the irrigation ditch and/or easement(s). R. 152-213. The Galvins never intended to abandon their prescriptive easement, and the Application for Zoning Amendment or Conditional Use Permit does not support that conclusion. R. 271, ¶ 6. The actual Ordinance Directing Amendments to Canyon County Zoning Ordinance No. 97-001 in fact notes the opposite, stating "[t]his description is for zoning use only, it does not necessarily represent existing or future property, right-of-ways or easement." R. 202-10 (*emphasis added*). Regardless, it is uncontested that the Galvins continued normal farming operation and use of the road and prescriptive rights continuously throughout the application process until today as it has since 1949. R. 270-271. Once the rezoning of the property was approved, no further action to develop the land occurred. *Id.*, ¶ 4.

Even so, the easement, secondary easements and rights associated therewith extend beyond just those activities related to *farming*. Thus, even should the Galvins develop the land into a golf course and rural subdivision in the future (which they have not), there would still be irrigation on the property and the utilization of the easement for repair, maintenance, cutting puncture vine, trapping gophers, etc. Whether changing the use would have changed the scope of the easement is debatable—however, this point is moot because the Galvins never developed the land nor changed their prescriptive practices. R. 270-271. The evidence cannot support any *intent* to abandon or affirmative acts of abandonment by the owner of the easement.

The Court correctly concluded that:

> [a]t 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 Plaintiffs' Motion for Summary Judgment, R. 301.

3. The Application Process and Grant of a Rezone Were not Sufficient as Further Acts or any Act of Abandonment.

The City's second argument is that all of the acts within the application for rezoning, and specifically the *granting* of the rezone, met the "further acts" requirement for abandonment. *City Brief*, p. 27. The district court found that the Galvins failed to engage in any act demonstrating abandonment. R. 301.

The evidence is undisputed that the Galvins have used their prescriptive easement, ditch, farm road and secondary easements from 1949, throughout the 1990s and through the present day when this matter was filed. R. 270-271, ¶¶ 3, 5 and 6. This has been continuous. *Id.*

However, the City argues that the "other or further acts" requirement was overlooked by the Court and that the application process and granting of the requested Comprehensive Plan, change/amendment and zoning ordinance was the clear, unequivocal and decisive act to abandon the easement. *City Brief*, p. 27.

To support its argument, the City cites *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000) (overruled on other grounds by *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010)). This Court in *Weaver* found that there were not facts sufficient to establish a prescriptive easement in the original ditch as the evidence fails "to establish a prescriptive easement in the original dirt ditch as it fails to establish the open, notorious, or uninterrupted nature of any prior use of the original dirt ditch and does not address the knowledge of such use by Weaver or any previous owner of Lot 16." *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000) (overruled on other grounds by *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010)). The court further stated that even assuming that Stafford did have a prescriptive easement, he abandoned his right because Stafford testified that he filled in the ditch. *Id.* This is consistent with Idaho law as mere nonuse of an easement does not affect an abandonment. *Id.* (*citing Kolouch v. Kramer,* 120 Idaho 65, 67, 813 P.2d 876, 878 (1991)). In the *Weaver* case, Stafford filled in the original ditch, destroying the very nature and use of the purpose of the easement. *Id.* The County Commissioner's Order did not make it "impossible" for the Galvins to use the easement. R. 108-202. Rather, the rezone itself recognizes that it is for rezoning only and does not represent the current or future property or easements. R. 206, 208, 2010. In the instant case, the easement was not destroyed, rather it was uncontroverted that the easement was continuously used by the Galvins. R. 270-271.

"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) (*quoting Northern Pac. Ry. Co. v. Tacoma Junk Co.,* 138 Wash. 116, 244 P. 117, 119 (1926)). O'Brien also makes clear that the act must be of the owner of the easement. The City's act in passing an ordinance is not an act by the Galvins, much less one that prevented them from using the roadway. The City has failed to explain how the Galvins have destroyed their easement, or that its use has been rendered impossible by their own act, or that there was an unequivocal act to show abandonment while they have continuously used the easement throughout the whole application process and through the present day without interruption. The City's argument is wholly without merit.

