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# Lingnaw v. Lumpkin Respondent's Brief Dckt. 47098

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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Murriah Clifton, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

DERRICK LINGNAW,

Plaintiff, Appellant

v.

STUART LUMPKIN in his official capacity as SHERIFF OF CUSTER COUNTY

Defendant-Respondent

CITY OF CHALLIS, an Idaho municipal corporation; CHALLIS JOINT SCHOOL DISTRICT NO. 181,

Defendants.

Docket No. 47098-2019

Custer County District Court
Case No. CV-2018-0003

# RESPONDENT'S BRIEF ON APPEAL

On Appeal from the Seventh Judicial District, County of Custer
Honorable Stevan H Thompson, presiding

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## TABLE OF CONTENTS



## TABLE OF CASES AND AUTHORITIES

**Cases**



**Statutes:**



**Secondary Sources:**

## STATEMENT OF CASE

### A. NATURE OF THE CASE

Respondent does not dispute the Appellant's version of the statement of the case and therefor will not repeat it verbatim.

### B. COURSE OF PROCEEDINGS

Respondent does not dispute the Appellant's version of the course of proceedings and therefor will not repeat it verbatim

### C. STATEMENT OF FACTS

Plaintiff/Appellant hereinafter referred to as "Lingnaw," purchased property located at 201 South 6th in Challis, Idaho in the spring of 2017. Lingnaw is a registered sex offender and cannot loiter within 500 feet from the property line of school grounds of this state, nor reside within 500 feet of property where a school is located,. *See Idaho Code § 18-8329(b) and/or (d).* Lingnaw conceded that from his home to the school property is less than 500 feet and according to his measurement it was 258 feet. (Tr.p.17-18) He also testified that from the top of his house to the stack (chimney in the middle of the building) on the gymnasium was 504 feet. (Tr.p.18-19, 70-71).

Lingnaw acknowledged that part of the school property has extracurricular activities present, (Tr.p.18 Ln 13-18), that his stepdaughter attended school in the building (Tr.p.12-13 and p.32 Ln 17-25), that a sign on the front of the building clearly states "Home of the Vikings, Challis Junior High School" (Tr.p.35-36, and 74-75), that behind the building is a ball field used by children (Tr.p.41-42), that he has observed children use the property (Tr.p.45), that school aged children use the buildings in the evening (Tr.p.46-47).

Lingnaw did no independent research to determine if a school or school property was within 500 feet of his residence prior to the purchase. He relied upon his sex offender registry officer Doug Sugden from Twin Falls to advise him if he could purchase the home. (Tr.p. 37, 61, and 84), he has the ability to check public records to determine the locations of school property, but did not do so (Tr.p. 49-51), he did no independent research to determine if his residence was in compliance with the statute prior to moving in. (Tr.p.61-63.)

Lani Rembeilski is the Elementary Principal and Superintendent of the School District. She testified that there are three schools in Challis, the elementary, high school and middle school on main street (Tr.p.89-92). The building on main street with the gymnasium is the middle school. (Tr.p.94 Ln 15-25, p.115). That the auditorium within the middle school is used by children (Tr.p.91-97), and is the only auditorium available to the students in Challis (Tr.p.101 Ln 15-20). That the middle school has been used for school instruction during times when it is needed. (Tr.p.102 Ln 15-24). It has been a school since at least 1975 and is still considered one of the District's schools. (Tr.p.105-107). The fields behind the school are considered the schools baseball fields and used by schoolchildren, and the gym is used on an almost daily basis for school sponsored activities. (Tr.p.109-111).

Jacquel Bruno, the Custer County Assessor, testified that by using the online county software the measurements from Lingnaw's house to the school property line was 173 feet. (Tr.p.139 Ln 18-25) and that a 500 foot radius from Lingnaw's house includes the middle school, the ball fields and the whole gymnasium. From Lingnaw's house it is 480 feet to the front door of the gym which is almost the furthest point of the building.(Tr.p.138-139).

## ISSUES ON APPEAL

Respondent requests that this court modify the issues of appeal as follows:

(A) Was this declaratory judgment action properly used by Lingnaw to attempt to bar a subsequent criminal prosecution.

(B) Whether Lingnaw met his burden of proof to show that the definition of a school, in Idaho Code § 18-8329(d) did not apply to him.

