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IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 45697
Bonneville County Case No. CV-2016-5707

SHAD LEWIS HAMBERLIN,
Plaintiff/Respondent

v.

JORDAIN LEANN BRADFORD,
Defendant/Appellant.

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville.
HONORABLE JOEL E. TINGEY, District Judge.

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE **1**

A. Nature of the Case. 1

B. Course of Proceedings. 1

C. Statement of Facts. 3

II. ADDITIONAL ISSUE PRESENTED ON APPEAL **4**

A. Whether Shad is entitled to his attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Rules 40 and 41 of the Idaho Appellate Rules. 4

III. ATTORNEY FEES ON APPEAL **4**

IV. ARGUMENT **4**

A. Standard of Review 4

B. The district court did not abuse its discretion in applying a reasonable person standard to the rescission requirements of Idaho Code § 7–1106. 6

1. Jordain's requested interpretation of Idaho Code § 7-1106 would result in absurd application. 6

2. The legislative history of Idaho Code § 7-1106 and legal precedent support the district court's application of a reasonable person standard. 9

C. Jordain has failed to provide any legal authority in support of her argument that the district court abused its discretion in finding Jordain did not act reasonably. 11

D. Shad should be awarded his attorney fees on appeal. 13

1. Jordain's appeal is frivolous and unfounded, and Shad is entitled to fees and costs pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41. 14

2. Jordain is not entitled to attorney fees under Idaho Code § 12-121, Idaho Appellate Rules 40 or 41, or any other rule or statute. 15

V. CONCLUSION **15**

TABLE OF AUTHORITIES

CASES

Avondale On Hayden, Inc. v. Hall, 104 Idaho 321, 658 P.2d 992 (Ct.App. 1983) 13
Bach v. Bagley, 148 Idaho 784, 229 P.3d 1146 (2010) 6
Ball v. City of Blackfoot, 152 Idaho 673, 273 P.3d 1266 (2012) 7, 14
C. Forsman Real Estate Co., Inc. v. Hatch, 97 Idaho 511, 547 P.2d 1116 (1976) 11
Chapman v. Chapman, 147 Idaho 756, 764, 215 P.3d 476, 484 (2009) 18
Chicoine v. Bignall, 127 Idaho 225, 899 P.2d 438 (1995) 17
City of Sandpoint v. Sandpoint Indep. Highway Dist., 126 Idaho 145, 879 P.2d 1078 (1994) 9
Clair v. Clair, 153 Idaho 278, 281 P.3d 115 (2012) 5
Corporation of Presiding Bishop v. Ada County, 123 Idaho 410, 849 P.2d 83 (1993) 9
Desfosses v. Desfosses, 120 Idaho 354, 815 P.2d 1094 (Ct.App. 1991) 5, 6
Frontier Development Group, LLC v. Caravella, 157 Idaho 589, 338 P.3d 1193 (2014) 15
Gem State Ins. Co. v. Hutchison, 245 Idaho 10, 16, 175 P.3d 172, 178 (2007) 7, 14
George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990) 8, 11, 13
Gordon v. Hedrick, 159 Idaho 604, 364 P.3d 941 (2015) 13
Grand Canyon Dories v. Idaho State Tax Comm'n, 124 Idaho 1, 5, 855 P.2d 462, 466 (1993) 8
Hentges v. Hentges, 115 Idaho 192, 765 P.2d 1094 (Ct.App. 1988) 6
Hogg v. Wolske, 142 Idaho 549, 130 P.3d 1087 (2006) 7, 15, 17
Hurtado v. Land O'Lakes, Inc., 153 Idaho 13, 18, 278 P.3d 415, 420 (2012) 6, 14
Idaho Dep't of Health & Welfare v. Doe, 150 Idaho 103, 244 P.3d 247 (Ct.App. 2010) 6
Idaho Military Historical Soc'y, Inc. v. Maslen, 156 Idaho 624, 329 P.3d 1072 (2014) 16
In re Clark, 153 Idaho 349, 356, 283 P.3d 96, 103 (2012) 6
In re Doe, 157 Idaho 14, 19, 333 P.3d 125, 130 (2014) 18
Ketterling v. Burger King Corp., 152 Idaho 555, 272 P.3d 527 (2012) 17
Kovachy v. DeLeusomme, 122 Idaho 973, 842 P.2d 309 (Ct.App. 1992) 13
Maclay v. Idaho Road Estate Commission, 154 Idaho 540, 300 P.3d 616 (2012) 7, 14
PacifiCorp. v. Idaho State Tax Comm'n, 153 Idaho 759, 291 P.3d 442 (2012) 15
Pelayo v. Pelayo, 154 Idaho 855, 303 P.3d 214 (2013) 5
Pierson v. Jones, 102 Idaho 82, 625 P.2d 1085 (1981) 5
State ex rel. Lisby v. Lisby, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995) 8
State v. Burnight, 132 Idaho 644, 978 P.2d 214 (1999) 9
State v. Grantham, 146 Idaho 490, 198 P.3d 128 (Ct.App. 2008) 7
State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997) 9
State v. Zichko, 129 Idaho 259, 923 P.2d 966 (1996) 7, 14
Stewart v. Stewart, 143 Idaho 673, 152 P.3d 544 (2007) 5
Suitts v. Nix, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) 6
Sweet v. Foreman, 159 Idaho 761, 367 P.3d 156 (2016) 16
Tisdale v. Tisdale, 127 Idaho 331, 900 P.2d 807 (1995) 5
Trotter v. Bank of N.Y. Mellon, 152 Idaho 842, 275 P.3d 857 (2012) 4, 18
Turner v. Turner, 155 Idaho 819, 317 P.3d 716 (2013) 17
Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 265 P.3d 502 (2011) 11

