3-25-2020

Lingnaw v. Lumpkin Appellant's Reply Brief Dckt. 47098

Electronically Filed
3/25/2020 5:51 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DERRICK RICHARD LINGNAW, Plaintiff-Appellant, vs. STUART LUMPKIN, in his official capacity as SHERIFF OF CUSTER COUNTY, Defendant-Respondent and CITY OF CHALLIS, an Idaho municipal corporation; CHALLIS JOINT SCHOOL DISTRICT NO. 181, Defendants.	Docket No. 47098-2019 Custer County District Court CV-2018-3

APPELLANT'S REPLY BRIEF

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

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ARGUMENT

The Respondent has raised several additional issues in Respondent's Brief on Appeal. First, the Respondent asserts that Lingnaw has attempted to utilize a declaratory judgment action in an attempt to bar a subsequent criminal prosecution. Second, the Respondent characterizes Lingnaw's challenge to the District Court's Findings of Fact and Conclusions of Law as a question of whether or not Lingnaw "met his burden of proof" as to a definition of "school", as that term is utilized in Idaho Code §18-8329(1)(d), that does not apply to him. Finally, the Respondent asserts that the District Court erred in denying the Respondent an award of attorney fees and costs.

A. The Respondent's failure to file a cross-appeal bars them from raising new issues on appeal.

Pursuant to Idaho Appellate Rule 11(g):

> After an appeal has been filed from a judgment or order specified above in this rule, a timely cross-appeal may be filed from any interlocutory or final judgment, order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.

In addition, Idaho Appellate Rule 15 states that:

> (a) Right to Cross-Appeal. After an appeal has been filed, a timely cross-appeal may be filed from any interlocutory or final judgment or order. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment or order, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal.
>
> (b) Time for Filing. A cross-appeal, as a matter of right, may be made only by physically filing the notice of cross-appeal with the clerk of the district court or administrative agency within the 42

> day time limit prescribed in Rule 14, as it applies to the judgment or order from which the cross-appeal is taken, or within 21 days after the date of filing of the original notice of appeal, whichever is later.

Therefore, pursuant to *Kunz v. Nield, Inc.*, 162 Idaho 432, 398 P.3d 165 (2017):

> Under Idaho Appellate Rule 11(g), a respondent must file a cross-appeal if it seeks affirmative relief by way of reversal, vacation, or modification of the judgment. I.A.R. 11(g). This Court has clarified, in *Walker v. Shoshone Cnty.*, that a cross-appeal is not required when a respondent "merely seeks to sustain a judgment for reasons presented at trial which were not relied upon by the trial judge but should have been." 112 Idaho 991, 993, 739 P.2d 290, 292 (1987). Here, N.I. is seeking the vacation or reversal of the district court's conclusion that an implied in fact contract existed for Gem State's profit sharing. We will not consider N.I.'s claim because N.I. failed to file a cross-appeal.

Id. at 440

The Respondent failed to file a cross-appeal, by "physically filing the notice of cross-appeal with the clerk of the district court or administrative agency within the 42 day time limit prescribed in Rule 14, as it applies to the judgment or order from which the cross-appeal is taken, or within 21 days after the date of filing of the original notice of appeal, whichever is later." (I.A.R. 11, 15).

In addition, Lingnaw has sought to "set aside the District Court's findings of fact and conclusions of law and resulting Judgment, and declare that the District Court's findings are clearly erroneous and not supported by substantial and competent evidence." (Appellant's Brief on Appeal, p.11). As such, where Lingnaw has sought affirmative relief, the Respondent's newly raised issues on appeal should be barred.

B. Lingnaw's Complaint for Declaratory & Injunctive Relief was properly filed.

The Respondent has alleged that the Lingnaw sought to utilize a declaratory judgment action in an attempt to bar a subsequent criminal prosecution. Pursuant to Idaho Code § 10-1201:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Pursuant to Idaho Code § 10-1202:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Where Lingnaw has been granted certain rights pursuant to the Declaratory Judgment Act, he has the right to raise the issue as to whether certain conduct does, or does not, violate the criminal law and affects property rights, he is not required to wait indefinitely to pursue his remedy. See *Sunshine Mining Co. v. Carver*, 34 F. Supp. 274 (D. Idaho 1940).

