9-14-2018

Kosmann v. Dinius Respondent's Brief Dckt. 45779

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID A. KOSMANN, Plaintiff-Appellant, vs. **LEO GILBRIDE**, Defendant	Supreme Court Docket No. 45779-2018 Canyon County Case No. CV-2013-795
DAVID A. KOSMANN, Plaintiff-Appellant, vs. **KEVIN DINIUS** an individual; and **DINIUS & ASSOCIATES, PLLC**, an Idaho professional limited liability company, Defendants-Respondents.	Canyon County Case No. CV-2017-568

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

THE HONORABLE GENE A. PETTY, PRESIDING DISTRICT JUDGE

Robert A. Anderson, ISB No. 2124
Yvonne A. Dunbar, ISB No. 7200
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
P. O. Box 7426
Boise, ID 83707-7426
Attorneys for Defendants-Respondents

Loren K. Messerly
MESSERLY LAW, PLLC
2350 E. Roanoke Drive
Boise, ID 83712
Attorneys for Plaintiff-Appellant

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I. STATEMENT OF THE CASE

A. Nature of the Case

The current matter arises out of a settlement reached during a court-ordered mediation between Defendants/Respondents Dinius & Associates, PLLC and Kevin Dinius and Plaintiff/Appellant David Kosmann before Judge Stephen Dunn. (R. Vol. 2 p. 106). Defendants disagree with Kosmann's rendition of what transpired during and after the mediation. Contrary to Kosmann's assertions, the mediation resulted in a valid and enforceable settlement being placed on the record. Kosmann and his counsel ratified the settlement and effectively waived any objections they may have had to the circumstances surrounding the parties' meeting which lead to the settlement. As is explained herein, the District Court correctly applied Idaho law when it ruled the settlement enforceable. It also properly exercised its discretion in denying Kosmann's motion for sanctions against Defendants and their counsel.

B. Course of Proceedings and Disposition

Defendants represented Kosmann in a 2013 civil litigation suit filed against Leo Gilbride (Canyon County Case No. CV-2013-795). (R. Vol. 1, p. 3). The litigation before the trial court lasted two years, involved substantial briefing practice, went to trial, then concluded over two years later through motion practice. (R. Vol. 1, pp. 3-20). While Kosmann paid a portion of Defendants' legal fees, he failed to pay the entirety of the fees owed. (R. Vol. 1, pp. 32-33). Therefore, following the conclusion of the 2013 litigation, in compliance with Idaho law, Defendants filed an attorney-fees lien related to the outstanding attorney fees owed to them. *Id.* Kosmann thereafter initiated litigation against Defendants wherein he pled claims of alleged attorney malpractice (Canyon County Case No. CV-2017-568). (R. Vol. 2 pp. 12-71). In an

effort to resolve all claims between the parties, the District Court ordered the parties to attend mediation with Judge Stephen Dunn. (R. Vol. 2 pp. 106-108).

The mediation occurred on July 26, 2017. (R. Vol. 3 p. 21 ¶2). Dinius attended the mediation on behalf of the Defendants and was represented by Yvonne Dunbar. Kosmann attended the mediation with his counsel, Loren Messerly.[1] (Ex. pp. 1-6; R. Vol. 3 p. 191 ¶2, p. 240 ¶3). Throughout the course of the mediation, Defendants and Kosmann were located in separate rooms and Judge Dunn would move between the two rooms in trial to reach a resolution. (R. Vol. 3 p. 250 ¶¶3-5, p. 240 ¶¶4-6). When the mediation was at a stalemate, Judge Dunn persistently requested that Dinius meet with Kosmann. (R. Vol. 3 p. 195 ¶12, p. 200 ¶6). After repeatedly declining Judge Dunn's invitation, Dinius ultimately reluctantly agreed to do so. *Id.* During that meeting, Dinius and Kosmann cleared the air between them and came to a mutual resolution of their respective claims. (R. Vol. 3 p. 195 ¶12, p. 200-201, ¶8). Following that meeting, the parties each met with their respective counsel and were able to discuss the voluntary settlement reached by Dinius and Kosmann. (R. Vol. 3 p. 92 ¶37, p.94 ¶46, Ex. p. 3 L6:4-6). The settlement was thereafter placed on the record by Judge Dunn and the parties. (Ex. pp. 1-6). Judge Dunn asked defense counsel to draft a written settlement agreement memorializing the settlement terms placed on the record. (R. Vol. 3 p. 21, ¶3).

Defense counsel did as requested by Judge Dunn. (R. Vol. 3 p. 22, ¶4). However, the parties were unable to agree on the language of the written settlement agreement. (R. Vol. 3 p. 22-24, ¶4-11). As such, on August 2, 2017, Defendants filed a motion to enforce the settlement entered on the record and noticed it to be heard on August 31, 2017. (R. Vol. 2 pp. 4-5, 110-111).

[1] Unbeknownst to Defendants and their counsel, Kosmann's girlfriend also attended the mediation. Her attendance was not disclosed to Defendants and their counsel until after the conclusion of the mediation.

The next day, Kosmann filed a cross-motion to enforce an unidentified settlement. (R. Vol. 2 pp. 4, 110-111). Kosmann, however, never filed memorandum in support of his cross-motion nor did he ever notice his cross-motion for hearing. (R. Vol. 2 pp. 4-10). Therefore, Kosmann's cross-motion was never properly before the District Court.

Kosmann thereafter opposed Defendants' *Motion to Enforce Settlement Agreement* on the ground that he believed the agreed-upon settlement amount was greater than the amount identified by the parties on the record. (R. Vol. 3 pp. 4, 169-178). Kosmann did not claim that Dinius' meeting with Kosmann occurred in violation of Idaho Rule of Professional Conduct 4.2 or that the alleged Rule violation invalidated the settlement agreement. *Id.* Instead, Kosmann waited until the August 31st hearing to first raise his claim of an alleged IRPC 4.2 violation and waited until after the hearing to initially argue the agreement was void for public policy reasons. (Tr. pp. 6-8 at L. 7:10-15:19; R. Vol. 2 pp. 118-126). Doing so was improper as these arguments were not timely raised in Kosmann's opposition materials. (R. Vol. 3 pp. 169-178).

Following the August 31, 2017 hearing, without first seeking leave from the District Court, Kosmann filed an untimely supplemental opposition brief which he incorrectly titled "*Supplemental Brief in Support of David Kosmann's Motion to Enforce Agreement*" (hereinafter "*Supplemental Brief*"). (R. Vol. 2 pp. 118-126). In his August 31st *Supplemental Brief*, Kosmann argued, for the first time, his claims that the settlement was void for public policy because Dinius and Dunbar purportedly violated IRPC 4.2 and 8.4 when Dinius met with Kosmann at Judge Dunn's request during the mediation. *Id.* As this *Supplemental Brief* and the legal arguments contained therein were not raised in compliance with Idaho Rule of Civil Procedure 7(b)(3), Defendants moved to strike the *Supplemental Brief*. (R. Vol. 3 pp. 203-208).

In response to Defendants' *Motion to Strike*, Kosmann filed a motion for leave to file his supplemental brief on September 6, 2017. (R. Vol. 3 pp. 209-212). In support of his motion for leave, Kosmann failed to explain why he did not complete the legal research at issue or present his IRPC 4.2 and public policy argument at least 7 days prior to the August 31st hearing. (R. Vol. 3 pp. 209-219).