D. The District Court Did Not Abuse its Discretion When it Awarded the Galvins' Attorney's Fees and Costs Pursuant to I.C. § 12-117

The district court awarded the Galvins' attorney's fees and costs pursuant to I.R.C.P. 54(d), I.R.C.P. 54(e) and I.C. § 12-117. In fact, the district court allowed an additional two weeks for the City to specifically brief the matter separate and apart from everything else. Tr., p. 94.

The review of a district court's award of fees is pursuant to an abuse of discretion standard. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012). That approach is preferable to a *de novo* review because:

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> (1) the Legislature specifically provided that the court shall award Section 12–117 attorney fees "if it finds" the nonprevailing party acted without reasonable basis in fact or law, indicating the determinative finding was to be made by the trial court; and (2) Section 12–117 speaks in terms of the "reasonableness" of the losing party's actions, which implies a measure of objectivity, and which is properly left to the district court's reasoned judgment.

Id.

The standard of review of a discretionary decision of the trial court as follows:

> Our inquiry is: (1) whether the trial judge correctly perceived the issue as one of discretion; (2) whether the trial judge acted within the outer boundaries of his or her discretion and consistently with the legal standards applicable to the specific available choices; and (3) whether the trial judge reached his or her decision by an exercise of reason. *Hudelson v. Delta Intl. Mach. Corp.,* 142 Idaho 244, 248, 127 P.3d 147, 151 (2005) (citing *Karlson v. Harris,* 140 Idaho 561, 568, 97 P.3d 428, 435 (2004)).

State v. Keithly, 155 Idaho 464, 467, 314 P.3d 146, 149 (2013). From the record, this Court can see that the trial court correctly perceived the issue as one of discretion, acted within the outer boundaries and reached its decision by an exercise of reason. In the *Order Granting Plaintiff's Motion for Summary Judgment* the district court went into great detail explaining its reasoning for awarding fees under I.C. § 12-117. R. 303-304. The district court found that the City's claims were without merit and that the City acted without a reasonable basis in law of fact. R. 304.

The City also requested to brief the issue separately once the legal description of the easement was established. Tr. p. 94, ll. 12-24. In its briefing, the City did not address the district court's previous findings under the standards for I.C. § 12-117. The district court noted that the City made its argument under the frivolous standard of I.C. § 12-121, instead of presenting argument based upon I.C. § 12-117, which was what the court awarded fees upon in the first place. R. 515. The district court indulged the City's argument that the issue regarding the width represented "a legitimate triable issue of fact regarding the dimensions of the prescriptive

easement," and stated, "[e]ven if the Court had awarded fees under I.C. § 12-121, the City's argument fails." R. 515.

The district court analyzed the City's argument juxtaposed with *Morgan v. New Sweden Irr. Dist.*, 156 Idaho 247, 322 P.3d 980 (2014) ("Morgan I") (citing *Turner v. Cold Springs Canyon Ltd. P'ship*, 143 Idaho 227, 229, 141 P.3d 1096, 1098 (2006)) ("[a]n easement's width is generally a factual question, but when only one party presents evidence of width, there is no genuine issue of material fact and summary judgment is proper.") In both *Turner* and *Morgan I*, the court granted summary judgment as to the easement, however had to have further clarification-type hearings concerning the easements. *Id.* In *Turner*, this court affirmed the district court's decision to amend the judgment to fix the width and held that no genuine issue of material fact existed because Cold Springs failed to bring forth evidence contradicting Turner's affidavit requesting twenty feet. *Turner,* 143 Idaho at 228. In awarding fees under I.C. § 12-121, this court stated that Cold Springs was unreasonable, because "at summary judgment stage, Cold Springs' sole contention was that no easement existed. After losing at summary judgment, Cold Springs argued that an express easement existed and then introduced new issues and arguments... Cold Springs could have argued these issues in the alternative at the summary judgment stage. It did not." *Id.* From the record, the district court found:

> In this case, like *Turner*, the City denied the existence of an easement through the summary judgment stage. From the record, it is clear that the Galvins placed the City on notice prior to the action by claiming the easement in city meetings and while defending the criminal trespass charges. The record also shows ample evidence of historical use and affidavits testifying to such that went uncontested by the City. Prior to summary judgment, Galvin described the width in his declaration as approximately twenty feet to accommodate the largest piece of equipment—a combine with a sixteen-foot header. Instead of offering evidence to dispute this, the City continued to argue the Galvins abandoned the easement when they applied to re-zone their farm, despite evidence of continuous use from numerous sources that went unchallenged.