C. The Respondent should be denied attorney fees.

In regards to attorney fees, Idaho Code §12–121 authorizes a court, in its discretion, to award attorney fees to the prevailing party in any civil action when the

judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. (Idaho Code §12-121) In District Court, Respondent filed a Motion to Reconsider relative to the Court's denial of an award of attorney's fees and costs, which was denied by a Decision and Order Re: Defendant's Motion for Reconsideration dated July 22, 2019. (R. p. 67-73) The Respondent did not file a cross-appeal as to said denial.

An award of attorney fees on appeal under Idaho Code §12–121 and I.A.R. 41 is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct.App.1995). However, an award of attorney fees under Idaho Code §12–121 is not a matter of right. *Michalk v. Michalk*, 148 Idaho 224 (2009).

When deciding whether attorney fees should be awarded under Idaho Code §12–121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. *Garner v. Povey*, 151 Idaho 462, 467–68 (2011); *Michalk* at 235.

D. The District Court's findings are clearly erroneous and are not supported by substantial and competent evidence.

In summarizing the factual record, which is relatively clear, the District Court characterized the gymnasium as a "school" as that term is utilized in Idaho Code §18-8329(1)(d), only after being prompted by Lingnaw, before which time the Court made a

finding that the gymnasium was a "school building". (Tr. p. 157, Ll. 21-23). While it is debatable as to whether or not the record supports a finding/conclusion that the gymnasium is a "school building" as the District Court initially found, such is not the standard to be utilized under an analysis of Idaho Code §18-8329(1)(d), which prohibits a registered sex offender from residing "within five hundred (500) feet of the property on which a school is located." (Idaho Code §18-8329(1)(d)).

Therefore, in order for the District Court's conclusions of law to be supported, that Court would have to make findings sufficient to support the conclusion that the gymnasium is a school, as opposed to a school building. Apparently, in an effort to incorporate Lingnaw's interruption of the District Court's verbal decision, the District Court finally concluded that "under the intent of the statute, the gymnasium would be considered a school." (Tr. p. 159, Ll. 11-17). This statement is not supported by substantial evidence, nor is it clear how the District Court defined the term "school". In addition, the District Court did not elaborate on its finding as to the "intent of the statute" as those terms were used immediately preceding the Court's ultimate conclusion.

Statutory interpretation is a question of law over which this Court exercises free review. *State v. Maidwell*, 137 Idaho 424, 426, 50 P.3d 439, 441 (2002) (citing *Lopez v. State*, 136 Idaho 174, 30 P.3d 952 (2001)). "The rule of lenity states that criminal statutes must be strictly construed in favor of defendants." *State v. Barnes*, 124 Idaho 379, 380, 859 P.2d 1387, 1388 (1993) overruled on other grounds, (citing *State v. Sivak*, 119 Idaho 320, 325, 806 P.2d 413, 418 (1990)). Idaho Code §18-8329 makes it a misdemeanor offense for sex offenders to "[r]eside within five hundred (500) feet of the

property on which a school is located, measured from the nearest point of the exterior wall of the offender's dwelling unit to the school's property line. . .". (Idaho Code §18-8329(1)).

As there is no definition of "school" as that term is utilized in Idaho Code §18-8329(d), it fell to the District Court, and to this Honorable Court, to determine the definition of a "school" as used in this code section. Black's Law Dictionary defines "school" as "[a]n institution of learning and education, esp. for children." (SCHOOL, Black's Law Dictionary (11th ed. 2019)). Black's Law Dictionary defines "public school" as "[a]n elementary, middle, or high school established under state law, regulated by the local state authorities in the various political subdivisions, funded and maintained by public taxation, and open and free to all children of the particular district where the school is located." *Id.*

It is clear that the gymnasium and/or auditorium at issue in the instant case do not meet the definition of "school" or "public school" as defined by Black's Law Dictionary. Neither the gym nor the auditorium are "[a]n institution of learning and education, esp. for children", nor are they "[a]n elementary, middle, or high school established under state law, regulated by the local state authorities in the various political subdivisions, funded and maintained by public taxation, and open and free to all children of the particular district where the school is located."