On September 14, 2017, the Court set an October 2, 2017 hearing on the parties' various pending motions. (R. Vol. 2 p. 6). On September 20th, Kosmann filed *Kosmann's Motion for Sanctions Against Dinius and Dunbar for Obtaining a Settlement Through Unethical Behavior and Then Repeatedly Refusing to Admit and Remedy Their Violations, at Great Expense to Kosmann* ("*Motion for Sanctions*") as well as a motion to shorten time to have that motion also heard during the October 2nd hearing.[2] (R. Vol. 3 pp. 231-237). Defendants opposed Kosmann's motion for leave. (R. Vol. 2 pp. 130-132). Given that they were unaware whether the District Court would hear Kosmann's untimely *Supplemental Brief* on October 2nd, on September 27, 2018, Defendants also filed supplemental reply materials wherein they responded to the new arguments presented in Kosmann's *Supplemental Brief*. (R. Vol. 3 pp. 238-269). As Rule 7(b)(3)(C) allows a party to file reply materials up to two business days prior to a hearing, Defendants supplemental reply materials were timely filed.

In their briefing, Defendants argued, inter alia, Kosmann's IRPC violation arguments should be disregarded since they were not timely raised and Kosmann failed to establish

[2] Based upon Kosmann's argument on appeal related to the Rule 11(c) "safe harbor provision", Kosmann's *Motion for Sanctions* was filed in contravention of that Rule. Kosmann did not reach out to the Defendants at least twenty-one days prior to September 20, 2017 to ask them to with their *Motion to Enforce Settlement* due to his allegations that the Kosmann-Dinius meeting violated IRPC 4.2. In fact, the first time Kosmann mentioned any alleged IRPC 4.2 violation was before the District Court on August 31, 2017, which is less than 21 days prior to September 20, 2017.

excusable neglect as required by Rule 2.2(b)(1)(B). (R. Vol. 2 pp. 130-132; R. Vol. 3 pp. 260-262). Defendants also presented arguments why Kosmann's arguments were substantively inaccurate, including, but not limited to: (1) Kosmann waived his objections to the settlement agreement entered on the record and any alleged IRPC violation when they ratified and assented to the settlement agreement; (2) an alleged IRPC violation did not provide a public policy basis for invalidating it; and (3) the record did not contain clear and convincing evidence of an IRPC 4.2 violation. (R. Vol. 3 pp. 262-267).

At the October 2, 2017 hearing, the District Court granted Kosmann's motion for leave; found Defendants' motion to strike was moot; provided Defendants until October 13th to file any further responsive supplemental briefing; and awarded Defendants the attorney's fees they expended in filing the motion to strike Plaintiff's untimely supplemental brief. (Tr. p.37 L.21 - p.39 L. 9). On October 13, 2017, Defendants timely filed their *Opposition to Plaintiff's Supplemental Brief* which augmented their prior August 17, 2017, August 29, 2017, and September 27, 2017 filings. (R. Vol. 3 pp. 270-273). In addition to the arguments previously raised, Defendants pointed out, among other things, Kosmann had not presented a proper public policy argument because he did not claim the settlement agreement on its face violated public policy. (R. Vol. 3 pp. 272-273).

On October 17, 2017, Kosmann noticed his motion for sanctions for a November 8, 2017 hearing. (R. Vol. 2 p. 7). Defendants subsequently filed their own motion for sanctions against Plaintiff and his counsel to also be heard on November 8, 2017. (R. Vol. 3 pp. 274-288). Prior to the hearing on the parties' cross-motions for sanctions, the District Court entered its *Memorandum Decision and Order to Enforce Settlement Agreement and Order to Release Funds*

("*Memorandum Decision and Order*"). (R. Vol. 2 pp. 142-161). A copy of that decision was provided to the parties at the November 8, 2017 hearing. (Tr. p. 11 L. 26:6-27:16).

In its *Memorandum Decision and Order*, the District Court ruled, inter alia: (1) the settlement agreement placed on the record before Judge Dunn was enforceable; and (2) Dinius' meeting with Kosmann did not void the settlement agreement for violation of public policy. (R. Vol. 2 pp. 148-153). The Court heard the parties' cross-motions for sanctions on November 8, 2017. (Tr. p. 11). It thereafter entered its November 22, 2017 *Memorandum Decision and Order on Parties' Cross-Motions for Sanctions* ("*Cross-Motions for Sanctions Decision*") wherein it denied Kosmann's *Motion for Sanctions*, denied Defendants' motion in part, and awarded Defendants $200, which represented one billable hour incurred in prosecuting their motion to strike. (R. Vol. 2 pp. 162-177). *Judgment* was entered on November 22, 2017. (R. Vol. 2 pp. 178-180).

Following the District Court's entry of *Judgment*, on December 5, 2017, Kosmann filed *Plaintiff's Motion to Reconsider* and a *Second Supplemental Declaration of David A. Kosmann*. (R. Vol. 3 pp. 343-354). In his *Motion to Reconsider*, Kosmann asked the District Court to reconsider six discrete decisions, which all related to the Court's denial of Kosmann's request for sanctions against the Defendants and the Defendants' request for sanctions against Kosmann and his counsel. (R. Vol. 3 pp. 344-345). Kosmann then waited until well after the Rule 11.2(b) deadline had passed and filed *Plaintiff's Memorandum in Support of His Motion to Reconsider* and the *Declaration of Counsel in Support of Kosmann's Motion to Reconsider* on December 24, 2017. (R. Vol. 3 pp. 355-417). On December 27, 2017, Kosmann filed the Exhibits to *Declaration of Counsel in Support of Kosmann's Motion to Reconsider*. (R. Vol. 3 pp. 418-426).

Because Kosmann's December 24th and 27th filings were untimely under Idaho Rule of Civil Procedure 11.2(b) and Kosmann failed to establish excusable neglect for his failure to timely file the same, Defendants moved to strike the same as well as any consideration of the new arguments raised in the memorandum. (R. Vol. 3 pp. 427-443). In his untimely filed memorandum, Kosmann attempted to have the Court expand its reconsideration review and to also reconsider its decisions that: (1) the settlement (as placed on the record) was valid and enforceable; (2) the settlement (as placed on the record) was not void for public policy as a result of the alleged ethical violations; and (3) its decision not to enforce a purported $40,000 settlement. (R. Vol. 3 pp. 383-403). Defendants filed their opposition to the *Motion to Reconsider* on January 4, 2018. (R. Vol. 3 pp. 454-470). On January 9, 2018, Kosmann filed his reply in support of his *Motion to Reconsider*. (R. Vol. 3 pp. 485-509). In his reply brief, Kosmann improperly brought new arguments which were not previously raised before the Court, including the argument that the sanctions against his counsel violated the "safe harbor provision" in Rule 11(c)(2). (R. Vol. 3 pp. 506-507). As such arguments were not timely raised, the Court did not have jurisdiction to consider them. *See Taylor v. Riley*, 162 Idaho 692, 703–04 (2017).

While the District Court had originally noticed the *Motion to Reconsider* for hearing on January 11, 2018, the District Court ultimately took the briefing related to *Plaintiff's Motion to Reconsider* and Defendants' *Second Motion to Strike* under advisement. (R. Vol. 2 pp. 9-10). It issued its ruling denying Kosmann's *Motion to Reconsider* in its January 24, 2018 *Memorandum Decision and Order on Plaintiff's Motion to Reconsider and Defendants' Second Motion to Strike* ("*Motion to Reconsider Decision*"). (R. Vol. 2 pp. 181-196). In doing so, the District Court struck from the record the untimely filed memorandum, declaration of counsel, and exhibits to the declaration of counsel as well as inadmissible portions of *Second Supplemental*

Declaration of David A. Kosmann. (R. Vol. 2 pp. 184-188). The District Court also made the following rulings:

- The settlement agreement placed on the record was enforceable;
- Kosmann knowingly and willingly entered into the settlement agreement after consulting with his attorney;
- Whether IRPC 4.2 was violated by Dinius, who was represented by counsel, is a matter of first impression in Idaho;
- It was unnecessary for the Court to determine whether IRPC 4.2 was actually violated when ruling on either the parties' cross-motions to enforce settlement or the parties' cross-motions for sanctions;
- The Court properly exercised its discretion in declining to impose sanctions against Defendants where it determined IRCP 11 was not violated; and
- The Court properly exercised its discretion in imposing a $200 sanction against Plaintiff's counsel.

