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Fitzpatrick Trustees v. Kent Trustees Appellant's Reply Brief 2 Dckt. 46797

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS B. FITZPATRICK and **TRACY L. FITZPATRICK, TRUSTEES OF THE FITZPATRICK REVOCABLE TRUST,** a revocable living trust, Plaintiff/Counterdefendant/Appellant vs. **ALAN KENT** and **SHERRY KENT, TRUSTEES OF THE ALAN & SHERRY KENT LIVING TRUST DATED 11/07/2003,** a revocable living trust, **ALAN** and **SHERRY KENT,** husband and wife, Defendants/Counterclaimants/Respondents/Cross-Appellants, And **JOHN** and **JANE DOES 1-10** Defendants.	**Supreme Court Docket No. 46797-2019** **Ada County District Court** **Case No.: CV01-18-19578**

CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District,
in and for the County of Ada

HONORABLE JASON D. SCOTT, Presiding

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I. INTRODUCTION

Cross-Appellants Alan Kent and Sherry Kent, Trustees of the Alan & Sherry Kent Living Trust Dated 11/07/2003, hereby file this reply brief pursuant to Idaho Appellate Rule 35(c), for the limited purpose of addressing five particular arguments in the "Argument on Cross-Appeal" section of the Fitzpatricks' brief of August 2, 2019. All of these arguments relate to the additional issues on appeal identified by the Kents in their Respondents' Brief of July 15, 2019, pursuant to Idaho Appellate Rule 34(b)(4), (5).

II. ARGUMENT

A. The Fitzpatricks Asserted, But Have Now Abandoned, Equitable Estoppel

One additional issue on appeal raised by the Kents is whether the Fitzpatricks assert the doctrine of equitable estoppel for the first time on appeal. (Respondents' Br. of 7/15/19, pp. 2, 17-18.) The Fitzpatricks now take the position they have not asserted equitable estoppel in this proceeding. (Reply Br. of 7/15/19, pp. 21-22.)

In their opening brief, the Fitzpatricks rely on the Florida case *Hensel v. Aurilio*, including a block quote that expressly applies "[e]quitable estoppel." (*See* Appellants' Br. of 6/26/19, p. 23 (*quoting Hensel v. Aurilio*, 417 So.2d 1035 (Fla. Dist. Ct. App. 1982)). They then assert the Kents' actions "fall squarely within the exception set out in *Hensel*" and that the Kents "should be estopped from attempting to extinguish the equitable servitude…." (*Id.* at p. 24.)

Any objective reading of these arguments leads one to conclude the Fitzpatricks were asserting equitable estoppel. Regardless, they have now abandoned it, and it should be disregarded.

B. The Fitzpatricks Now Assert Quasi-Estoppel for the First Time on Appeal

The Fitzpatricks further assert their "estoppel" argument is based on quasi-estoppel. (*See* Reply Br. of 8/2/19, pp. 22-24.) However, the Fitzpatricks' opening appeal brief does not assert quasi-estoppel. (*See* Appellant's Br. of 6/26/19, pp. 1-41.) Similarly, the Kents can find no reference to quasi-estoppel in the record, and the district court had no reason to apply the multi-factor test for quasi-estoppel now advanced by the Fitzpatricks. (R., Vol. I, pp. 273-289 (Mem. Dec. on Summ.J. of 12/31/18).) Therefore, pursuant to its "longstanding rule" against considering issues presented for the first time on appeal, the Court should disregard the Fitpatricks' quasi-estoppel arguments. *See Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991) (*quoting Smith v. Sterling*, 1 Idaho 128, 131 (1867)).

C. The District Court Did Not Have the Opportunity to Apply the *Murr v. Wisconsin* Factors

Another issue raised by the Kents on appeal is whether the Fitzpatricks' arguments under the U.S. Supreme Court case of *Murr v. Wisconsin* present new issues on appeal. (*See* Respondents' Br. of 7/15/19, pp. 2, 23 (*discussing Murr v. Wisconsin*, 582 U.S. ___, 137 S.Ct. 1933 (2017).) The Fitzpatricks respond by arguing that *Murr* does not present a new issue on appeal because it is within their prior assertion of exceptions to the merger doctrine. (*See* Reply Br. of 8/2/19, pp. 24-25.)

The Kents agree with the general proposition that citation to a new case on appeal is perfectly acceptable if it is fairly contemplated by, and within the scope of, arguments properly advanced at the district court level. Indeed, this principle is embodied in Idaho Appellate Rule

35, which states that the statement of issues in the appellant's brief "will be deemed to include every subsidiary issue fairly comprised therein." I.A.R. 35(a)(4).

The distinction here, however, is that the Fitzpatricks do not rely on *Murr* purely for the resolution of an issue of law. Instead, they dedicate several pages to the application of a multi-factor test to the facts of this particular case. (Appellants' Br. of 6/26/19, pp. 26-33.) The district court resolved this case on summary judgment on the narrow legal issue of the enforceability of the Easement Agreement and had no reason to make those factual determinations. (R., Vol. I, pp. 273-289 (Mem. Dec. on Summ.J. of 12/31/18).)

"It is the province of the trial court rather than the appellate court to determine factual questions." *King v. H. J. McNeel, Inc.*, 94 Idaho 444, 447, 489 P.2d 1324, 1327 (1971) (*citing* I.R.C.P. 52(a); *Thompson v. Fairchild*, 93 Idaho 584, 468 P.2d 316 (1970)). In addition, as this Court has recognized, two rationales for the rule against raising new issues on appeal are for the "protection of the inferior courts" and to avoid situations in which the appellate courts are "deciding questions of law in the first instance." *Sanchez*, 120 Idaho at 322, 815 P.2d at 1062 (*quoting Smith v. Sterling*, 1 Idaho 128, 131 (1867)). If these rationales still stand, then the Fitzpatricks' application of *Murr v. Wisconsin* to the facts of this case for the first time on appeal should be disregarded.