Lani Rembelski (hereinafter "Rembelski"), who is the Superintendent of the Challis School District and the elementary principal testified at the trial. (Tr. p. 88) She testified that the building at issue with the BLM sign on the front of it is owned by the

school. She testified that between the courthouse and the BLM building there is a gym. (Tr. p. 91) Rembelski testified that the BLM is leasing some of the building from the school district. (Tr. p. 92) She also testified that there was another tenant in that building, InterMountain Family Services. She went on to testify that there is a junior/senior high school in which the junior component consists of 7th and 8th grade and the senior component consists of 9th to 12th grade. She testified that the elementary school consists of grades Pre-K through 6th. (Tr. p. 93)

Rembelski testified that the junior/senior high school was approximately 100-200 yards away from the elementary. In addition to the elementary school and the junior/senior high school, Rembelski referred to the BLM building as a middle school, however, conceded that no grades currently attended that building. (Tr. p. 94) She admitted that while the BLM building may have functioned as a middle school in the past, that at the time of trial, it was not functioning as a middle school. She further testified that there was no academic instruction occurring at that building and that there were no children dropped off in the morning at said building. (Tr. p. 95) Rembelski testified that in the BLM building there is an auditorium that is used intermittently. (Tr. p. 96) She testified that the auditorium was used by the school district on average once per month. (Tr. p. 97)

Rembelski further admitted that the term "middle school" is no longer utilized by the school system in Challis. (Tr. p. 99) She clarified that while there had been two baseball fields behind the BLM building, one of the baseball fields was removed and converted into the BLM yard. She further stated that there were no school sponsored

events occurring on that remaining field. Rembelski made it clear that the only portion of the property that housed school sanctioned events was the gym or the auditorium. (Tr. p. 100) She set forth that the last time the BLM building had been utilized as a traditional school with academic instruction was the 2002-2003 school year. It was then utilized as an alternative school between 2008-2010, and had not been utilized as a traditional school for some nine (9) years as of the date of trial. (Tr. p. 103) Rembelski stated that the auditorium is not used during school hours and that the gym is usually used after school hours. (Tr. p. 119)

The mere fact that a gymnasium and or auditorium is utilized by a school district, on average once per month, is insufficient to characterize said facility as a "school". To say that said facility is a "school" would have to be premised upon the mere fact that school children occasionally utilize said facility. As this Honorable Court is aware, school districts commonly utilize various public recreational facilities and gymnasiums to facilitate school related activities.

To say that a public recreational facility, not directly affiliated with a traditional school, or school district, would become a "school" for the purposes of Idaho Code §18-8329(1)(d), in the event that they host a school activity, would result in innumerable public spaces being labeled as a "school" so as to prevent registered sex offenders from residing within 500 feet. This interpretation would result in an assault upon all of Idaho registered sex offenders' ability to utilize public recreation centers, city parks, etc., and is a slippery slope to say the least.

E. The District Court erred in denying the Lingnaw closing argument.

The case of *Isaacson v. Isaacson*, 777 N.W.2d 886 (2010) reasons that closing arguments serve an important function and are an important part of constitutional due process, and stated as follows in this regard:

> Erik Isaacson argues his due process rights were violated when the district court denied him the opportunity to present closing arguments. "[L]itigants in civil nonjury cases ... have a right to have their attorneys make a final argument." *Fuhrman v. Fuhrman*, 254 N.W.2d 97, 101 (N.D.1977). The right to closing arguments can be waived by the parties and narrowed by the courts, but it cannot be unilaterally denied. *Id.* The protections afforded closing arguments flow from the important functions they serve. Closing arguments can correct premature misjudgments by the court and bring opposing viewpoints to the court's attention, leading courts to fewer erroneous decisions. *Id.* at 102.

Isaacson v. Isaacson, 777 N.W.2d 886, 890 (2010)

As such, Lingnaw asserts that this Honorable Court should rule that closing arguments in civil cases are a constitutional right, protected by the 14th Amendment to the U.S. Constitution as well as Article 1, Sections 1 (acquiring, possessing and protecting property; pursuing happiness and securing safety), 9 (every person may freely speak, write and publish on all subjects), 13 (nor be deprived of life, liberty or property without due process of law), and 18 (courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice) of the Idaho Constitution.

CONCLUSION

In conclusion, Lingnaw respectfully requests this Honorable Court to set aside the District Court's Findings of Fact and Conclusions of Law and resulting Judgment, and

declare that the District Court's findings are clearly erroneous and not supported by substantial and competent evidence. Lingnaw requests that this matter be remanded to the District Court consistent with this Honorable Court's directives.

RESPECTFULLY SUBMITTED This 25th day of March, 2020.

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CERTIFICATE OF E-FILING AND E-SERVICE

I, the undersigned, do hereby certify that on the 25th day of March, 2020, a true and correct copy of the foregoing Appellant's Reply Brief was e-filed and e-served to the following:

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/s/ Ranee M. Marsing