(R. Vol. 2 pp. 188-195).

On January 31, 2018, Plaintiff filed his Notice of Appeal wherein he seeks to appeal the District Court's November 2, 2017 *Memorandum Decision and Order*, November 22, 2017 *Cross-Motions for Sanctions Decision*, November 22, 2017 *Judgment*, and January 24, 2018 *Motion to Reconsider Decision*. (R. Vol. 2 pp. 197-205).

II. STATEMENT OF FACTS

On July 26, 2017, the parties attended mediation in the current matter with Judge Dunn. (R. Vol. 3 p. 21 ¶2). Throughout the course of the current matter and during the July 26, 2017, Defendants were represented by Yvonne Dunbar. (Ex. pp. 1-6; R. Vol. 3 p. 240 ¶3, p. 250 ¶2). Dinius was not acting in a *pro se* capacity at any time during the current litigation or the mediation. *Id.*

During the mediation, Dinius and Dunbar sat in a room together. (R. Vol. 3 p. 240 ¶¶4-5 p. 250 ¶¶3-4). The room did not have any windows facing the hallway. *Id.* As such, from the room, they could not see into the hallway. *Id.* Based upon statements by Judge Dunn, it was their understanding that Kosmann and his counsel, Loren Messerly, were located in another room. *Id.* Throughout the mediation, Judge Dunn came into the room where Dinius and Dunbar were located and he would discuss information, arguments, or requests he received from Kosmann and Messerly. (R. Vol. 3 p. 240 ¶6 p. 250 ¶5). Judge Dunn's comments during the mediation established that any information he was relaying was on behalf of both Kosmann and Messerly. *Id.* Therefore, throughout the mediation, it was understood that both Kosmann and Messerly consented to all information and requests shared with Dinius and Dunbar. *Id.*

During the mediation, the parties discussed a possible settlement of $40,000 with confidentiality and non-disparagement clauses. (R. Vol. 3 p. 192-193 ¶7, p. 199 ¶4). Initially, Dinius and Dunbar believed an agreement may have been reached; however, before the purported settlement was finalized with complete, definite, and certain material terms, the mediator came back in the room and informed Dinius and Dunbar that Kosmann and Messerly requested language in the settlement agreement which would specify the basis for any settlement payments to Kosmann. *Id.* According to the mediator, Kosmann was concerned that the parties in other litigation, including the *Gilbride v. Kosmann* matter and *Kosmann v. McCarthy* matter, could utilize any settlement payment to him as an offset. *Id.* Dunbar explained to the mediator that they would not include such language in the agreement as it could become complicated and because it was unnecessary under Idaho law. (R. Vol. 3 p. 192-193 ¶7). In particular, Idaho law precluded any offsets from any settlement because there was no joint and several liability between Dinius and Gilbride or McCarthy. *Id.*

Judge Dunn asked Dunbar to explain this directly to Messerly in the hallway. (R. Vol. 3 p. 193-194 ¶8). Dunbar agreed to do so and went into the hallway. *Id.* She initially informed Messerly that she was pulling up the pertinent statutes on her phone so they could discuss them. *Id.* Before she completed this task, Messerly demanded yet another additional term to the settlement, specifically that he be included on the release to personally protect him from Dinius' potentially litigation against him. *Id.* Such a term had not previously been discussed by the parties or brought to Dinius and Dunbar's attention during the mediation. (R. Vol. 3 p. 194-195 ¶10). Dunbar declined the inclusion of this additional term. (R. Vol. 3 p. 193-194 ¶8).

In response, Messerly became hostile and started raising his voice. *Id.* He loudly stated that no settlement would occur unless he was personally released from any liability. *Id.* This statement prompted Dunbar to explain to Messerly that his new position created a conflict of interest between him and his client. *Id.* By demanding his personal release and stating that a settlement with his client would not occur unless he was also personally released, Messerly was putting his personal interests before his client's interests, which is a conflict of interest under the Idaho Rules of Professional Conduct. *Id.* Dunbar explained this to Messerly. *Id.* Judge Dunn was present in the hallway and also informed Messerly that he agreed with Dunbar's explanation as to the existence of a conflict of interest. (R. Vol. 3 p. 194 ¶9). The only individuals present in the hallway were Dunbar, Messerly, and Judge Dunn. *Id.*

Despite the potential conflict of interest, Messerly continued his demand, which was not a part of his client's prior settlement requests. (R. Vol. 3 p. 193-194 ¶8). Immediately before he walked away, Messerly specifically withdrew any potential settlement and informed Dunbar that there was no settlement since he would not be personally released in any settlement agreement. *Id.* After Messerly went back into the room where he and Kosmann had been sitting, Dunbar

and Judge Dunn returned to the room where she and Dinius had been sitting during the mediation. (R. Vol. 3 p. 199 ¶4). Dunbar then informed Dinius about the conversation with Messerly. *Id.* Judge Dunn informed Dunbar and Dinius that such a request had not been brought to his attention previously during the mediation. (R. Vol. 3 p. 194-195 ¶10, p. 199 ¶4). Therefore, the initial demand was made by Messerly, not by Kosmann. *Id.* Judge Dunn then left the room to go speak with Messerly and Kosmann.

Due to Messerly's statement that there was no settlement if he was not personally released, Dunbar and Dinius understood the parties had not reached a final and complete settlement and, to the extent there could have been a settlement, Messerly repudiated the same on his client's behalf. (R. Vol. 3 p. 195 ¶11, p. 200 ¶5). Therefore, they understood that Judge Dunn was continuing to meet with the parties and their counsel to see if he could still garner a settlement. *Id.*

Shortly thereafter and over the course of about 15 to 30 minutes, Judge Dunn came into the conference room where Dinius and Dunbar were seated, to see if Dinius would go into the hallway to talk to Mr. Kosmann. (R. Vol. 3 p. 195 ¶12, p. 200 ¶6). At all times, Dinius and Dunbar were under the impression that Judge Dunn had been speaking with both Kosmann and Messerly. *Id.* Initially, Judge Dunn said. Kosmann wanted Dinius to "look him in the eye and promise he would not sue Messerly." *Id.* Dinius refused to do that. *Id.* Next, Judge Dunn said Kosmann wanted Dinius to say he had no present intention to sue Messerly. *Id.* Dinius again refused. *Id.* Finally, Judge Dunn asked if Dinius would simply sit down with Kosmann to just talk. *Id.* Judge Dunn assured Dinius and Dunbar that Kosmann was not demanding any particular statements by Dinius. *Id.* Given Judge Dunn's insistence and permission for the parties to meet, Dinius agreed to meet alone with Kosmann. (R. Vol. 3 p. 241 ¶9).

At all times, neither Dinius nor Dunbar had reason to believe Messerly was unaware of the meeting. (R. Vol. 3 p. 195-196 ¶14, p. 200 ¶7, p. 240-241 ¶¶6, 8, p. 250-251 ¶¶5-6). Instead, they believed the interactions were continued as before, where Judge Dunn met jointly with Kosmann and his counsel and then relayed their joint requests or comments to Dunbar and Dinius. *Id.* Given the practice which had transpired during the mediation, Dunbar and Dinius believed Messerly was involved with the discussions between Judge Dunn and Kosmann and was aware of Kosmann's requests to speak directly with Mr. Dinius. *Id.*