STATUTES

IDAHO CODE § 7-1106 (1995) 12
IDAHO CODE § 7-1106 (2018) 8
IDAHO CODE 12-121 (2018) 17

OTHER AUTHORITIES

S.B. 1307, 1996 Leg., 53rd Sess. (2nd Reg. Sess.) (Idaho 1996) (enacted) 10

RULES

IDAHO APP. R. 40 (2018) 13
IDAHO APP. R. 41 (2018) 13

I. STATEMENT OF THE CASE

A. Nature of the Case.

At issue in this appeal is appellant Jordain LeAnn Bradford's (Jordain) efforts to rescind a Voluntary Acknowledgment of Paternity (VAP) executed by Jordain and respondent Shad Lewis Hamberlin (Shad), in which Jordain and Shad voluntarily acknowledged Shad to be the biological father to Jordain's child, T.J.H., and which the parties filed with the Idaho Bureau of Vital Records and Health Statistics. Based on the filing of the VAP, the State of Idaho issued a Certificate of Live Birth identifying Shad as the father of T.J.H. Jordain now alleges that she made a material mistake of fact in identifying Shad as T.J.H.'s biological father, and appeals from the district court's Decision on Appeal, in which the district court, acting in its appellate capacity, affirmed the magistrate court's decision denying Jordain's motion to rescind the VAP.

B. Course of Proceedings.

Shad filed a Petition to Establish Child Custody and Child Support, in which Shad requested the parties share joint legal and physical custody of T.J.H., on October 21, 2016 in Bonneville County Case No. CV-2016-5707, *Shad Lewis Hamberlin v. Jordain LeAnn Bradford*, with Judge L. Mark Riddoch presiding. (R. p. 32, Aff. of Shad Lewis Hamberlin ¶ 10; R. p. 49, Aff. of Jordain LeAnn Bradford in Resp. to Aff. of Shad Lewis Hamberlin ¶¶ 20–21; R. pp. 11–16, Pet. to Establish Child Custody and Child Support.) On February 10, 2017, during the course of the custody proceedings in the underlying magistrate court action, Jordain filed a Motion to Rescind the VAP on the grounds of material mistake of fact. (R. pp. 167–68, Mot. to Rescind Acknowledgment of Paternity Affidavit.) Jordain filed an Amended Motion for Stay of Proceedings Pending Paternity Test and/or Determination of Biological Father of Minor Child and supporting affidavit on February 10, 2017, in which Jordain alleged that her execution of the

VAP, specifically her statement therein that Shad was the biological father of T.J.H., was a material mistake of fact. (R. pp. 169–170, Am. Mot. for Stay of Proceedings Pending Paternity Test and/or Determination of Biological Father of Minor Child; R. pp. 171–173, Am. Aff. of Resp. in Supp. of Mot. for Stay of Proceedings Pending Paternity Test and/or Determination of Biological Father of Minor Child.)