( C ) Whether or not the Court abused its discretion/erred in denying the parties the opportunity to present closing argument.

(D) Did the court err in failing to award attorney fees to Respondent in the underlying action and is Respondent entitled to an award of attorney fees in this appeal.

## ARGUMENT

**(A) Was this declaratory judgment action properly used by Lingnaw to attempt to bar a subsequent criminal prosecution.**

The Plaintiff in this matter requested that the Court issue a decision that essentially prohibited the Defendant from arresting/prosecuting him for a violation of Idaho Code § 18-8329(d). The courts have been hesitant in allowing the declaratory judgment act to be used as an advisory opinion.

This Court in *Country Ins. Co. v. Agricultural Development, Inc.*, 107 Idaho 961, 695 P.2d 346, (1984) stated that "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Id* at 794.

This Court stated:

> "We can well appreciate that the parties would prefer a definite answer by this court to the questions posed by petitioner's points rather than to take an "educated guess" based upon a study of our prior decided cases and authoritative materials as to what we would hold,--as, if and when the questions are presented in justiciable form. However, the giving of advice as to proposed or possible settlements is not a judicial function. As a practical matter if for no other reason, this must be left to the profession. *Id* at 973. In *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949), cited with approval in the Puretex case, the North Carolina Supreme Court said: "There is much misunderstanding as to the object and scope of this legislation (Uniform Declaratory Judgment Act). Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counselors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 [1942]; Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 [1936]; Poore v. Poore, 201 N.C. 791, 161 S.E. 532 [1931]; Anderson on Declaratory Judgments, section 13. *Id* at 974.

In *MDS Investments, L.L.C. v. State*, 138 Idaho 456, 65 P.3d 197, (2003) this Court stated that:

> "The Plaintiffs contend that they should be entitled to have their rights defined in a declaratory judgment action so that they do not have to risk criminal prosecution. Their rights could be defined in these declaratory judgment actions only if this Court were to

hold that a judgment in their favor in these actions could bar a subsequent criminal prosecution under the doctrine of res judicata, [1] or that an adverse ruling would establish their criminal liability. If we were to so hold, it would, in effect, enable persons suspected of criminal activity to take control of their own criminal prosecutions. They could determine whether and when to commence the prosecutions and what offense(s) to charge, thereby interfering with the discretion that rightfully belongs to the prosecuting attorney" *Id* at 460. Also see Note (1) "If the judgment in the declaratory judgment action could not be used defensively to bar a subsequent criminal prosecution, then it would not define the Plaintiffs' rights in the manner that they desire. Because the judgment would not bar relitigation of the same issues in a later criminal proceeding, the judgment would simply constitute the opinion of the trier of fact in the declaratory judgment action regarding the Plaintiffs' possible criminal culpability if they were later charged with crimes. The Plaintiffs can obtain opinions regarding their criminal culpability from their counsel. There is no need to alter the burden of proof in order to enable them to obtain a second opinion from the trier of fact in the declaratory judgment action." *Id* at 466.

In this matter Lingnaw requested that the court issue a order in regards to his ability to legally reside at the property and an Injunction directing parties to comply with that order. *See Amended Complaint.* As a result of Lingnaw's request essentially attempting to bar a future prosecution of him for a violation of Idaho Code § 18-8329(d), he was seeking legal advice from the court and then asking the court to bar a future prosecution, which is what this Court has consistently declined to use the Declaratory Judgment Act to do.

**(B) Whether Lingnaw met his burden of proof to show that the definition of a school, in Idaho Code § 18-8329(d) did not apply to him.**

If this Court determines that the District Court had jurisdiction under the Declaratory Judgment Act to grant Lingnaw the relief he requested, the record is clear that Lingnaw was in violation of the statute.

Lingnaw cited the correct legal standard in his brief:

> As set forth in *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317 (2013):
>
> When this Court reviews a trial court's findings of fact and conclusions of law after a bench trial, the review is "limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law."