Based upon that understanding, Dinius agreed to meet with Kosmann. (R. Vol. 3 p. 241 ¶9). Judge Dunn led Dinius to an office across the hall to meet with Kosmann. (R. Vol. 3 p. 200 ¶7). During that meeting, Kosmann did not mention that his attorney was unaware of the meeting or that their meeting was not sanctioned by his attorney. During the meeting, Kosmann and Dinius "cleared the air." (R. Vol. 3 p. 200-201 ¶8). Kosmann apologized for suing Dinius and stated he was hearing so many different stories, he didn't know what to believe. (R. Vol. 3 p. 242 ¶11). After they "cleared the air" and attempted to mend their prior friendship, Kosmann expressed to Dinius that he wanted to settle and be done with this case. (R. Vol. 3 p. 200-201 ¶8, p. 200-201 ¶8p. 242 ¶11). Dinius asked Kosmann what he wanted to settle their dispute. (R. Vol. 3 p. 200-201 ¶8, p. 242 ¶11). He stated that he wanted a settlement for as much as he could get because he was paying Messerly monthly and money was tight for him. (R. Vol. 3 p. 200-201 ¶8). Dinius asked him if the approximately $32,000 being held by the court would resolve the claims – in addition to a full release of all claims – including claims against Messerly. (R. Vol. 3 p. 200-201 ¶8, p. 242 ¶11). Kosmann responded that he was in agreement with settling the case in exchange for payment to him in the amount being held by the court (although the source of this payment was left to be determined); a mutual release between Dinius and Kosmann; and a

release of Messerly from any potential claims of contribution and/or indemnity Dinius may have. (R. Vol. 3 p. 200-201 ¶8). During their meeting, Kosmann did not request any further settlement sums and specifically did not request $40,000, despite the fact that the parties had previously discussed that number. (R. Vol. 3 p. 201 ¶9, p. 242 ¶11).

While Dinius and Kosmann were meeting, Messerly went into the hall and learned the meeting was transpiring from Judge Dunn. (Ex. p. 3 L. 6:1-6). Messerly did not interrupt the meeting or otherwise prevent it from continuing. *Id.* Instead, Messerly went back into his room and waited for the return of his client. *Id.*

After Dinius and Kosmann's meeting, the parties went back to their respective rooms and met with their respective attorneys. (R. Vol. 3 p. 92 ¶37, p.94 ¶46, Ex. p. 6 L6:4-6). Kosmann and Messerly discussed the settlement reached by Kosmann and Dinius. (R. Vol. 3 p. 76 ¶46). According to Messerly, during that discussion:

> I [Messerly] then told Kosmann that he had two options: 1) we would fight to get the $40,000 settlement and enforce it, through more mediation that day or likely through a motion practice, with the unfortunate belief that Judge Dunn would do whatever he could to support the other side; or 2) he could take the $32,000 and be done but I would put on the record that I had not asked for Dinius' verbal release and also the other highly irregular things that had happened during the mediation. . . .
>
> Kosmann wanted to be done and did not want to have to litigate for many more weeks to try and get back his $40,000 settlement. So he chose the 2nd option.

(R. Vol. 3 p. 76 ¶¶46-47). Therefore, after receiving counsel from his attorney, Kosmann voluntarily decided to proceed with the settlement arrangement he discussed with Dinius. *Id*.

After the parties had an opportunity to meet with their counsel, the parties' agreement was placed on the record by Judge Dunn. (R. Vol. 3 p. 76-77 ¶¶46-49). As is set forth in the

transcript of the audio record, the mediation resulted in a successful settlement with the following agreed upon terms:

- The Plaintiff would receive a payment equal to the sum (approximately $32,047.19) being held by the court in Canyon County Case No. CV-2013-795. The Plaintiff would receive those monies via a combination of the following: (1) a partial payment to him by the Defendants' insurance company[3]; and (2) through a release of a portion of the funds held by the court to him. A portion of the funds held by the court would be released to Kevin Dinius in an amount equal to that which is paid by the Defendants' insurance company to Plaintiff.

- The parties agreed to keep the settlement terms confidential and that the written settlement agreement would contain a confidentiality clause.

- The parties agreed to not disparage one another and that the written settlement agreement would contain a non-disparagement clause.

- There will be a complete release and dismissal of any and all claims between the parties, with each party to bear its own costs and fees.

- The Defendants agreed not to pursue any indemnification claims against Kosmann's current counsel, Loren Messerly, with regard to Kosmann's claim that the Defendants failed to timely file litigation against real estate agent Justin McCarthy.

(Ex. pp. 1-6; R. Vol. 3 p. 21 ¶2).

After Judge Dunn identified the terms of the agreement, he allowed each party and their respective counsel to make statements on the record. (Ex. pp. 1-6). In an effort to protect himself from a potential conflict-of-interest issue with his client, Messerly made numerous statements to establish that he did not request his personal release which was part of the settlement. (Ex. pp. 2-3 L. 4:13-7:21, R. Vol. 3 p. 77 ¶48). In particular, he explained he did not ask his client to seek the release during the Kosmann-Dinius meeting and, in fact, he did not initially know about and was not present for that meeting. (Ex. pp. 2-3 L. 4:13-7:21). Contrary to Kosmann's contentions

[3] The insurer's portion of the payment was later clarified to be $15,000, thus Defendants were to receive $15,000 of the funds held by the District Court.

on appeal, Messerly did not make these statements as a way of objecting to the meeting. *Id.* He also did not claim the meeting constituted an ethical violation or resulted in an unenforceable agreement. *Id.* To the contrary, Messerly stated on the record "And I understand the clients can meet with other clients." (Ex. pp. 3 L. 7:4-5). This statement alone establishes the lack of any objection to the meeting at the time the settlement was entered on the record.

When Kosmann was able to speak, he explained his decision to voluntarily settle as follows:

> I'll express the same things I expressed with Kevin [Dinius]. It is my hope to be done today. And I want to move forward with my life. I feel comfortable with the agreement that I made with Kevin just from man to man, besides all the legal stuff. Would I prefer having more money? Yes. But I also want my peace of mind. And I want to continue with my lawyer, Loren [Messerly], to go on to the litigation that I have ahead of me. And I want bygones to be bygones between Kevin and I so that we can end on good terms and we can – we can both move on with our lives.
>
> This did not end the way we wanted it to end today. But from just man to man, today was the day that, you know, it's time to move on and be done. And I'm – I'm happy with it. Loren had to protect himself for those types of things. I want him to protect himself. Probably didn't do what he asked. But I'm doing this for my own accord because today is the day to move forward.

(Ex. p. 3 L. 8:4-23).

Judge Dunn asked defense counsel to prepare the written settlement agreement memorializing what was placed on the record. (Ex. p. 5 L. 13:3-5) As is set forth in the oral recording, the parties intended to be bound by the terms of the settlement prior to the drafting and execution of a contemplated written settlement agreement. (Ex. pp. 1-5).

Defense counsel did as requested and prepared several versions of a written settlement agreement. (R. Vol. 3 p. 22-24 ¶¶4-10). Despite Defendants' best efforts to draft a release mirroring the transcript, Messerly continually refused to have Kosmann sign any draft of the

agreement and, instead, stated the Defendants needed to proceed with the Motion to Enforce Settlement. (R. Vol. 3 p. 22-24 ¶¶4-10, p. 51). That motion was thereafter filed.

III. ADDITIONAL ISSUES PRESENTED ON APPEAL

- Whether the Plaintiff's appeal should be disregarded to the extent the Plaintiff raises issues not argued before the District Court.
- Whether the Plaintiff's appeal should be disregarded to the extent the Plaintiff raises issues which were not timely presented below.
- Whether the Plaintiff's appeal should be disregarded to the extent the Plaintiff raises issues he waived before the District Court.
- Whether the Plaintiff's appeal should be disregarded to the extent the Plaintiff does not properly support arguments on appeal.

IV. ARGUMENT

Kosmann's briefing is a bit difficult to follow, given the order in which his various arguments were presented and due to his failure to present cogent arguments and legal authority for each issue he references. With that being said, it appears he is essentially arguing the District Court erred by declining Kosmann's request for sanctions; the District Court erred by enforcing the settlement placed on the record; and the District Court erred in imposing a $200 sanction against Kosmann's counsel. For the reasons set forth below, the District Court's rulings were proper and should be affirmed.

