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Idaho Supreme Court
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In the
**SUPREME COURT**
of the
**STATE OF IDAHO**

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**Idaho Supreme Court DOCKET NO. 47286-2019**

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JONATHON FRANTZ,

Appellant,

v.

DAVID A. OSBORN and NAOMI OSBORN,

Respondents.

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# APPELLANT'S BRIEF

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***Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai***

***The Honorable Cynthia K. Meyer presiding.***

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## STATEMENT OF THE CASE

### A. *SUMMARY OF THE CASE*

This case arose when, after the Mathis family had used a particular driveway for residential access since the mid 1980's, the new joint owners, the Defendants (the "**Osborns**"), placed concrete barriers across the driveway, installed a locked gate, and used an excavator to dig up a portion of the Mathis family's driveway. While it took the Mathis family some time to gather together the financial resources to file a suit, when they did, they filed for a preliminary injunction. After denying the motion for preliminary injunction, the Defendants moved for attorneys fees against the *Plaintiffs only* for their costs in defending the preliminary injunction.

At the hearing on Defendants' motion for attorney fees, Defendants acknowledged that, "as a professional courtesy, we didn't bring this as a motion for Rule 11 sanctions" against Mr. Frantz. Regardless, in their next breath, the Defendants orally moved "the Court to consider exercising its authority under Idaho Rule of Civil Procedure 11(c)(3)." Appellant, Mr. Frantz, immediately objected on the basis that the procedures of Rule 11 had not been complied with and the district court "noted" the objection.

Regardless, without any further procedure, without notice that Mr. Frantz's conduct was under scrutiny, and without affording Mr. Frantz an opportunity to present a defense, the district court awarded attorneys fees against the Plaintiffs *and Mr. Frantz* jointly and severally.

### B. *COURSE OF THE PROCEEDINGS*

On January 11, 2019, Mr. Frantz represented the Mathis family in a preliminary injunction hearing. After hearing testimony and taking evidence, the Court denied the request

for a preliminary injunction on January 16, 2019. On March 27, 2019, Defendants filed a motion for attorney's fees *against the Plaintiffs only* for the time spent defending against the Preliminary Injunction. No request was made to seek fees against Plaintiffs' attorney, appellant Jonathon Frantz. Mr. Frantz was given **no notice** that sanctions or fees were sought against him, personally. On June 5, 2019, a Judgment was entered against all the Plaintiffs and Jonathon Frantz jointly and severally. Then, on September 16, 2019 the district court signed a Rule 54(b) certificate on the Judgment *as to Jonthon Frantz only*; the Judgment was not final as to the Plaintiffs, who were jointly and severally liable thereunder.

Mr. Frantz filed his notice of appeal, which was originally filed prematurely on August 19, 2019, was perfected when the Rule 54(b) certificate was appropriately executed for the judgment.

**C.** *STATEMENT OF FACTS*

The district court granted attorney's fees against Mr. Frantz because the district court determined (albeit wrongly) that "their attorney did not [] perform their due diligence, so to speak, to gather the documentary and other evidence necessary to prove many of the elements of their claim." R. 380. Because Mr. Frantz challenges that finding as well as procedures employed in ordering fees against Mr. Frantz, there are two different sets of facts important for this appeal: 1) the facts supporting the motion for a preliminary injunction, and 2) the facts regarding the procedural deficiencies.

## FACTS REGARDING THE PRELIMINARY INJUNCTION

1) **November 16, 2018**: Plaintiff, Brook Tracy, moved for a temproary restraining order and prelmiminary injunction allowing her to drive across the Osborns' property. R. 23-35.