*Borah v. McCandless*, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009) (citing *Benninger v. Derifield*, 142 Idaho 486, 488-89, 129 P.3d 1235, 1237-38 (2006)). Because "it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses," this Court liberally construes the trial court's findings of fact in favor of the judgment. *Id.* (citing *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942 (1999)). "This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous." *Id.* (citing *Ransom v. Topaz* Mktg., L.P., 143 Idaho 641, 643, 152 P.3d 2, 4 (2006): I.R.C.P. 52(a)). Therefore, if the trial court's findings are based upon "substantial evidence, even if the evidence is conflicting," those finding will not be overturned on appeal. *Id.* (citing *Benninger*, 142 Idaho at 489, 129 P.3d at 1238). Nor will this Court substitute its view of the facts for that of the trial court. *Id.* (citing *Ransom*, 143 Idaho at 643, 152 P.3d at 4). "This Court exercises free review over matters of law." *Id.* (citing *Bolger v. Lance*, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002)).

The term "substantial evidence" is further discussed in the case of *City of Middleton v. Coleman Homes, LLC,* 163 Idaho 716 (2018) as follows:

> This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous." *Mortensen v. Berian,* 163 Idaho 47, 50, 480 P.3d 45, 48 (2017) (quoting *Borah v. McCandless,* 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009)). "Clear error will not be deemed to exist if the findings are supported by substantial and competent, though conflicting, evidence." Id. (quoting *Pandrea v. Barrett,* 160 Idaho 165, 171, 369 P.3d 943, 949 (2016)). Evidence is substantial and competent if a reasonable trier of fact could accept and rely upon the evidence in making a factual finding. *Id.* (citing *Greenfield v. Wurmlinger,* 158 Idaho 591, 598, 349 P.3d 1182, 1189 (2015)).

In this matter the record was clear that the "Challis Middle School" was one of the three schools in Challis. It clearly was labeled as such, was used by children for their educational and extra-curricular activities and was within 500 feet of Lingnaw's home.

Lingnaw is hung up on his definition of a school that he continues to use, "a traditional school, i.e. there is no academic instruction occurring at the building and that there are no children dropped of in the morning at said building." *See* Appellants Brief p 7.

Lingnaw's proposed definition is in error. Common sense dictates that the school auditorium and/ or gymnasium is part of a school. Blacks Law Dictionary defines school as "An institution or place for instruction or education" It further defines public schools as "Schools established under the laws of the state (and usually regulated in matters of detail by the local authorities), in the various districts, counties, or towns, maintained at the public expense by

taxation, and open, usually without charge, to the children of all the residents of the city, town or other district. Schools belonging to the public and established and conducted under public authority. "*See* Black's Law Dictionary (6th ed.1990).

If the legislature wanted Idaho Code §18-8329(d) to be limited to just the school building itself, then they easily could have done so as they did in Idaho Code §18-8329(a), or school property as in Idaho Code § 18-8329(b). The legislature in (d) clearly made as broad of a definition as possible to protect school children and used the words "on which a school is located." This definition is as broad as possible so that registered sex offenders can not live within 500 feet of a school.

The evidence in this matter clearly showed that this property is a school. As a result of the substantial and competent evidence showing that Lingnaw purchased a home within 500 feet of "on which a school is located" the court did not err in denying Lingnaw the relief that he requested.

**( C ) Whether or not the Court abused its discretion/erred in denying the parties the opportunity to present closing argument.**

In the State of Idaho, in the context of a criminal case, the accused has the constitutional right to counsel which includes the right to closing argument. *State v. Gilbert* 65 Idaho 210, 142 P.2d 584 (1943).

Although it may be unusual for a court not to offer counsel the opportunity to make closing argument in a civil bench trial, the undersigned was unable to find any Idaho Case law on this issue.

In some states the courts have found that it is not error to forego closing arguments in a bench trial.

> The great weight of authority is that in a non-jury civil case [1] the refusal of the trial court to allow a litigant's counsel to argue the case is not prejudicial error. Id., § 5(h) at 1431-1436; see Later Case Service thereto at 763-764. Many of the decisions are based