On March 15, 2017, Jordain filed an Amended Verified Motion to Rescind Acknowledgment of Paternity Affidavit, in which Jordain alleged material mistake in her former identification of Shad as T.J.H's father, as she later realized she had sexual relations with Matthew Edwards (Matthew) during the timeframe of T.J.H.'s conception, and that Matthew voluntarily underwent paternity testing resulting in a 99.99% chance that Matthew is T.J.H.'s biological father. (R. pp. 204–205, Am. Ver. Mot. to Rescind Acknowledgment of Paternity Aff. ¶¶ 1, 4; R. pp. 209–15, March 14, 2017 Aff. of Matthew Edwards.)

Shad filed an objection to Jordain's amended verified motion to rescind the VAP on March 20, 2017. (R. pp. 216–2019, Obj. to Am. Mot. to Rescind Acknowledgment of Paternity Affidavit.) On March 30, 2017, the magistrate court issued an order denying Jordain's motions to stay the proceedings and rescind the VAP. (R. pp. 228-30, Order on Various Motions.)

On May 12, 2017, Jordain filed a Motion for Order Certifying Order and Granting Permissive Appeal, requesting the magistrate court certify as final the portion of its Order on Various Motions regarding Jordain's motion to rescind the VAP. (R. pp. 291–92, Mot. for Order Certifying Order and Granting Permissive Appeal.) On May 31, 2017, the magistrate court entered its orders granting Jordain's motion for permissive appeal and Jordain's motion to certify as final the magistrate court's order denying Jordain's motion to rescind the VAP. (R. pp. 307–08, Order Granting Mot. for Permissive Appeal; R. pp. 309–311, Order Granting Mot. to Certify

Order as Final.) Jordain filed her Notice of Appeal to the district court, in its appellate capacity, on July 18, 2017. (R. pp. 318–20, Notice of Appeal.)

Following oral argument on Jordain's appeal to the district court on October 25, 2017, District Judge Joel E. Tingey issued his Decision on Appeal on November 9, 2017, in which he affirmed the magistrate court's decision denying Jordain's motion to rescind the VAP. (R. pp. 365–66, Minute Entry; R. pp. 367–76, Decision on Appeal.) Jordain filed her Notice of Appeal of the district court's decision on December 6, 2017. (R. pp. 378–80.)

C. Statement of Facts.

Shad and Jordain were involved in a sexual relationship prior to the birth of T.J.H. on September 24, 2014, causing both parties to believe Shad was the father of T.J.H. (R. p. 31, Aff. of Shad Lewis Hamberlin ¶ 3; *see generally* R. pp. 45–52, Aff. of Jordain LeAnn Bradford in Resp. to Aff. of Shad Lewis Hamberlin.) In furtherance of this belief, Jordain and Shad executed the VAP on July 7, 2015, in which Jordain stated, "I acknowledge that the man named above [Shad] is the biological father of my child. I consent to the recording of his name, date, and place of birth on the birth certificate of the above child [T.J.H.]." (R. p. 160, Objection to Mot. for Stay of Proceedings Pending Paternity Test and/or Determination of Biological Father of Minor Child Ex. A, Acknowledgment of Paternity Affidavit.) The State of Idaho, via the Idaho Department of Health and Welfare Bureau of Vital Records and Health Statistics, issued a Certificate of Live Birth for T.J.H., on which Shad is listed as T.J.H.'s father. (R. p. 161, Obj. to Mot. for Stay of Proceedings Pending Paternity Test and/or Determination of Biological Father of Minor Child Ex. B, Certificate of Live Birth.)