2) **January 11, 2019**: The district court held a hearing regarding the motion for preliminary injunction. At that hearing, the following evidence was submitted:

*Evidence from Plaintiffs: Tracy Brook- Witness*

a. Exhibit A[1] from the preliminary injunction is a map showing property boundaries which contain labels for three pieces of property: the "Tracy Property," the "Osborn Property," and the "Mathis/Roll Property."

b. Ms. Tracy and her brother currently own the Tracy Property. Tr. 12:2-8.

c. Ms. Tracy and her brother inherited the property from their father when he passed away in 1997. Tr. 22:12-18.

d. Ms. Tracy's father, Ricky Mathis, obtained the Tracy Property from Calvin Mathis (Ricky's father). Tr. 20:8-12.

e. The Osborn Property is owned and occupied by the Osborns. Tr. 12:9-16.

[1] Appellant notes that Deputy Clerk of the District Court of the First Judicial District, Katherine Hayden, certifies that Exhibit A "will be submitted as EXHIBITS to the Record." R. 399. However, Appellant has not been provided any way to make reference to those exhibits other than to refer to them by their alphanumeric character used at the hearing on the preliminary injunction.

f. The Mathis/Roll Property is occupied by Gailord Mathis, Rebecca Stafford, and Laura Roll. Tr. 12:17-24.

g. Calvin Mathis owned the Tracy Property, the Mathis/Roll Property, and the Osborn Property as one parcel since at least the 1980's. Tr. 15:19 - 16:17.

h. Calvin Mathis split off the Tracy Property in the 1980's. Tr. 16:19-25.[2]

i. Ms. Brook, her parents, and her siblings moved into a trailer house on the Tracy Property in 1987. Tr. 17:12 – 18:20.

j. Ms. Brook lived on the Tracy Property from 1987 – 2003. Tr. 18:21 – 19:1.

k. During that entire time, Ms. Brook's family used the driveway labeled "Osborn Driveway" the entire time. Tr. 23:18 – 24:4.

l. Ms. Brook, personally, moved back on the Tracy Property in 2017. Tr. 24:5-13.

m. Ms. Brook was forced to leave the property in Summer/Fall of 2018 because the Osborns placed cement barriers and a gate over her driveway blocking her access to the Tracy Property. Tr. 24:21 – 25:6; *see also* Exhibit B & C (Tr. 26:5-16, and Tr. 27:1-10).

n. Ms. Brook had three children ages 10, 12, and 14. Tr. 29:18-25.

o. There was another skid trail that led from the Tracy Property to another public road, however, that driveway was not drivable by regular vehicle. Tr. 30:22 –

[2] It may be worth noting that there was an objection, but it was made *after* the complete answer and there was never any motion to strike the answer. R. 17:1-4.

37:8; *see also* Exhibits D, E, and F (photos of the skid road); *see also* Tr. 50:16-20.

*Evidence from Plaintiffs: Gailord Mathis- Witness*

p. Mr. Gailord Mathis ("**Gailord**") was raised on the property at issue. Tr. 52:20 53:1.

q. While Gailord was growing up, the Tracy Property, Osborn Property, and the Mathis/Roll Property were all "one piece" owned by Gailord's father. Tr. 53:2-8.

r. Gailord's father acquired the property (as one piece) in the late 1960's. Tr. 67:15 – 68:1.

s. Gailord was [redacted]. Tr. 52:18-19.

t. Gailord built the driveway labled on Exhibit A as the Osborn Driveway in 1978. Tr. 53:23 – 54:11.

u. The driveway was initially built to serve as access for Gailord's cabin. Tr. 56:12-19.

v. Gailord lived in the cabin and used the Osborn Driveway as access from 1982 – 1997. Tr. 58:19 – 59:13.

w. The Tracy Property and the Osborn Property were split off in approximately 1983 from the Mathis/Roll Property. Tr. 68:7-11; *see also* Tr. 69:9-12.[3]

x. In 1983, after being split off, the Osborn Property was owned by Laura Roll. Tr. 74:23-25 (Gailord testifies that Laura Roll became the owner of the Osborn Property "when it was parcelled out" in 1983).

*Evidence from Plaintiffs: Travis Mathis- Witness*

y. While growing up (through the 80's and 90's) the Osborn Property was owned by Laura Roll. Tr. 91:3-16.

z. Travis Mathis lived on the Tracy Property from 1987 – 1997 while a youth. Tr. 85:17-20.