D. The Kents Are Entitled to Attorneys' Fees at the District Court and on Appeal

Additional issues on appeal raised by the Kents are whether they are entitled to attorneys' fees at the district court level and on appeal pursuant to Idaho Code Section 12-121. (Respondents' Br. of 7/15/19, pp. 1-2, 26-30.) The Kents assert the district court erred in

denying their request for two reasons: (1) because the prohibition against self-granted easements is already well-established in Idaho, and (2) because the Fitzpatricks asserted a variety of other legal theories that were clearly inapplicable, given the very narrow issue presented in this case. (*Id.*).

As to the first basis, "[w]here an appeal turns on questions of law, we will award attorney fees under I.C. § 12-121 if the law is well settled and the appellant has made no substantial showing that the district court misapplied the law." *Andrews v. Idaho Forest Industries, Inc.*, 117 Idaho 195, 198, 786 P.2d 586, 589 (App. 1990) (*citing Davis v. Gage*, 109 Idaho 1029, 712 P.2d 730 (App.1985)). Again, the Kents believe the prohibition against self-granted easements was already "well settled" in Idaho and, therefore, that an award of attorneys' fees is appropriate.

As to the second basis, the Fitzpatricks cite *Bremer* and *Coward* for the proposition that if one legitimate issue is presented, an award of attorneys' fees pursuant to Section 12-121 is not appropriate, even if the losing party has asserted other legal claims that are frivolous, unreasonable, or without foundation. (Reply Br. of 8/2/19, p. 18 (*citing Bremer, LLC v. East Greenacres Irr. Dist.*, 155 Idaho 736, 745, 316 P.3d 652, 661 (2013);[1] *Coward v. Hadley*, 150 Idaho 282, 289, 246 P.3d 391, 398-99 (2010)). Subsequent opinions by this Court and enactments by the Legislature call *Bremer* and *Coward* into question.

In 2014, the Court, after an extensive discussion of prior decisions, held that it is appropriate for district courts to apportion attorneys' fees between claims that satisfy

[1] *Bremer* was incorrectly identified as a 2014 opinion in the Fitzpatricks' reply brief. As the next two paragraphs establish, the timing of this line of cases is important.

Section 12-121 standards and those that do not. *Idaho Military Historical Society, Inc. v. Maslen*, 156 Idaho 624, 631-632, 329 P.3d 1072, 1079-1080 (2014). The 2014 date of this opinion is critical because when the Idaho Legislature amended Section 12-121 in 2017, it stated that it intended to "reinstate and make no change to Idaho law on attorneys' fees as it existed before the Idaho Supreme Court's decision in *Hoffer v. Shappard*, 2016 Opinion No. 105, September 28, 2016."[2] S.L. 2017, ch. 47, § 1, p. 75. This necessarily includes *Maslen*, which was decided after *Bremer* and *Coward*. In addition, the Court has re-affirmed the approach in *Maslen* as recently as 2018. *Petrus Family Trust Dated May 1, 1991 v. Kirk*, 163 Idaho 490, 501-503, 415 P.3d 358, 369-371 (2018).

The Kents argued to the district court that an award of attorneys' fees was appropriate based upon the Fitzpatricks' assertion of various inapplicable legal theories in a case involving a narrow legal issue. (R. Vol. I, pp. 323-324.) However, the district court did not address this argument when it granted the Fitzpatricks' motion to disallow. (Tr., Vol. II, p. 13, L. 9 – p. 15, L. 1.) In light of the more recent *Maslen* and *Petrus Family Trust* cases, this was error. For the same reasons, the Kents are also entitled to attorneys' fees on appeal pursuant to Idaho Appellate Rule 41.

E. The Fitzpatricks Are Not Entitled to Attorneys' Fees on Appeal

In their Reply Brief, the Fitzpatricks request an award of attorneys' fees on appeal. However, "[a]ny party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party…." I.A.R. 41(a). The

[2] *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016).

Fitzpatricks did not request an award of attorneys' fees in their "first appellate brief." (*See* Appellant's Br. of 6/26/19, pp. 1-41.) Therefore, the Fitzpatricks have waived their right to seek attorneys' fees on appeal. *Bingham v. Montane Resource Associates*, 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999) ("because the Binghams did not raise the issue of attorney fees on appeal in their first appellate brief, we will not consider their request").

Even without that procedural defect, there is no basis to award the Fitzpatricks attorneys' fees under applicable standards. As the Fitzpatricks note, "[a]ttorney fees on appeal are appropriate under I.A.R. 41 if the appellate court is left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation." (Reply Br. of 8/2/19, p. 26 (*citing Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990)).) Even if the Court disagrees with the Kents' arguments regarding their additional issues on appeal, there is no basis to conclude they pursued those issues "frivolously, unreasonably, or without foundation."

III. CONCLUSION

Based on the foregoing and the arguments advanced in their Respondents' Brief of July 15, 2019, the Kents respectfully request an order from the Court that:

Affirms the district court's summary judgment rulings;

Reverses the district court's denial of an award of attorneys' fees to the Kents pursuant to Idaho Code Section 12-121 and Idaho Rule of Civil Procedure 54; and

Awards the Kents their attorneys' fees on appeal pursuant to Idaho Code Section 12-121 and Idaho Appellate Rule 41.

DATED this 22nd day of August, 2019.

VARIN WARDWELL, LLC

BY: */s/ Dylan Lawrence*
Dylan B. Lawrence
Attorneys for
Defendants/Counterclaimants/Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of August, 2019, a true and correct copy of the within and foregoing instrument was served upon:

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