Since executing the VAP, Jordain has alleged a material mistake of fact in her identification of Shad as the biological father of T.J.H., alleging instead that Matthew is T.J.H.'s

biological father. (*See generally* R. pp. 204–208, Am. Ver. Mot. to Rescind Acknowledgment of Paternity Aff.) Jordain alleged that at the time she learned she was pregnant with T.B.H. in late March or early April 2014, she was dating Shad and believed Shad to be T.B.H.'s father. (*Id.* at ¶ 3.) Jordain alleged that she did not contact Matthew about the pregnancy because she and Shad had calculated the date of conception as a time when Jordain and Shad had sexual relations. (*Id.* at ¶ 3.) Jordain alleged further that after the end of her relationship with Shad, she renewed contact with Matthew and, after conversations with Matthew regarding the date of conception of T.J.H., "it became apparent to [Jordain] that [she] may have made a mistake of fact that [Shad] was the biological father of [T.B.H.]." (*Id.* at ¶ 4.) Matthew underwent voluntary paternity testing in November 2016 and March 2017, with each test resulting in a 99.99% chance that Matthew is the biological father of T.B.H. (R. pp. 209–15, March 14, 2017 Aff. of Matthew Edwards.)

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

A. Whether Shad is entitled to his attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Rules 40 and 41 of the Idaho Appellate Rules.

III. ATTORNEY FEES ON APPEAL

Shad is entitled to his attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41. *See* IDAHO CODE § 12-121 (2018); IDAHO APP. R. 40 (2018); IDAHO APP. R. 41 (2018). *See infra.*

IV. ARGUMENT

A. Standard of Review

As the appellant, Jordain has the burden of establishing error on behalf of the district court. *Trotter v. Bank of N.Y. Mellon*, 152 Idaho 842, 848, 275 P.3d 857, 863 (2012); *Chapman v. Chapman*, 147 Idaho 756, 764, 215 P.3d 476, 484 (2009). Appellate courts review decisions

addressing child custody disputes under an abuse of discretion standard. *Clair v. Clair*, 153 Idaho 278, 282, 281 P.3d 115, 119 (2012).

Under an abuse of discretion standard, appellate courts review a lower court's exercise of discretion in a "'three-tiered inquiry: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.'" *Pelayo v. Pelayo*, 154 Idaho 855, 861, 303 P.3d 214, 220 (2013) (quoting *Stewart v. Stewart*, 143 Idaho 673, 678, 152 P.3d 544, 549 (2007)). "If findings of fact are supported by substantial and competent, although conflicting, evidence, those findings will not be disturbed on appeal." *Desfosses v. Desfosses*, 120 Idaho 354, 356, 815 P.2d 1094, 1096 (Ct.App. 1991) (citing *Pierson v. Jones*, 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981)); *see also Tisdale v. Tisdale*, 127 Idaho 331, 333, 900 P.2d 807, 809 (1995). "If the law has been properly applied to those facts found, the judgment will be affirmed, and upheld on further appeal." *Desfosses*, 120 Idaho at 356, 815 P.2d at 1096 (citing *Hentges v. Hentges*, 115 Idaho 192, 194, 765 P.2d 1094, 1096 (Ct.App. 1988)).

Idaho appellate courts have routinely declined to search an appellate record for unspecified errors. *In re Clark*, 153 Idaho 349, 356, 283 P.3d 96, 103 (2012); *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010); *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 103, 113, 244 P.3d 247, 257 (Ct.App. 2010). Idaho appellate courts require argument and a specific assignment of error under the Idaho Appellate Rules in order for an issue to be preserved and deemed properly brought before the Court. *See Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

The Idaho Supreme Court has articulated the standard for preserving issues on appeal, noting that "[i]ssues on appeal are not considered unless they are properly supported by both authority *and* argument." *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012) (citing *Gem State Ins. Co. v. Hutchison*, 245 Idaho 10, 16, 175 P.3d 172, 178 (2007)) (emphasis added). The Court has ruled that an issue is waived when no argument or authority is cited in support of the issue. *Ball v. City of Blackfoot*, 152 Idaho 673, 678, 273 P.3d 1266, 1271 (2012) (citing *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). In *Maclay v. Idaho Road Estate Commission*, the Idaho Court of Appeals declined to hear arguments that were not supported by argument or authority in the opening brief. 154 Idaho 540, 548, 300 P.3d 616, 624 (2012) (citing *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006)); *see also State v. Grantham*, 146 Idaho 490, 500, 198 P.3d 128, 138 (Ct.App. 2008).

B. The district court did not abuse its discretion in applying a reasonable person standard to the rescission requirements of Idaho Code § 7–1106.