A. Kosmann's Appeal Should be Disregarded in Several Respects

1. Kosmann's Appeal Should be Disregarded to the Extent it Raises Issues Not Argued Below

The Idaho Supreme Court has repeatedly held that matters not raised below will not be considered on appeal. *See e.g. Zylstra v. State*, 157 Idaho 457, 461 (2014) ("With the exception of jurisdictional issues, '[a]n argument not raised below and not supported in the briefs is waived on appeal'"). Here, Kosmann presents the following arguments for the first time on appeal:

- Kosmann is entitled to recover as sanctions $8,000, *see Appellant's Brief*, p. 34;
- The settlement placed on the record is unenforceable due to substantive and procedural unconscionability, *see Appellant's Brief*, p. 37, ftnt. 3
- Defendants should be sanctioned for an alleged abuse of Idaho Rule of Civil Procedure 11, *see Appellant's Brief*, p. 40-41; and
- If the appeal is granted, Judge Petty should be disqualified from this matter. *See Appellant's Brief*, p. 42.

As these arguments were not raised by Kosmann below; they are not properly before this Court and should not be considered on appeal. *See e.g. Zylstra*, 157 Idaho at 461.

2. Kosmann's Appeal Should be Disregarded to the Extent it Raises Issues Not Timely Presented Below

The Idaho Supreme Court and Idaho Court of Appeals have also declined to consider issues on appeal which were not properly or timely brought to the District Court's attention. *See e.g. Taylor v. Riley*, 162 Idaho 692, 703–04 (2017) (holding, even though the district court considered a the motion to reconsider, it lacked jurisdiction to do so because the motion was not timely filed; and, due to the untimely filing, the Court the district court's "denial of the motion for reconsideration is not an issue for consideration on appeal, nor can the documents submitted

with that motion be considered on appeal") *Karlson v. Harris*, 140 Idaho 561, 571 (2004) (finding a request for judicial notice was not properly before the Court as it was not timely raised in the district court proceeding); *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 87 (Ct. App. 1983) (citations omitted) (ruling "Because that issue was not timely raised before the district court, we decline to consider it here").

Here, Kosmann's *Appellant's Brief* is replete with arguments which were not properly and timely raised below, including the following:

- The settlement agreement placed on the record is unenforceable due to a failure of consideration, fraud, and mistake, *see Appellant's Brief*, p. 37, ftnt. 3; and
- The District Court's award of sanctions against Kosmann violates the "safe harbor provision" of Idaho Rule of Civil Procedure 11(c)(2). *See Appellant's Brief*, p. 39.

With regard to the contract-based arguments, Kosmann failed to timely and properly raise them below. Instead, he referenced these legal theories, without providing any actual analysis or argument in support, in his untimely *Memorandum in Support of His Motion to Reconsider*. With regard to the Rule 11(c)(2), Kosmann did not timely raise the issue because he waited until he filed his reply brief in support of his motion to reconsider to mention it.

In a recent decision, the Idaho Supreme Court held that a District Court did not have jurisdiction to consider a motion to reconsider which was not timely filed under Rule 11(a)(2)(B). *See Taylor*, 162 Idaho at 703–04. Similar to that holding, the Idaho Supreme Court has made clear that any memorandum, affidavits, or arguments lodged in support of a motion to reconsider must also be filed within the Rule 11(a)(2)(B) 14-day deadline. *See e.g. Marek v. Hecla, Ltd.*, 161 Idaho 211, 221 (2016); *Franklin Bldg. Supply Co. v. Hymas*, 157 Idaho 632, 642

(2014). More specifically, the Court in *Franklin Bldg. Supply Co.*, 157 Idaho at 642, addressed the 14-day deadline contained in the predecessor rule and held:

> A party cannot sidestep the requirement to file a motion within a certain period by filing an unsupported motion and promising support down the road. *See Kuhn v. Coldwell Banker Landmark, Inc.,* 150 Idaho 240, 248, 245 P.3d 992, 1000 (2010) (holding that motions for a new trial were untimely where the movant filed the motions within the fourteen-day period dictated by the rule, but did not provide factual support for the motions until after the period expired, "[b]ecause there was no factual support filed in support of these motions within the fourteen-day period prescribed by the rule"). Rule 11(a)(2)(B) does not require that a movant support a motion for reconsideration with an affidavit. A movant who does so, however, must serve the affidavit with the motion and within the period of time for filing of the motion.

Furthermore, this Court has held that arguments which are raised by a moving party for the first time in a reply brief, rather than in the initial brief, are not properly before the Court. *Jacklin Land Co. v. Blue Dog RV, Inc.*, 151 Idaho 242, 248 (2011).

While there is no Idaho case law on point, other jurisdictions have held, while a motion to reconsider allows a court to consider additional facts or new law, it cannot be utilized to present "a *new* legal theory for the first time or to raise legal arguments which could have been raised in connection with the original motion." *In re JSJF Corp*., 344 B.R. 94, 103 (B.A.P. 9th Cir. 2006), *aff'd and remanded*, 277 F. App'x 718 (9th Cir. 2008); *see also First Bank & Tr. of Idaho v. Parker Bros.*, 112 Idaho 30, 32, 730 P.2d 950, 952 (1986) ("Discovery of new legal theories does not constitute grounds for bringing a 60(b) motion").

Pursuant to the above-referenced case law, the aforementioned arguments should be disregarded and not considered on appeal because they were not properly and timely raised before the District Court.

3. Kosmann's Appeal Should be Disregarded to the Extent it Raises Issues He Conceded Below

The Idaho Supreme has held that matters which are conceded before the trial court will not be considered on appeal. *See e.g. State v. Cohagan*, 162 Idaho 717, 721 (2017), *reh'g denied* (Nov. 17, 2017). On appeal, Kosmann admits he conceded that his motion to reconsider memorandum and affidavits were not timely filed. *See Appellant's Brief*, p. 41, ftnt. 5. Despite that concession, Kosmann now asks this Court to review whether the District Court erred in finding the pleadings were untimely filed. *See Appellant's Brief*, p. 41. Given Kosmann's prior concessions, this issue should be disregarded on appeal.

4. Kosmann's Appeal Should be Disregarded to the Extent Kosmann failed to Properly Support the Arguments Raised in his Appellant's Brief

It is clearly established in Idaho that issues which are raised, but not adequately briefed, on appeal will be disregarded by this Court. In fact, this Court has held: "Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." *Liponis v. Bach*, 149 Idaho 372, 374 (2010); *see also H.F.L.P., LLC v. City of Twin Falls*, 157 Idaho 672, 686 (2014); *Akers v. D.L. White Const., Inc.*, 156 Idaho 37, 48 (2014).

In his Appellant's Brief, Kosmann makes several conclusory arguments without properly providing any cogent argument or authority to support the same. The conclusory arguments include the following:

- The District Court erred in holding the Idaho State Bar, rather than the District Court, should resolve allegations of IRPC violations, *see Appellant's Brief*, p. 32-34;

- The District Court erred in enforcing the settlement agreement placed on the record, *see Appellant's Brief*, p. 37-38
- This Court should find that contract-related defenses, such as public policy, failure of consideration, fraud, mistake, and procedural and substantive unconscionability, invalidate the settlement agreement entered on the record *see Appellant's Brief*, p. 37; and
- Judge Petty should be disqualified or replaced if this matter is remanded. *See Appellant's Brief*, p. 42.

Given Kosmann's failure to support these issues with cogent argument and appeal, they should not be considered on appeal. *See e.g. Liponis*, 149 Idaho at 374.

B. The Trial Court Correctly Declined Kosmann's Requested Sanctions Against Defendants

In his brief, Kosmann claims the District Court erred in declining to impose sanctions against Defendants and their counsel. This issue is reviewed for an abuse of discretion.

A court has discretion in determining whether to sanction a party and its counsel and a decision to sanction will not be overruled unless the court clearly abused its discretion. *See e.g. Kantor v. Kantor*, 160 Idaho 810, 819 (2016).

> "The test for determining whether a judge abused his or her discretion is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) whether the court reached its decision by an exercise of reason." *Id.* at 610, 301 P.3d at 268.