*Evidence from Defendants: Jodi Bland- Witness*

aa. The Osborn Property was acquired by Ms. Bland's mother in 2002. Tr. 97:8-14.

3) **January 12-16, 2019:** The district court engages in its own investigation of the facts.[4] Tr. 203:24 – 204:2 (the district court searched Kootenai County map tools to see who

[3] The testimony references "three parcels" being split off: the Tracy Property, the Osborn Property, and a third property which is not labeled in Exhibit A, which unlabeled property is irrelevant to this appeal.

[4] *See* Idaho Code of Judicial Conduct, Rule 2.9(D) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented…"). The information gathered by the district court could not be refuted by the Plaintiffs because they were wholly unaware that such information was being considered. It was not until *after* the court's opinion was reached that the Plaintiffs were aware that the district court was looking at facts not presented by the parties.

Kootenai County assessor listed as the property owner); *see also* Tr. 211:23 – 212:3 (the district court researched other cases in which the parties were litigants).

4) **January 16, 2019:** The district court entered its oral findings regarding the preliminary injunction hearing and denied the motion. The district court made the following statements:

    i. "…while there was some testimony concerning [the] parceling out of the property in about 1983, there were actually no chain of title documents submitted into evidence, which makes analysis of the various easement theories difficult, if not impossible." Tr. 203:18-23.

    ii. "So a timeline of the parties' use… Based on the testimony at the hearing last week, a timeline of the parties' use of the Osborn driveway is as follows: '83 to '85, Gailord used the driveway on the Osborn property. It's unclear in whose name title to the Osborn property was held. '85 to '89, Gailord used the driveway to access the cabin, which was now – or at the time on the map as the Roll property, and he used the driveway regularly. From '89 to '94, Gailord used the driveway to access the cabin intermittently. 1987 to 2007, Ricky and his family members used the driveway to access the Tracy property." Tr. 208:24 – 209:13.

    iii. "Indeed, the Court cannot determine when title was severed or even that title was severed without a proper chain of title." Tr. 216:9-12.

## FACTS REGARDING THE PROCEDURAL DEFICIENCIES

1) **January 11, 2019:** The district court holds a hearing regarding the Mathis's preliminary injunction. Tr. 3.
2) **January 16, 2019:** The district court orally denies the Mathis's motion for a preliminary injunction. Tr. 225: 2-3.
3) **January 31, 2019:** The district court signs a written order denying the motion for preliminary injunction. R. 49.
4) **March 27, 2019**: The Osborns move for attorneys fees for defending against the preliminary junction under I.C. §§12-121, and 123. R. 111. The Osborns do not include any notice that they are seeking fees against Jonathon Frantz. R. 114-128 (the Osborns' memorandum supporting their motion for fees is devoid of any reference to seeking fees against Counsel, Jonathon Frantz); *see also* R. 380 ("Defendants' motion seeks attorney's fees against the Plaintiffs themselves…").
5) **April 3, 2019**: The Mathises object to the motion for fees. R. 138. There is no request for attorney's fees against Mr. Frantz. R. 138 – 156.
6) **April 10, 2019:** The hearing regarding the Osborns' motion for fees is held. Tr. 232.
    a. At that hearing, Counsel for the Osborns admits the no motion was filed against Mr. Frantz, but then orally moves the court to grant sanctions based on I.R.C.P. 11. Mr. Frantz immediately objected on the grounds that the proper procedure has not been followed, and the district court noted Mr. Frantz's

objection. Tr. 290: 9-23. The exchange occurred after the evidentiary portion of the hearing had closed, and went as follows:

> As a profestional courtesy, we didn't bring this as a motion for Rule 11 sanctions, but perhaps, if the Court determines that this motion was pursued frivolously and that Miss Tracy did not understand the nuances and the construction of the document, perhaps then the Court should, and we respectfully ask the Court to consider exercising its authority under Idaho Rule of Civil Procedure 11(c)(3).
>
> MR. FRANTZ: Judge, there's a lot of procedures there that I don't think ought to be considered at this time.
>
> MISS CAIRES: 11(c)(3) allows the Court to consider it on its own without a motion pending before it.[5]
>
> THE COURT: Your objection is noted.