1. Jordain's requested interpretation of Idaho Code § 7-1106 would result in an absurd application.

Jordain limits the legal analysis and argument in her appellate brief to one issue: whether the district court abused its discretion in applying a reasonable person standard to the rescission requirements in Idaho Code § 7–1106. (App. Brief 8.) Idaho Code § 7-1106 establishes the legal effect of voluntary acknowledgments of paternity for Idaho birth and provides the framework by which such acknowledgments may be rescinded. IDAHO CODE § 7-1106 (2018). While any party may rescind a voluntary acknowledgment of paternity within 60 days after the acknowledgment is filed, Idaho Code § 7-1106 limits the grounds on which a party may challenge or seek rescission of a prior acknowledgment after the initial 60-day period to fraud, duress, or material

mistake of fact, with the burden of proof upon the party seeking to challenge or rescind the acknowledgment. *Id.*

Jordain argues that because Idaho Code § 7-1106 does not reference a reasonable person standard in articulating the grounds on which a party may challenge a voluntary acknowledgment of paternity after the initial 60-day rescission period, the district court abused its discretion in applying such a standard in affirming the magistrate court's decision denying Jordain's motion to rescind the VAP. However, Jordain's interpretation of the statutory language calls for an absurd result that favors semantics over public policy, while ignoring settled Idaho jurisprudence regarding statutory interpretation and application.

This Court has previously articulated the methodology by which a court is to interpret a statute:

> When interpreting a statute, the Court begins with an examination of the literal words of the statute. *Grand Canyon Dories v. Idaho State Tax Comm'n,* 124 Idaho 1, 5, 855 P.2d 462, 466 (1993); *State ex rel. Lisby v. Lisby,* 126 Idaho 776, 779, 890 P.2d 727, 730 (1995). **The language of the statute is to be given its plain, obvious and rational meaning.** *Lisby,* 126 Idaho at 779, 890 P.2d at 730. A statute is to be construed as a whole without separating one provision from another. *George W. Watkins Family v. Messenger,* 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990). The Court should also construe statutes under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994). Last, in attempting to discern and implement the intent of the legislature, the Court may seek edification from the statute's legislative history and contemporaneous context at enactment. *Corporation of Presiding Bishop v. Ada County,* 123 Idaho 410, 416, 849 P.2d 83, 89 (1993). However, if statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997).

State v. Burnight, 132 Idaho 644, 659, 978 P.2d 214, 219 (1999) (emphasis added). When adopting the Court's prior rulings on statutory interpretation, it becomes apparent that the district

court correctly exercised its discretion in affirming the magistrate court's prior decision denying Jordain's motion to rescind the VAP on the basis of material mistake of fact.

On appeal, Jordain requests this Court find that the district court abused its discretion in determining that Jordain was required, as the moving party, to prove by clear and convincing evidence that her alleged material mistake of fact in identifying T.J.H's biological father was a reasonable mistake justifying rescission. (App. Brief 8; *see also* R. 374, Decision on Appeal 8.) However, Jordain's requested interpretation of the statute calls for an interpretation of the statute that is neither plain, obvious, nor rational. *See Burnight*, 132 Idaho at 659, 978 P.2d at 219. Under Jordain's proposed interpretation of the statute, any party could challenge a voluntary acknowledgment of paternity months or years after the initial sixty-day rescission period by alleging that the party made *any* kind of "material" mistake, with such degree of materiality measured by the party challenging the acknowledgment of paternity. Such an interpretation is problematic for myriad reasons, not the least of which being that it would completely eviscerate the burden of the party seeking to challenge the acknowledgment of paternity to do so by clear and convincing evidence, as the moving party could merely allege that he or she made a "material" mistake of fact. In contrast, utilizing a reasonable person standard, as demonstrated by the magistrate court and the district court, preserves the moving party's burden in objectively establishing the existence of material mistake by clear and convincing evidence.

Without employing a reasonable person standard to gauge such a claim of material mistake of fact, the grounds by which a person could challenge a previously-filed acknowledgment of paternity would become entirely subjective in nature, frustrating both the legislative intent in passing Idaho Code § 7-1106 and public policy related to the statute. By enacting Idaho Code § 7-1106, the legislature signaled its intent to expressly limit the cases in

which a party could later challenge a voluntary acknowledgment of paternity to those situations in which the moving party can establish, by clear and convincing evidence, the presence of fraud, duress, or material mistake of fact. Undoubtedly such express limitations on a party's ability to later rescind an acknowledgment of paternity helps provide certainty in a minor child's life, while simultaneously limiting a party's ability to weaponize a voluntary acknowledgment of paternity in later custody proceedings.