Id. If all three factors exist, the district court's ruling must be upheld.

Here, Judge Petty properly perceived the issues of sanctions as one of discretion; he acted within the boundaries of such discretion and consistently with applicable legal standards; and he

reached his decision by an exercise of discretion. Therefore, his decision denying the sanctions requested by Kosmann must be affirmed.

1. The District Court Properly Exercised its Discretion in Ruling that the Case Presented a Matter of First Impression

In its *Memorandum Decision and Order* and its *Cross-Motions for Sanctions Decision*, the District Court held it was a matter of first impression in Idaho whether an attorney-litigant who was represented by other counsel was "representing a client" for the purposes of Idaho Rule of Professional Conduct 4.2. Contrary to Kosmann's argument, this holding was not an abuse of discretion. Instead, it was accurate as such an issue was not previously addressed by an Idaho appellate court.

The Idaho Supreme Court has explained an issue is a matter of first impression where it was not expressly decided by it, the Idaho Supreme Court. *See Blake v. Starr*, 146 Idaho 847, 852 (2009) ("This appeal sought determination of an issue not heretofore expressly decided by this Court and therefore involved a case of first impression"). In *Runsvold v. Idaho State Bar*, 129 Idaho 419 (1996), the Idaho Supreme Court only addressed whether an attorney acting pro se, that is, whether an attorney-litigant who was representing himself and did not have other counsel, was "representing a client" under IRPC 4.2. The Idaho Supreme Court did not address, in *Runsvold* or in any other case, whether an attorney-litigant who was represented by counsel was "representing a client" under IRPC 4.2. Therefore, the precise issue before the District Court was not previously addressed by the Idaho Supreme Court. Accordingly, the issue was a matter of first impression and the District Court did not err so holding.

2. The District Court Properly Exercised its Discretion in Failing to Award Sanctions Against Defendants

a. A Determination of whether IRPC 4.2 was Violated was Not Necessary for the District Court to Rule on the Issues Before It

Kosmann claims the District Court erred in finding that no ethical violation occurred as a result of the Kosmann-Dinius meeting. However, the District Court made no such ruling; in fact, the District Court did not rule on the issue at all. Instead, the Court held "[w]hether Dinius's meeting with Kosmann violated IRPC 4.2 is not clearly settled under Idaho law." Given that the Court did not actually rule that no ethical violation had occurred, Kosmann's request to have the Idaho Supreme Court review a non-existent decision is without merit and should be denied.

It should also be noted that the District Court did not abuse its discretion because a final determination regarding whether an ethical violation had occurred was not necessary to the matters before it. First, the District Court did not need to determine whether IRPC 4.2 was actually violated when ruling on Kosmann's argument that the settlement was void for public policy. Instead, the Court simply assumed a violation had occurred and then determined whether the assumed violation voided the settlement agreement for public policy reasons. Notably, Kosmann has not presented argument on appeal that the District Court erred in determining the settlement agreement was not void for public policy reasons.

Next, the District Court did not need to determine whether IRPC 4.2 was actually violated when it ruled on Kosmann's motion for sanctions. Kosmann moved for sanctions pursuant to Idaho Rule of Civil Procedure 11. The Idaho Rules of Civil Procedure govern when a district court can sanction a party of his counsel. Those Rules provide only limited bases for the imposition of sanctions. For instance, Rule 11 provides for sanctions where a party files frivolous pleadings; Rule 16 allows a court to sanction a party where the party fails to obey a pretrial order

and/or participate in good faith during a scheduling conference; and Rule 37 provides for sanctions for discovery-related violations. Noticeably missing from these Rules is any reference to the IRPC. This is because the Idaho Rules of Civil Procedure and, in particular, Rule 11 does not provide a district court with the ability to sanction a party and/or his counsel due to alleged violations of the IRPC.

Accordingly, the Court correctly focused on the sanction requirements set forth in IRCP 11(b) and (c). In doing so, the District Court correctly analyzed whether the Defendants presented nonfriviolous arguments based upon a good faith belief. The Court also properly exercised its discretion when it ruled the Defendants had not acted in bad faith and had not presented frivolous arguments in support of its motion to enforce the settlement. Notably, on appeal, Kosmann does not seek to have this Court review the District Court's determination that IRCP 11 was not violated by Dinius and Dunbar. For this reasons and because Rule 11 was the basis for Kosmann's underlying motion for sanctions, Kosmann has waived his right to appeal the District Court's denial of sanctions against Defendants.

b. The Record Does Not Contain Clear and Convincing Evidence of a Violation of IRPC 4.2

On appeal, Kosmann only argues that the District Court erred in failing to find an IRPC 4.2 violation based upon his belief that *Runsvold* dictated such a ruling. *See Appellant's Brief*, p. 32. As explained above, because *Runsvold* is a distinguishable case, it did not mandate that the District Court automatically hold IRPC 4.2 was violated. For this reason and because Kosmann does not present any argument as to why, independent of the *Runsvold* holding, he believes IRPC 4.2 was violated, his appeal fails. In failing to present argument proving an independent basis for the alleged IRPC 4.2 violation, Kosmann waives any such argument on appeal.

Regardless of whether the issue is waived, Kosmann's appeal still fails because the record does not support a finding of an IRPC 4.2 violation. Violations of the Idaho Rules of Professional Conduct must be proven by clear and convincing evidence. *See e.g. Idaho State Bar v. Clark*, 153 Idaho 349, 355 (2012). IRPC 4.2 reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Several courts, including the Idaho Supreme Court, have interpreted "in representing a client" "to include the situation in which an attorney is acting *pro se*..." *Runsvold*, 129 Idaho at 421. In so holding, the Idaho Supreme Court ruled "a *pro se* lawyer/litigant does represent a client when representing himself or herself in a matter; thus, I.R.P.C. 4.2 applies to prevent the *pro se* attorney from directly contacting a represented opposing party." *See id.* As explained in *Runsvold*, an attorney is acting *pro se* where he represents himself in a matter and is not represented by other counsel. *See id.*; *see also* Black's Law Dictionary (10th ed. 2014) ("pro se" is defined as "[f]or oneself; on one's own behalf; without a lawyer").

At the time of Dinius' communication with Kosmann, he was not acting *pro se*. (Ex. pp. 1-6; R. Vol. 3 p. 240 ¶3, p. 250 ¶2). Instead, Dinius was, and has been throughout this litigation, represented by independent counsel. *Id.* Notably, no Idaho court has found IRPC 4.2 applicable to situations where an attorney-party is represented by counsel, rather than acting *pro se*. This is because, unlike an attorney who is acting *pro se*, an attorney who is represented by other counsel is not "representing a client" and is not representing himself/herself. Rather, the attorney is being represented by another lawyer. As Dinius was not "representing a client" when he communicated with Kosmann, IRPC 4.2 is inapplicable and did not prohibit the communication. *Id.*

Similarly, because Dinius was a represented party and was not "representing a client", his communication with Kosmann was warranted by Comment 4 of IRPC 4.2. Comment 4 provides: "[p]arties to a matter may communicate directly with each other..." Importantly, Comment 4 is not limited to non-attorney parties; instead, it encompasses all parties, including attorney-parties who are represented and are not acting *pro se*.

The evidence also establishes that, even if IRPC 4.2 were triggered (which it is not), Dinius' communication was allowable by the exceptions contained in the final parenthetical of the Rule, which provides: "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Both exceptions existed when Dinius met with Kosmann. First, it is and has always been undisputed, that the Kosmann-Dinius communication was authorized by an oral court order. (Ex. p. 4, L. 10:9-16; R. Vol. 3 p. 195 ¶12, p. 200 ¶6, p. 241 ¶9, p. 251 ¶6). As Kosmann admitted, Judge Dunn facilitated, authorized and encouraged the communication between Dinius and Kosmann during the mediation. (*Id.*; R. Vol. 3 p. 335 ("A sitting district judge, the mediator, had authorized the meeting..."). On the record, Judge Dunn explained he allowed the communication because "clients can meet if they wish". (Ex. p. 4, L. 10:9-16).