Tr. 290: 9-23.

7) **June 3, 2019:** The district court enters its Memorandum Decision and Order on Osborn Defendants' Motion for Attorney's Fees. R. 365-87. In its Memorandum Decision, the district court sua sponte raises its own claim for fees *under I.C. §12-123*. R. 385 ("Defendants do not raise this in their motion for attorney's fees, but on its own motion, the court will discuss this issue."). In that very same memorandum decision, the court grants sanctions against Mr. Frantz pursuant to the issues that the court had just simultaneously raised on its own motion in its decision. R. 385-387.

[5] This statement of the law regarding I.R.C.P. 11(c)(3) is inaccurate. For a court to consider Rule 11 sanctions on its own, it must issue a motion to show cause.

8) **June 5, 2019**: The district court enters a judgment awarding attorneys fees against the Mathises *and* Mr. Frantz jointly and severally.

9) **July 12, 2019**: The district court grants an order for a 54(b) certificate on the judgment *against Jonathon Frantz only* (the order is not certified final as it applies to the Mathises, who have joint and several liability). R. 318.

10) **Dateless**: At no point is there ever any notice, hearing, or order to show cause regarding whether or not fees should be assessed against Mr. Frantz.[6]

## ISSUES ON APPEAL

a. Did the District Court err by failing to follow the procedures set forth in I.C. §12-123 when it granted sanctions against Jonathon Frantz?

b. Did the District Court err by moving sua sponte for sanctions pursuant to I.C. §12-123?

c. Did the District Court err by requiring a chain of title in order to decide if there was a non-express easement?

d. Did the District Court err by failing to consider the non-documentary evidence of ownership?

e. Did the District Court err by sanctioning Mr. Frantz for the misstatements of the Plaintiffs?

f. Did the District Court err by depriving Mr. Frantz of due process by granting sanctions against him without proper notice and an opportunity to be heard?

g. Is Jonathon Frantz entitled to attorney's fees and costs on appeal?

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[6] There is no citation to the record because the record is devoid of any such item. Instead, it is the lack of any evidence of such in the record which demonstrates that no such hearing, notice, or order to show cause was ever filed.

## STANDARD OF REVIEW

"Statutory attorney fee awards, as well as an award of sanctions under Rule 11, are subject to an abuse of discretion standard of review." *Urrutia v. Harrison*, 330 P.3d 1035, 1038 (Idaho 2014) (citations omitted). "To determine whether the court abused its discretion, this Court must inquire: '(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.'" *Id.* (citation omitted).

In reviewing fee awards on appeal, the Supreme Court's function "is to review the trial court's finding to determine if it is supported by the record." *Sun Valley Shopping Ctr. v. Idaho Power*, 803 P.2d 993, 998 (Idaho 1991) (emphasis added).

## ARGUMENT

1. *The district court abused its discretion by failing to follow the procedures and legal standards set forth in I.C. §12-123 when it ordered sanctions against Mr. Frantz without hearing, or proper notice thereof.*

Idaho code requires that before a court can enter an order for fees under section 12-123, it must provide notice to the party or attorney who allegedly engaged in friviolous conduct. I.C. §12-123(b) specifically sets forth that,

> An award of reasonable attorney's fees may be made by the court upon the motion of a party to a civil action, **but only after** the court does the following:
>
> (i) …
>
> (ii) **Gives notice** of the date of the hearing **to each party or counsel of record** who allegedly engaged in frivolous conduct…

> (iii) … Additionally, the court shall allow the parties and counsel of record involved to present any other relevant evidence at the hearing.