The reasonable person standard employed by both the magistrate court and the district court is appropriate under Idaho Code § 7-1106, given the plain, obvious, and rational meaning of the statutory language. Without application of the reasonable person standard, courts would be hampered in their ability to properly address a late challenge to a voluntary acknowledgment of paternity. Given the Court's prior statement that "[i]n the final analysis we must decide the question on the basis of what we deem to be a reasonable statutory interpretation, consistent with public policy and purpose," the district court's application of a reasonable person standard was an appropriate exercise of its discretion, and Jordain has failed to establish an abuse of discretion by the district court. *C. Forsman Real Estate Co., Inc. v. Hatch*, 97 Idaho 511, 520, 547 P.2d 1116, 1120 (1976).

2. The legislative history of Idaho Code § 7-1106 and legal precedent support the district court's application of a reasonable person standard.

While the plain, obvious, and rational meaning of Idaho Code § 7-1106's language addressing post-rescission period challenges to a voluntary acknowledgment of paternity calls for application of a reasonable person standard, as set forth above, *supra*, the district court also correctly exercised its discretion in looking to Idaho case law imposing a reasonable person standard when discussing setting aside a judgment under the analogous requirements of Idaho Rule of Civil Procedure 60(b)(1). (*See* R. pp. 373–75, Decision on Appeal 7–9.)

It has been long-established by this Court that, when faced with questions of statutory construction, "[i]t is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) (*abrogated on other grounds*, *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 895–96, 265 P.3d 502, 508–09 (2011)) (internal citations omitted). A review of the legislative history of Idaho Code § 7-1106, in conjunction with contemporary legal precedence, provide further justification for the district court's application of a reasonable person standard when affirming the magistrate court's prior decision denying Jordain's motion to rescind the VAP on grounds of mistake.

Prior to the legislature's 1996 revision to Idaho Code § 7-1106, the statute did not include language regarding a party's ability to challenge a voluntary acknowledgment of paternity. *See* IDAHO CODE § 7-1106 (1995). However, in 1996, the Idaho legislature amended Idaho Code § 7–1106 to include the initial 60-day rescission period and expressly limit the grounds on which parties could later challenge voluntary paternity acknowledgments to fraud, duress, or material mistake of fact. *See* S.B. 1307, 1996 Leg., 53rd Sess. (2nd Reg. Sess.) (Idaho 1996) (enacted); *see also* IDAHO CODE § 7-1106 (2018).

At the time the legislature amended Idaho Code § 7-1106 to limit the grounds on which a party could challenge a voluntary acknowledgment of paternity beyond the initial 60-day rescission period to circumstances of fraud, duress, or material mistake of fact, Idaho jurisprudence was replete with interpretation of the "analogous" provision allowing judgments to be set aside on grounds of *mistake*, inadvertence, surprise, or excusable neglect under Idaho Rule of Civil Procedure Rule 60(b)(1), as referenced by the district court in its Decision on Appeal. (R. pp. 374–375, Decision on Appeal 8–9.) *See also Gordon v. Hedrick*, 159 Idaho 604, 610, 364

P.3d 941, 957 (2015). Specifically, the *Avondale* and *Kovachy* cases cited by the district court in its appellate decision, both issued before 1996, establish that courts interpreted "mistake" language similar to that in Idaho Code § 7-1106, as amended in 1996, as being subject to a reasonable person or reasonably prudent standard. (*Id.*) *See Avondale On Hayden, Inc. v. Hall*, 104 Idaho 321, 325–26, 658 P.2d 992, 996–97 (Ct.App. 1983); *Kovachy v. DeLeusomme*, 122 Idaho 973, 974, 842 P.2d 309, 310 (Ct.App. 1992)).