> upon the theory that in a trial before the court without a jury, argument of counsel is a privilege, not a right, which is accorded the parties by the trial court in its discretion. This reliance on the discretion of the judge is in accord with the view of the role of the trial judge in this jurisdiction. In State v. Hutchinson, Md.App., 271 A.2d 641, filed 16 December 1970 the Court of Appeals noted 'the professional expertise, experience, and judicial temperament with which our legal system has inherently invested a trial judge vis a vis a jury composed of laymen.' It said: 'It is true that judges, being flesh and blood are subject to the same emotions and human frailties as effect other members of the specie(s); however, by his legal training, traditional approach to problems, and the very state of the art of his profession, he must early learn to perceive, distinguish and interpret the nuances of the law which are its 'warp and woof." We believe that argument by counsel upon submission of a civil case tried without a jury is a matter within the discretion of the trial court. We find no abuse of discretion in the circumstances here. *Fritts v. Fritts, 11 Md.App. 195, 273 A.2d 648, (Md.App. 1971)*

Other states including North Dakota have adopted the rule that it is a violation in a civil case to not allow closing argument, The Supreme Court of North Dakota held in *Fuhrman v. Fuhrman, 254 N.W.2d 97, 101 (1977)*, that "litigants in civil nonjury cases (and, of course, in all criminal and jury cases as well) have a right to have their attorneys make a final argument."

It appears that different jurisdictions have split decisions. In Idaho there are certain civil cases where you are entitled to the appointment of counsel including termination of parental rights, post conviction relief, etc. If you are entitled to counsel by statute then you should be entitled to closing arguments by appointed counsel. If however, you are not entitled to appointed counsel by constitution, rule or statute then in a bench trial, to a judge, what is the reasoning behind guaranteeing closing arguments from counsel.

Further, as can be seen from the record, counsel for Lingnaw did interrupt the court to clarify the statute. If counsel wanted to make closing argument he should have interrupted the courts findings and requested it. Counsels failure to demand closing argument makes this issue, if error, not prejudicial.

If Appellant felt that because of the failure to allow closing argument, the court erred in some finding of fact or conclusion of law which Appellant felt the court needed to review. He had the opportunity to file a motion to reconsider which was not done.

**(D) Did the court err in failing to award attorney fees to Respondent in the underlying action and is Respondent entitled to an award of attorney fees in this appeal.**

In the underlying case the court denied Respondents request for attorney fees and costs. The court erred when it made the findings that Lingnaw did not bring the case frivolously, unreasonable, or without foundation.

Pursuant to Idaho Code § 10-1210, Idaho Code § 12-117, and Idaho Code § 12-121, Respondent should have been awarded his attorney fees and costs in the underlying case. There was no reason for Lingnaw to sue the local sheriff and request an order to prohibit him from arresting/prosecuting Lingnaw. As has been outlined above, that is a request for an advisory opinion, or legal advise from the court, which this Court has refused to do in the past. Lingnaw could have filed an action to clarify what the statute meant, what the court understood the legislature to mean, when stating "of which a school is located" or some other legitimate claim/cause of action. Because his claim had no legal basis it was therefor frivolous, unreasonable, and without foundation and fees and costs should have been awarded.

## ATTORNEY FEES ON APPEAL

Respondent further requests that this Court award attorney fees and costs on appeal pursuant to Idaho Code 10-1210, Idaho Code 12-117, and Idaho Code 12-121. Respondent requests that this court find that the appeal was brought frivolously, unreasonably, or without foundation.

## CONCLUSION

Respondent respectfully requests that the Petitioners appeal be denied.

RESPECTFULLY SUBMITTED this 4 day of March, 2020.

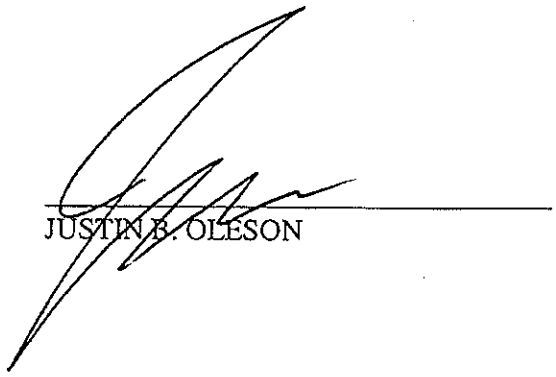
JUSTIN B. OLESON
Custer County Prosecuting Attorney

## CERTIFICATE OF SERVICE

I certify that, on the 4, day of March, 2020, I served a copy of the Respondent's Brief on Appeal in the manner indicated:

Daniel Brown
fullerlaw@cableone.net

[X] EFILE



JUSTIN B. OLESON