(emphasis added). An award of fees pursuant to I.C. §12-123 is improper if there is no motion, notice, or a hearing. *See Roe Family Services v. Doe*, 88 P.3d 749, 757 (Idaho 2004) (overturning an award of fees pursuant to I.C. § 12-123 because there was no motion, notice, or hearing). Moreover, "where a statute . . . is plain, clear, and unambiguous, it 'speaks for itslef and must be given the interpretation the language clearly implies.'" *Verska v. St. Alphonsus Regional Med. Ctr.*, 265 P.3d 502, 508 (Idaho 2011) (citations omitted).

In this particular case, the statute is very clear. If sanctions under 12-123 are to be granted, notice must be given. There was never any notice that the Osborns sought attorney's fees against Mr. Frantz. In fact, at the hearing, counsel for the Osborns admitted that "as a professional courtesy" they did not file any motion against Mr. Frantz. Tr. 290:9-16. Then, in the same sentence, they orally move the district court for sanctions pursuant to I.R.C.P. 11(c).

At that moment, Mr. Frantz placed his objection on the record to any such consideration right then an there. Mr. Frantz stated, "Judge, there's a lot of procedures there [such as notice and a hearing] that I don't think ought to be considered at this time."

Moreover, Mr. Frantz understood that he was only arguing and presenting evidence on behalf of the Plaintiffs. At the hearing, Mr. Frantz concluded, "Judge, I ask that you don't hit my clients with sanctions on this…" Tr. 288: 4-5. Mr. Frantz also stated, "I have not treated – the plaintiffs, forgive me, have not treated the preliminary injunction hearing as a fact finding mission." Tr. 274: 14-16.

The district court, too, recognized that the Osborns only sought fees against the Plaintiffs, and not counsel. *See* R. 380 ("Defendants' motion seeks attorney's fees against the Plaintiffs themselves…"). At that hearing, Mr. Frantz was unaware that he would be potentially liable for any finding under the Osborns motion for fees. Had Mr. Frantz been aware of such, he would have presented evidence in his own behalf.

**Even in its own ruling, the district court was raising new issues**. R. 385 ("Defendants do not raise this in their motion for attorney's fees, but **on its own motion, the court will discuss this issue**." (emphasis added)). The district court, as late as in the memorandum decision, was raising new issues. The district court continued by noting that, "There was no evidence offerred at the attorney's fees hearing regarding [the issue raised by the court on its own motion]…" R. 385. Of course no evidence was offerred at the hearing; Mr. Frantz did not know that the conduct was at issue. When issues are raised for the first time in the memorandum decision, there is simply no opportunity for a party to respond to it because the decision has been made at the same time it was raised. Mr. Frantz was clearly deprived of his right to notice and a hearing as the district court acknowledged in its own opinion that it was raising new issues on its own motion in the very same order settling that same motion.

As such, because the plain language of the statutes were not followed, and because due process rights were trampled, and the necessary procedures did not take place, the award of fees was improper. Consequently, this Court should reverse the judgment of the district court.

2. *Additionally, the district court erred when it ordered sanctions under 12-123 against Mr. Frantz because a court may not sua sponte make its own motion for fees pursuant to §12-123.*

Next, the court abused its discretion by going outside the legal standards available. The district court noted in its memorandum decision that even though the "Defendants do not raise this in their motion for attorney's fees, [] on its own motion, the court will discuss the issue." R. 385. The district court was further aware that the Defendants had not filed sanctions against Attorney, Mr. Frantz. R. 380 ("Defendants' motion seeks attorney's fees against the Plaintiffs themselves based on the misrepresentations revealed by gross inconsistencies between the Verified Motion statements and testimony elicited at the preliminary injunction hearing.").