Next, Messerly, by way of his conduct, provided inferred or implied consent to the communication. Below, Messerly testifies he not only allowed, but actually directed Kosmann to communicate his and Kosmann's joint position to Judge Dunn. (R. Vol. 3, p. 310 ¶8). By directing such communication, Messerly provided his inferred or implied consent to any statements made by Kosmann to Judge Dunn, including Kosmann's requests to speak directly with Dinius.

Throughout the mediation, Messerly also provided Judge Dunn with his actual consent to relay his and Kosmann's statements and requests to Dinius and his counsel. (R. Vol. 3 p. 240 ¶6 p. 250 ¶5). Messerly was aware Judge Dunn was a relaying such statements on his and Kosmann's behalf. Based upon Messerly's testimony, he intended or at least was aware Judge Dunn would share Kosmann's communications with Dinius and his counsel. Under the circumstances, Messerly provided his inferred or implied consent to the meeting Kosmann requested with Dinius and, therefore, to Dinius' communication with Kosmann.

For these reasons, the record does not support clear and convincing evidence of an IRPC 4.2 violation and the District Court did not abuse its discretion in failing to rule that such a violation existed.

c. The District Court Did Not Deny Kosmann's Motion for Sanctions Due to Any Settlement Agreement by Kosmann

On appeal, Kosmann claims the District Court erred in denying his motion for sanctions on the basis that Kosmann voluntarily agreed to the settlement on the record. However, a review of the Court's *Cross-Motions for Sanctions Decision* and its *Motion to Reconsider Decision* establishes that this was not one of the bases provided by the Court in denying Kosmann's motion for sanctions. In fact, the District Court's rulings on Kosmann's motion for sanctions do not even mention the settlement placed on the record or whether Kosmann voluntarily agreed to the same. Accordingly, this argument by Kosmann does not provide a basis for questioning the District Court's decision to deny sanctions against the Defendants

d. The District Court Did Not Abuse its Discretion in Holding the IRPC Do Not Provide a Basis for It to Sanction Parties

On appeal, Kosmann claims the District Court erred in holding that the Idaho State Bar, rather than the Court, was the proper forum for his allegations of IRPC violations. This issue

should be disregarded because he fails to properly support this argument. The Idaho Supreme Court has routinely held that it will not consider issues on appeal which are not supported by both cogent argument and authority. *See e.g. Liponis*, 149 Idaho at 374. Here, Kosmann only claims the District Court erred because the holding was illogical. *See Appellant's Brief*, p. 33-34. Kosmann, however, does not support his position with any cogent argument and legal authority to support his argument. *Id*. In particular, Kosmann fails to cite any Idaho case or court rule granting Idaho district court's the ability to sanction parties or their counsel for alleged IRPC violations. *Id*. Due to his failure to properly support this argument, it should be disregarded on appeal. *See e.g. Liponis*, 149 Idaho at 374.

It should also be noted that this issue does not provide a valid basis for reversing the District Court's decision to decline sanctions against Defendants. In his *Motion for Sanctions*, Kosmann sought an award of sanctions against Defendants under Idaho Rule of Civil Procedure Rule 11. (R. Vol. 3 pp. 220-234). Specifically he argued sanctions should be imposed because he claimed Defendants purportedly violated Rule 11 when they sought to enforce the settlement reached as a result of their alleged IRPC 4.2 violations. *Id*. Kosmann did not seek to have the Court impose sanctions pursuant to any independent authority allegedly contained in the IRPC or otherwise. *Id*. Therefore, any decision by the District Court in this regard is mere dicta and does not present a basis for reversing its decision to decline to award sanctions against Defendants.

Moreover, to the extent this Court is inclined to allow Kosmann to proceed with this argument despite the lack of support, it should be noted that the District Court correctly exercised its discretion when it reviewed applicable law and determined the IRPC and the statutes addressing the attorney disciplinary process do not provide from the imposition of sanctions by a district court. (R. Vol. 2 p. 170-171). "The Rules [of Professional Conduct] are

designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." IRPC SCOPE. Pursuant to I.C. §3-401, et seq., the Idaho State Bar and Idaho Supreme Court, not a district court, have jurisdiction to determine whether a Rule has been violated and, if so, whether an attorney should be disciplined. *See also Idaho State Bar v. Clark*, 153 Idaho 349, 355 (2012). Pursuant to I.C. § 3-412, the Board of Commissioners, with the approval of the Idaho Supreme Court, established rules, namely the Idaho Bar Commission Rules, which "govern[] procedure in cases and investigations involving alleged misconduct of members of the Idaho State Bar." *See* IBCR 500-525. While the procedure provides for review by the Idaho Supreme Court, the rules do not provide any review by an Idaho district court. IBCR 509. Under the circumstances, the District Court correctly applied Idaho law in determining that the District Court was not the proper forum for IRPC violation claims.

e. The District Court did Not Abuse its Discretion in Failing to Award the Sanctions Identified by Kosmann on Appeal

On appeal, Kosmann claims the District Court erred because he should have been awarded monetary sanctions as a result of the alleged IRPC violations. Kosmann's argument fails because Kosmann moved for sanctions under Rule 11 and he does not appeal the District Court's determination that Defendants and their counsel did not violate Rule 11. (R. Vol. 3 pp. 220-234). Due to the lack of a Rule 11 violation, sanctions were not recoverable.

Next, Kosmann is barred from seeking an award of $8,000 from this Court because he did not raise that issue below. In Kosmann's *Motion for Sanctions*, he requested four specific sanctions against Dunbar and Dinius. (R. Vol. 3 pp. 228, 232). An award of $8,000 was not among his requests. *Id*. Accordingly, such a request should not be considered by this Court. *See e.g. Zylstra*, 157 Idaho at 461.

Moreover, the District Court did not abuse its discretion in denying Kosmann's sanction requests because the sanctions he sought were not recoverable for an IRPC violation. Idaho Bar Commission Rule 506 identifies the only sanctions which may be imposed by the Idaho State Bar and/or the Idaho Supreme Court when there exists clear and convincing evidence of an IRPC violation. The enumerated available sanctions do not include any of the sanctions requested by Kosmann. Consequently, the application of the rule of construction expressio unius thus bars the requested sanctions. *See e.g. Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639 (1978) ("It is a universally recognized rule of the construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others"). Moreover, the SCOPE of the IRPC specifically provides that a "violation of a Rule does not necessarily warrant any other nondisciplinary remedy..." such as what are requested by Kosmann.

For the reasons set forth herein, Kosmann's appeal of the District Court's decision not to impose sanctions against Defendants and their counsel should be denied and the District Court's decision should be affirmed.

C. The Trial Court Correctly Determined the Settlement Agreement Entered on the Record was Enforceable

On appeal, Kosmann claims the District Court erred in finding the settlement agreement placed on the record was valid and enforceable. However, Kosmann offers no cogent analysis or legal authority for why he claims such a decision was "contrary to law." A review of the District Court's decision establishes that it correctly applied Idaho law and the facts at issue when it determined that settlement agreements were enforceable; that the Transcript of Mediated Agreement identified an agreement to settle by all parties; that the Dinius-Kosmann meeting did

not violate public policy; and that the agreement was not void for a public policy violation. (R. Vol. 2 pp. 142-153). Notably, Kosmann does not specifically assign error to any of these findings. *See Appellant's Brief*, pp.37-38. By failing to specifically appeal these issues, Kosmann waives his ability to do so. *See e.g. Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 313 (2010) (holding "We will not consider assignments of error not supported by argument and authority in the opening brief"). Notably, Kosmann's vague and conclusory reference to potential contract-related defenses is not sufficient for this Court to reconsider the District Court's rulings. *See e.g. Murray v. State*, 156 Idaho 159, 168 (2014) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking").