> Only after the Court established the existence of the easement did the City challenge its dimensions. Indeed, the first summary judgment did not include the scope and width as required. The Galvins offered an amended judgment containing a legal description setting the width at twenty fee, which the Court signed. After protest from the City, the Court allowed the parties to submit additional briefing. The City present a new legal description with a sixteen-foot-wide easement, then ***incredulously*** refused to stipulate to their own evidence.

Memorandum Decision and Order Regarding Costs and Attorney's Fees, R. 517 (emphasis added). Based upon those findings, the district court concluded the City frivolously defended this case when the City:

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

R. 518.

The district court was of the opinion that the City had "burdened the Galvins enough and unreasonably prolonged this litigation for the sole purpose of avoiding the award of attorney fees." The Record fully supports the district court's conclusion. In its discretion, the court awarded the Galvins attorney's fees and costs because:

> the City of Middleton perfectly exemplified the dual purpose of I.C. § 12-117: (1) to deter groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne an unfair and unjustified financial burden attempting to correct mistakes agencies should never have made.

R. 518.

Each and every one of these conclusions is amply supported by the record.

The City continues to argue that if there is a single (no matter how minute) "legitimate" issue, then the court cannot award attorney's fees at all. *City Brief*, p. 40. This is not the law. *Syringa Networks, LLC v. Idaho Department of Administration*, 159 Idaho 813, 832, 367 P.3d

208, 227 (2016). In *Syringa*, this Court rejected the argument now being made by the City and awarded fees even when the Department successfully defended one of the claims. *Id.* Here, the City successfully defended none of the claims. It has not even shown the existence of any "legitimate" defense. More importantly, it continues to ignore *Syringa* and I.C. § 12-117.

E. The Court Should Grant the Galvins Attorneys' Fees and Costs on Appeal

The Galvins request and should be awarded costs and attorney's fees on appeal pursuant to I.A.R. 40 and 41 and I.C. § 12-117.

I.A.R. 40 provides that "[w]ith exception of post-convictions appeals and appeals from proceedings involving the termination of parental rights or an adoption, costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." I.A.R. 40.

I.C. § 12-117 provides that:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, 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(1). This Court has awarded attorney fees pursuant to I.C. § 12-117 when a nonprevailing party "continued to rely on the same arguments used in front of the district court, without providing any additional persuasive law or bringing into doubt the existing law on which the district court based its decision." *State v. Hudson*, 162 Idaho 888, 894, 407 P.3d 202, 208 (2017) (*quoting City of Blackfoot v. Spackman*, 162 Idaho 302, 310, 396 P.3d 1184, 1192 (2017)). This Court can see that the City has set forth the same argument that previously failed before the district court. The City is simply rehashing its same old arguments. There is nothing new here. The City has not presented any new persuasive law nor challenge the existing law

upon which the district court relied in granting summary judgment in favor of the Galvins. *See State v. Hudson*, 162 Idaho 888, 894, 407 P.3d 202, 208 (2017). The City continues to burden the Galvins with a baseless argument concerning abandonment, solely to avoid attorney's fees. *See* R. 518.

As a result, this Court should award the Galvins attorney's fees on appeal.

IV. CONCLUSION

This Court should affirm the decisions of the district court and further grant the Galvins attorney's fees and costs on appeal.

DATED this 13th day of June, 2018.

BARKER ROSHOLT & SIMPSON LLP

Albert P. Barker
Scott A. Magnuson
Attorneys for Respondents Martin C. and Patricia L. Galvin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June 2018, I caused to be served a true and correct copy of the foregoing **RESPONDENTS' BRIEF** the method indicated below, and addressed to each of the following:

Original to:

IDAHO SUPREME COURT
451 W. State Street
P.O. Box 83720
Boise, ID 83720

_x_ Hand Delivery
____ U.S. Mail, postage prepaid
____ Facsimile
____ Overnight Mail
____ Email

Copies to:

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____ Hand Delivery
_x_ U.S. Mail, postage prepaid
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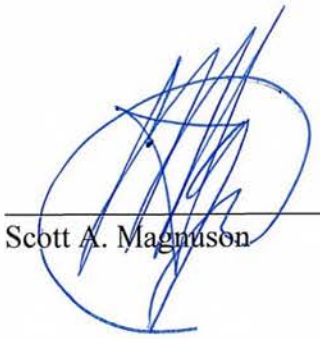
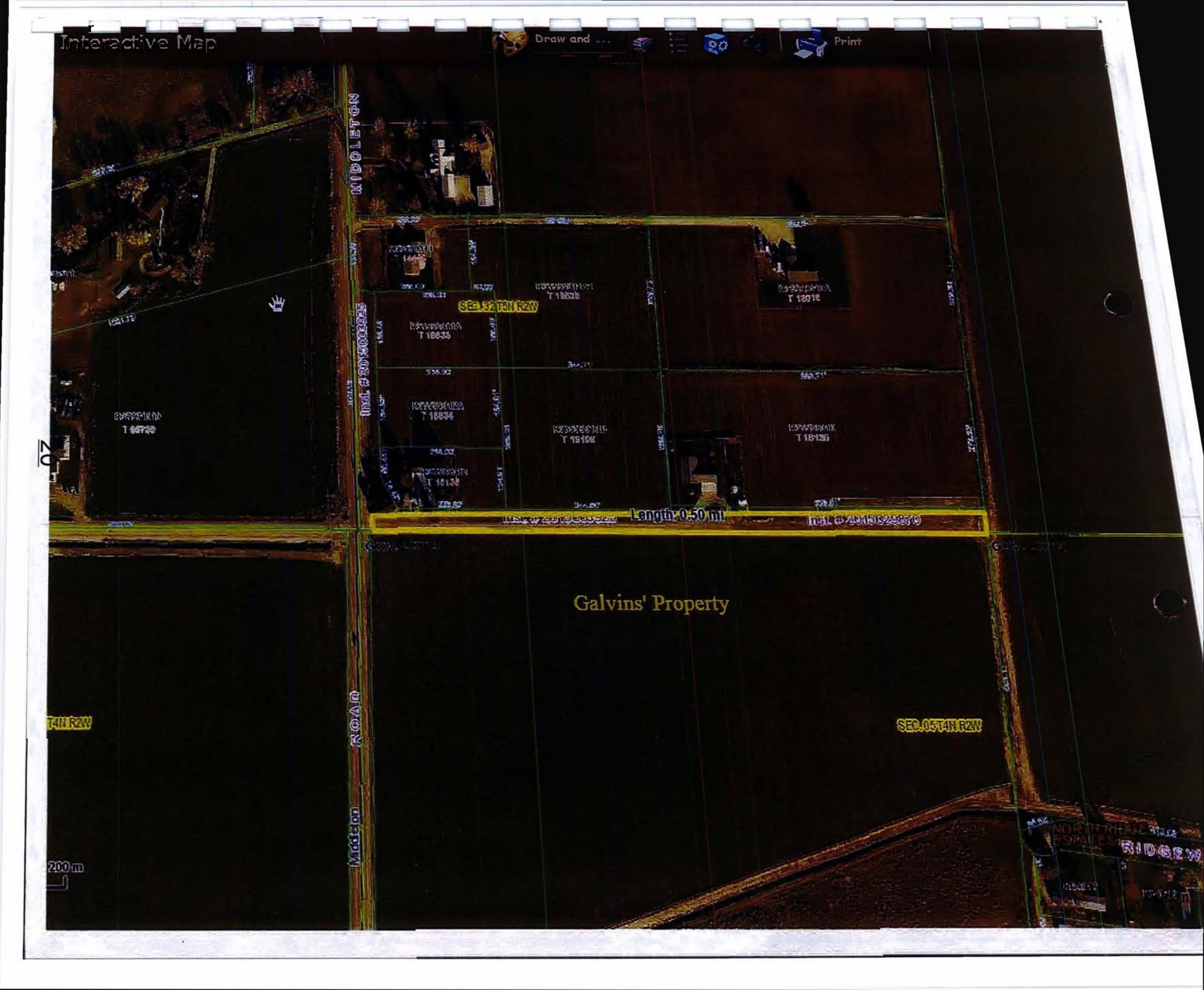


Scott A. Magnuson

Supreme Court No. 45578-2018

Respondents' Brief

EXHIBIT A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