However, I.C. §12-123 does not allow a court to sua sponte, on its own motion, file for §12-123 sanctions. Instead, §12-123(2)(b) sets forth that "An award of reasonable attorney's fees may be made by the court *upon the motion of a party to a civil action*." (emphasis added). It does not contemplate a court raising such a motion on its own; the statute is limited to responding to a request by a party in a civil action only. Conversely, in I.R.C.P. 11(c)(3) a court is specifically authorized to make the motion on its own. I.C. §12-123 contains no such language. Moreover, this court has interpreted §12-123 according to its plain language. *See Bird v. Bidwell*, 209 P.3d 647, 650 (Idaho 2009) (recognizing that 12-123 does not apply to an appellate court because "by its terms" 12-123 must be commenced within 21 days after the entry of judgment in a civil action.).

The plain language of I.C. §12-123 does not allow a court to, on its own motion, raise issues of sanctions. Yet, the district court granted sanctions pursuant to its own raised issues

pursuant to 12-123. There was never any analysis or discussion in the district court's memorandum decision addressing I.R.C.P. 11.

Therefore, the district court abused its discretion because it did not operate consistently with the appropriate legal standards. Therefore, its decision should be reversed.

***3.*** *Even if proper procedure and adequate notice was provided, the district court erred when it applied an incorrect legal standard: the district court mistakenly believed a chain of title was necessary to prove a non-express easement.*

In finding that the Plaintiffs motion for a preliminary injunction was frivolous, the district court errantly believed that a prescriptive easement or implied easement required documentary evidence in the form of a chain of title. The district court consistently held that,

> The fact remains that they lacked the necessary evidence at the preliminary injunction hearing to show how the property was titled, and when different pieces of the property was titled in others, and they failed to offer any evidence as to other necessary elements such as separation of title or intent to establish an easement (implied easement); separation of title, reasonable necessity at time of separation, great present necessity (easement by necessity); and use that is open and notorious, continuous and uninterrupted, adverse and under a claim of right, with actual or constructive knowledge of the owner (prescriptive easement). This complete lack of preparation is attributable to the Plaintiffs, but also to Mr. Frantz. . . . **It would not have been "nice" to have the chain of title." It was absolutely essential**...

R. 386 (emphasis added). The district court had earlier repeated its mantra that a chain of title is absolutely necessary. *See* Tr. 203:18-23 ("there were actually no chain of title documents submitted into evidence, which makes analysis of the various easement theories difficult, **if not impossible**."); *see also* Tr. 216:9-12 ("Indeed, **the Court cannot determine when title was severed or even that title was severed without a proper chain of title**.").

Nowhere in any controlling law is there a requirement that a party provide a chain of title in order to successfully prosecute an easement case. Nowhere in any controlling law is there a

prohibition against relying on oral evidence. While perhaps oral evidence is the least reliable form of evidence, the oral evidence regarding ownership provided by the Plaintiffs at the hearing was **uncontroverted**. The district court acted outside the bounds of its discretion when it wrongly believed that a chain of title for the properties at issue was a necessity, especially considering that there was evidence presented regarding ownership.

There is no requirement that you provide a chain of title to prove a non-express easement. In fact, Idaho recognizes prescriptive easements in gross, which are not tied to a dominant estate in any way. *Cf. West v. Smith*, 511 P.2d 1326, 1332-33 (Idaho 1973). For a prescriptive easement in gross, no use tied to a dominant parcel need be demonstrated by the evidence. At the very least, without the evidence as to the ownership of the Tracy Property, the district court could have found any resulting easement to be *in gross* instead of appurtenant.

As such, since the district court abused its discretion by applying an incorrect legal standard, the judgment for attorney's fees (based on the opinion that the motion for a preliminary injunction was frivolous because there was no evidence of a chain of title submitted) should be reversed.

***4.*** *Moreover, the district court was clearly erroneous when it determined that no evidence of ownership had been entered into the record because, at the hearing, the Plaintiffs provided uncontroverted oral evidence regarding ownership.*

Moreover, any finding that the Plaintiffs' arguments regarding ownership of the property (as it applies to the non-express easement theories) were without factual support is clearly erroneous because the Plaintiffs submitted the following title history evidence:

1. Gailord's father acquired all the referened/relevant properties (as one piece) in the late 1960's. Tr. 67:15 – 68:1 (testimony from Gailord).