Under the standard articulated by the Idaho Supreme Court in the *Messenger* case, it is assumed that the legislature knew of the language in Rule 60(b)(1) analogous to the amended language of Idaho Code § 7-1106, as well as judicial interpretation of Rule 60 requiring that a party seeking to set aside a judgment on grounds of mistake must show it has acted with reasonable prudence. *See Messenger*, 118 Idaho at 540, 797 P.2d at 1388 (internal citations omitted). By amending the language of Idaho Code § 7-1106 to include references to mistake as a basis for rescinding a voluntary paternity acknowledgment, given the jurisprudence interpreting the similar language of Rule 60(b)(1) as requiring a showing of reasonable prudence, the legislature tacitly approved a reasonable person standard for determining the existence of a material mistake of fact sufficient to rescind a voluntary acknowledgment of paternity.

Under both an analysis of the plain, obvious, and rational meaning of Idaho Code § 7-1106, as well as a review of its legislative history and related legal precedent, the district court correctly exercised its discretion in applying a reasonable person standard in its Decision on Appeal. Jordain, as the moving party, has failed to establish error on behalf of the district court, and the district court's judgment should be affirmed and upheld on appeal.

C. Jordain has failed to provide any legal authority in support of her argument that the district court abused its discretion in finding Jordain did not act reasonably.

Jordain focuses the majority of her appellate brief on her argument that the district court, and the magistrate court before it, erred in finding that Jordain did not act as a reasonable person. (App. Brief 9–10.) However, in so arguing, Jordain does not cite to *any* legal authority or provide any legal argument in support of her position. (*See id.*)

As noted above, *supra*, the Idaho Supreme Court has held that "[i]ssues on appeal are not considered unless they are properly supported by both authority *and* argument." *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012) (citing *Gem State Ins. Co. v. Hutchison*, 245 Idaho 10, 16, 175 P.3d 172, 178 (2007)) (emphasis added). A party waives an issue on appeal when the party fails to cite authority in support of the issue, and appellate courts have declined to hear arguments that were not supported by legal authority in the opening brief. *Ball v. City of Blackfoot*, 152 Idaho 673, 678, 273 P.3d 1266, 1271 (2012) (citing *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)); *Maclay v. Idaho Road Estate Comm'n*, 154 Idaho 540, 548, 300 P.3d 616, 624 (2012) (citing *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006)).

Rather than provide any legal authority in support of her argument that the district court abused its discretion in finding that Jordain acted unreasonably, Jordain invites this Court to reweigh the evidence in the record. However, "[i]t is not this Court's role to reweigh evidence." *Frontier Development Group, LLC v. Caravella*, 157 Idaho 589, 595, 338 P.3d 1193, 1199 (2014) (citing *PacifiCorp. v. Idaho State Tax Comm'n*, 153 Idaho 759, 768, 291 P.3d 442, 451 (2012)).

Ultimately, Jordain's argument in support of her contention that the district court abused its discretion in determining that she acted unreasonably underscores the need for application of a reasonable person standard when a party seeks to rescind a voluntary paternity

acknowledgment on the grounds of material mistake. As noted above, *supra*, were such a standard not adopted by the reviewing court, every case in which material mistake of fact is alleged by the party challenging the voluntary acknowledgment of paternity would be replete with the type of argument Jordain makes on appeal: that because *Jordain* considers her actions to be reasonable, Jordain's subjective opinion regarding her own actions constitutes *prima facie* evidence that such behavior is reasonable and justifies rescission of the VAP more than three years after Jordain executed the VAP, and almost four years after the birth of T.J.H. As addressed earlier, *supra*, this interpretation of Idaho Code § 7-1106 is absurd and would completely do away with the burden of the party challenging the voluntary acknowledgment of paternity, as well as render meaningless the express limitations on a party's ability to challenge such acknowledgments after the initial rescission period.

Jordain has failed to establish any error or abuse of discretion by the district court in entering its Decision on Appeal and affirming the magistrate court's denial of Jordain's motion to rescind the VAP. Because Jordain, as the appellant, has failed to meet her burden in providing cogent legal authority establishing that the district court abused its discretion in issuing its Decision on Appeal, the Court should affirm the district court's decision.