Because Kosmann failed to present cogent argument or authority regarding his assert of error by the Court, this issue cannot be considered on appeal.

D. The District Court Did Not Abuse Its Discretion in Sanctioning Kosmann and Messerly

Kosmann argues the District Court erred in sanctioning him and his counsel. This argument lacks merit as Kosmann cannot establish that the Court abused its discretion in sanctioning him. First, on page 3 of its decision, it correctly perceived the issue of sanctions as one of discretion. (R. Vol. 2 p. 164). Next, it acted within its boundaries of discretion because Rule 11 provided it with the ability to sanction a party and their counsel for the filing of not warranted by existing law. It then reached its decision by an exercise of reason because it fully reviewed the conduct of Kosmann and its counsel and found that such conduct violated Rule 11(b). (R. Vol. 2 p. 173-174). In particular, it determined that the filing of Kosmann's supplemental brief was unwarranted because it was filed in contravention of the deadlines set forth in Rule 7(b)(3) and it was filed without first seeking permission under Rule 2.2(b)(1)(B).

Id. In utilizing its discretion and exercising reason, the Court determined that the appropriate sanction was the cost the Defendants incurred in seeking to strike the supplemental briefing, rather than striking the supplemental briefing. *Id*. Given that the sanction was only $200, it was reasonable. Therefore, the imposition of such a sanction should be upheld as the Court did not abuse its discretion in imposing the same.

Notably, both on appeal and below, Kosmann has failed to raise any argument or cite any case law to support his contention that an abuse of discretion occurred. *See Appellant's Brief*, pp. 38. As explained above, Kosmann's claim that the imposition of the sanction somehow violated Rule 11(c)(2) must be disregarded as it was not properly and timely raised below. Even if the argument were timely raised, it does not provide a basis for reversing the District Court's decision. As the Ninth Circuit explained "The purpose of the safe harbor, however, is to give the offending party the opportunity, within 21 days after service of the motion for sanctions, to withdraw the offending pleading *and thereby escape sanctions*." *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998). Here, Kosmann did not withdraw his *Supplemental Brief* within 21 days of being served with Defendants' initial request for sanctions contained in its September 5, 2017 *Motion to Strike* or at any time before the Court imposed sanctions in its November 22, 2017 *Cross Motions for Sanctions Decision*. Accordingly, Rule 11(c)(2) does not bar the award of sanctions.

E. The District Court Did Not Abuse Its Discretion in Failing to Sanction Defendants for Any Alleged Abuse of Rule 11

For the first time on appeal, Kosmann seeks sanctions against Dinius and Dunbar for their requests for sanctions against Kosmann and Messerly, which Kosmann claims was an alleged abuse of Rule 11. *See e.g. Zylstra*, 157 Idaho at 461. As previously explained, this issue

should be disregarded because it was not raised before the District Court. Kosmann's request should further be disregarded because he fails to appeal the District Court's determination that Defendants did not violate Rule 11.

F. The District Court Did Not Abuse Its Discretion in Striking Kosmann's Untimely Filed Pleadings

As explained above, because Kosmann conceded that his memorandum and declaration were not timely filed, his appeal of this issue should be disregarded. *See e.g. Cohagan*, 162 Idaho at 721; *Appellant's Brief*, p. 41 ftnt 5. Kosmann's appeal should further be dismissed because Kosmann fails to present any argument or legal authority to support a finding that the District Court abused its discretion in striking those untimely pleadings. *See e.g. Liponis*, 149 Idaho at 374. Moreover, a review of the Court's *Motion to Reconsider Decision* establishes that it did not abuse its discretion. To the contrary, it rightly recognized the issue of striking untimely pleadings was a matter of its discretion; the Court reached its decision by an exercise of reason after reviewing applicable court rules and case law; and acted consistently with those rules and case law in reaching its decision. (R. Vol. 2 pp. 184-185).

G. The District Court Should Not be Disqualified From Further Proceedings

Kosmann's request to disqualify or otherwise replace Judge Petty should not be considered an appeal as it was not raised below and because Kosmann fails to offer any legal authority to support disqualification of Judge Petty. *See e.g. Zylstra*, 157 Idaho at 461. In fact, Kosmann does not even identify the standard applicable to such a request. *See Appellant's Brief*, p. 42.

H. Kosmann Is Not Entitled to Attorney's Fees on Appeal

Kosmann's final issue on appeal is his request for attorney fees on appeal. The Idaho Supreme Court has repeatedly held that it will "not consider a request for attorney fees on appeal that is not supported by legal authority or argument." *Capps v. FIA Card Servs., N.A.*, 149 Idaho 737, 744 (2010) (internal citations omitted). "Attorney fees are awardable only where they are authorized by statute or contract or by court rule". Id. (internal citations omitted).

Here, Kosmann claims he should be able to recover under contract and I.C. § 12-121 and because he had to litigation a purported ethical violation. Each of Kosmann's claims fail. Initially, Kosmann is not entitled to attorney's fees as he is not the prevailing party. It is anticipated that Kosmann's appeal will be denied and the trial court's decisions will be affirmed.

Next, Kosmann has failed to identify any authority providing for an award of attorney's fees based upon a draft settlement agreement which was never agreed to or signed by the parties. The lack of legal authority, alone, is a sufficient basis for denying Kosmann's request. *Capps*, 149 Idaho at 744. Kosmann's request should further be denied because it is not supported by facts. Notably, the record does not contain any evidence that the draft agreement was agreed to or signed by the parties. To the contrary, the record reveals that it was not agreed to and that it was later replaced by at least 3 subsequent drafts, none of which were ever agreed to or entered into by the parties. (R. Vol. 3 at 19-59). Moreover, the record establishes that Defendants sought to enforce the settlement agreement which was placed on the record. (R. Vol. 2 at 110-111; R. Vol. 3 at 10-18). A review of the transcript of that agreement establishes that it did not contain an attorney fees provision. (Ex. pp. 1-6) Accordingly, Kosmann's request for fees pursuant to contract law should be denied.

Moreover, Kosmann is not entitled to recover fees under I.C. § 12-121 because he cannot establish that Defendants' position or defense to the appeal is frivolous. To the contrary, Defendants' position and defense to Kosmann's appeal are grounded in both law and fact. Kosmann's entire appeal addresses decisions of the District Court which were favorable to Defendants. Among the District Court's favorable rulings was its determination that Defendants did not violate Rule 11, including that Defendants position was nonfrivolous. (R. Vol. 2 p. 168). Notably, Kosmann has not appealed that ruling by the District Court; therefore, he has waived any argument to the contrary. Specifically, by failing to appeal this aspect of the Court's findings, Kosmann is barred from establishing that Defendants' position below or on appeal is frivolous. Therefore, Kosmann is barred from recovery attorney's fees under I.C. § 12-121.

Finally, Kosmann is not entitled to recover fees due to his alleged "having to bring litigation to prove up the ethical violation." Notably, Kosmann fails to cite any statute or court rule providing for such an award; thereby nullifying his request. *Capps*, 149 Idaho at 744. As attorney's fees cannot be awarded unless they are authorized by "statute or contract or by court rule", Kosmann's request must be denied. *See id.*

V. CONCLUSION

For the reasons outlined above, the District Court's underlying decisions should be affirmed and Kosmann's appeal should be dismissed in its entirety.

DATED this 14th day of September, 2018.

ANDERSON, JULIAN & HULL LLP

By /s/ Yvonne A. Dunbar
Robert A. Anderson, Of the Firm
Yvonne A. Dunbar, Of the Firm
Attorneys for Defendants-Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2018, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Loren K. Messerly MESSERLY LAW, PLLC 2350 E. Roanoke Dr. Boise, ID 83712 T: (208) 407-2188 E: lorenmesserly@gmail.com *Counsel for Plaintiff-Appellant*	☐ ☐ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile E-Mail iCourt/e-File

/s/ Yvonne A. Dunbar