2. Gailord built the driveway at issue in 1978. Tr. 53:23 – 54:11.

3. The Tracy Property and the Osborn Property were split off in approximately 1983 from the Mathis/Roll Property. Tr. 68:7-11 (Gailord's testimony); *see also* Tr. 69:9-12 (Gailord's testimony); *see also* Tr. 16:19-25 (corroborating testimony from Ms. Tracy).

4. In 1983, after being split off, the Osborn Property was owned by Laura Roll. Tr. 74:23-25 (Gailord testifies that Laura Roll became the owner of the Osborn Property "when it was parcelled out" which occurred in 1983); *see also* Tr. 91:3-16.

5. After being split off, the Tracy Property was owned by Ricky Mathis (Ms. Tracy's father). Tr. 19:5-24; *see also* Tr. 20:8-12.

6. In 1997 Ricky Mathis passed away and the property transferred to Brook Tracy and Travis Mathis. Tr. 22:12-18.

7. In 2002, Joan Booth acquired the Osborn Property. Tr. 110:14-23.

8. In 2017, the estate of Joan Booth sold the Osborn Property to the Osborns. Tr. 112:6-14.

Unfortunately, we do not know whether the district court failed to consider the aforementioned evidence presented of ownership because it felt that documentary evidence (i.e. a chain of title) was mandatory; because it simply forgot the evidence; or because it found the evidence not credible[7]. Either way, however, the motion for preliminary injunction was supported by facts. More importantly, those facts were never disputed! (there is no citation to the record because you cannot cite to something that is not there).

[7] I would note that it is obvious that the district court found various statements by the Plaintiffs not credible. But it is not clear if the referenced statements by the trial court regarding the title history were also determined by the district court to not be credible or untrue.

To the extent that it is determined that the district court found the above mentioned oral evidence insufficient, it should also be noted that I.C. §12-123 does *not* authorize the granting of attorney's fees when there is *insufficient* evidence presented to meet one's burden. It is one thing to fail to meet your burden, and an entirely different one to argue something not supported in fact. It is only under the later scenario where fees may be granted under section 12-123. If the matter is one where the Plaintiffs' evidence was insufficient, attorney's fees under 12-123 are inappropriate.

In this case, at the preliminary injunction hearing the Mathises put on evidence of every element of various easement theories. The district court actually made a significant finding important to entering a preliminary injunction on the basis of prescription:

> So a timeline of the parties' use… 1987 to 2007, Ricky and his family members [Brook Tracy and Travis Mathis] used the driveway to access the Tracy property.

Tr. 208:24 – 209:13. The district court found that Brook Tracy and Travis Mathis's family had used the driveway continuously and uninterrupted for 20 years. There was no evidence that the use was permissive; moreover, there was evidence that it was made with the knowledge of the owner. Tr. 78:12-21. The photos of the driveway (primarily the aerial photo comprising Ex. A) show that the driveway was obvious and noticeable. Gailord testified that the driveway was "about 14 feet wide." Tr. 63:17-18. You could see the driveway and the vehicles driving on it from the home located on the Osborn Property. Tr. 40:13-18. The Mathis family's use of the driveway was open and notorious.

Additionally, this is all against the backdrop that the Osborns were not challenging the ownership of the various properties and that the Osborns never actually raised that argument. *See* Tr. 171:23 - 181:23 (the Osborns' closing arguments at the preliminary injunction hearing are void of any such challenge to the sufficiency of the evidence of ownership). The Osborns never presented any conflicting evidence as to the ownership dates; never questioned the Plaintiffs about it during the hearing; never raised any issues regarding lack of proof of ownership during closing arguments; and never raised those issues in their opposition to the preliminary injunction.[8] The evidence was uncontroverted.

Consequently, the district court abused its discretion by failing to exercise reason. It failed to account for the uncontroverted evidence of ownership that was submitted at the hearing. Had the district court considered that evidence (or at least the fact that such evidence was submitted) the court could not have reached a reasoned conclusion that the Plaintiffs failed to have any factual support for their motion. Therefore, the judgment for sanctions pursuant to 12-123 (based on a finding that Plaintiffs' preliminary injunction motion was without foundation or support) should be reversed.