D. Shad should be awarded his attorney fees on appeal.

Shad should be granted his attorney fees and costs on appeal. Idaho Appellate Rule 41 allows a party to affirmatively seek attorney fees on appeal. IDAHO APP. R. 41 (2018). A basis for attorney fees must be presented in a party's first appellate brief in order to avoid waiver of a claim for attorney fees. *Id.* A party prevailing on appeal is likewise entitled to costs. IDAHO APP. R. 40 (2018).

1. Jordain's appeal is frivolous and unfounded, and Shad is entitled to fees and costs pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41.

Idaho Code § 12-121 provides a mechanism for awarding attorney fees to Shad. An appellate court "will award fees to a prevailing party under Idaho Code section 12-121 when the Court believes 'that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.'" *Sweet v. Foreman*, 159 Idaho 761, 367 P.3d 156, 162 (2016) (quoting *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 633, 329 P.3d 1072, 1081 (2014)). "When an appellant fails to present a cogent argument as to why he should prevail, an award to his opponent is appropriate." *Turner v. Turner*, 155 Idaho 819, 827, 317 P.3d 716, 724 (2013) (citing *Chicoine v. Bignall*, 127 Idaho 225, 228, 899 P.2d 438, 441 (1995)). An award of attorney fees is appropriate under Idaho Code § 12-121 "if the appeal simply invites this Court to 'second-guess the trial court on conflicting evidence.'" *Turner*, 155 Idaho at 827, 317 P.3d at 724 (quoting *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006)).

Idaho Code § 12-121 is specifically designed to compensate parties who are dragged into the legal process without an underlying fair or reasonable dispute. *See* IDAHO CODE 12-121 (2018). This appeal is just such a case, where Jordain, without any legal basis, invites this Court to disregard and "second guess" the district court's prior decision, following the district court's refusal to do so to the magistrate court's order denying Jordain's motion to rescind the VAP. Such conduct should justify an award of attorney fees under Idaho Code § 12-121. "Normally, this Court will award attorney fees pursuant to I.C. § 12-121 if the appeal merely invites the Court to reweigh the evidence or second guess the lower court, or if the appeal was brought or defended frivolously, unreasonably, or without foundation." *Ketterling v. Burger King Corp.*, 152 Idaho 555, 562, 272 P.3d 527, 534 (2012). *See also In re Doe*, 157 Idaho 14, 19, 333 P.3d 125, 130 (2014). Jordain's appeal is frivolous and lacks foundation, and Shad should be awarded

his attorney fees and costs pursuant to Idaho Code § 12-121 and Idaho Appellate Rules 40 and 41.

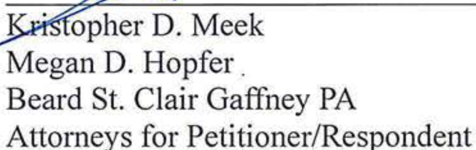
2. Jordain is not entitled to attorney fees under Idaho Code § 12-121, Idaho Appellate Rules 40 or 41, or any other rule or statute.

Jordain is not entitled to attorney fees and costs under any of the rules or statutes she cited in her appellate brief, or under any other avenue of Idaho law. As established above, *supra*, the district court correctly exercised its discretion in affirming the magistrate court in its Decision on Appeal, and Jordain has failed to meet her burden as the appellant to establish error on behalf of the district court. *Trotter v Bank of N.Y. Mellon*, 152 Idaho 842, 848, 275 P.3d 857, 863 (2012); *Chapman v. Chapman*, 147 Idaho 756, 764, 215 P.3d 476, 484 (2009). For the reasons stated above, *supra*, the Court should affirm the district court's Decision on Appeal. Further, because Jordain has failed to meet her burden as appellant, Jordain is not the prevailing party and is not entitled to attorney fees or costs. The Court should accordingly deny Jordain's request for attorney fees and costs on appeal.

V. CONCLUSION

As a result of the foregoing, the Court should affirm the district court's Decision on Appeal and award Shad his attorney fees and costs on appeal.

DATED: July 31, 2018.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of July, 2018, I caused to be served two true and correct copies of the foregoing document to the following party via the method of delivery designated:

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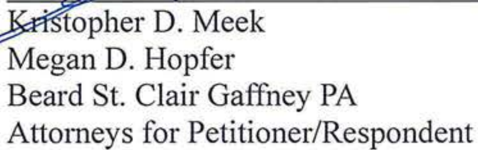

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