[8] It should be noted that the Osborns' opposition to the preliminary injunction is not a part of the record. Regardless, there is no evidence in the record that could demonstrate that the Osborns actually raised the lack of a chain of title as a problem.

***5.*** *Mr. Frantz should not be sanctioned in connection with any misstatements found to be in the Verified Motion*

The district court sanctioned Mr. Frantz for essentially two reasons: 1) for his alleged "complicity" in writing the Verified Motion, and 2) his failure to be prepared for the preliminary injunction hearing by not providing a chain of title. The issue regarding the chain of title has been addressed above. Therefore, Mr. Frantz will now review the issues with the statements in the Verified Motion.

*The Verified Motion*

The first bit of conduct that the district court addressed was what the court saw as misleading testimony.

> In preparing for the hearing on the motion for preliminary injunction, the court interpreted the Verified Motion to indicate that the Tracy family lived at 8531 W. Highland Drive for 19 years, that in August 2017, the Osborns blocked the driveway to the Tracy property, and that as a result, the Tracys lost vehicular access to their property, resulting in children potentially missing the school bus, and the Tracys being forced to move from the property until the issue of the barriers was resolved, causing significant financial hardship.

R. 384. The district court's general understanding of the matter at the time it prepared for the preliminary injunction hearing matched Attorney Jonathon Frantz's own understanding at the time the Verified Motion was signed and submitted. In fact, Mr. Frantz was probably more surprised than the court when he realized that Ms. Tracy did not move back onto the Tracy Property until *after* the gate was locked and the concrete barriers were placed. Mr. Frantz's understanding was that Ms. Tracy had lived on the property in her youth, but that (now being married) had moved her own family (her husband and children) back to the Tracy Property when

the Osborns placed the blockade in her way. In fact, Mr. Frantz took this matter on a heavily discounted basis because the facts, as he understood them, seemed quite unjust. However, Mr. Frantz never put any evidence of the foregoing before the district court because he did not know that he was proverbially "on trial" and at risk of being sanctioned.

Moreover, the finding that Mr. Frantz helped "type up" the Verified Motion is not consistent with the evidence and is unsupported by Ms. Tracy's testimony. At the hearing on fees, the following questions were put to Ms. Tracy,

Q. Miss Tracy, did you draft the [Verified Motion]?

A. Yes.

Q. You drafted this legal document?

A. You mean, like, rough drafted it?

Q. No, you wrote this document that was filed with the Court?

A. Oh, no.

Tr. 254: 15-18. Ms. Tracy testified that she wrote the "rough draft" for the Verified Motion. Of course, she didn't prepare the heading.

Q. Do you know the name of who drafted it?

A. I think it's Christine.

Tr. 255: 1, 10.

Q. Okay. Did you draft paragraph one?

A. Did I write it?

Q. Yeah. Did you write paragraph one as it reads on this document? Yes or no?

A. No, I guess. I don't know.

Q. Yes or no?

. . .

A. I didn't physically write it, but I told them what -- like, what to put, and they physically typed it out, but I didn't physically type it.

Tr. 260: 1-16. From the testimony, it is clear that Mr. Frantz did not prepare the wording for the Verified Motion. Instead, Ms. Tracy dictated to "Kristen" or "Christine" the alleged facts.[9] Sure, Mr. Frantz reviewed the Verified Motion, but it did not raise any red flags because it matched with his understanding of the facts. Mr. Frantz had the right to rely on his client's sworn statement in the Verified Motion with regard to facts that he could not otherwise independently investigate (there is no register of when the driveway was constructed, etc.).

So, the district court abused its discretion when it reached the conclusion that "paragraph one was crafted carefully *by client(s) and attorney* to mislead the court…" (R. 382), because the finding that Mr. Frantz drafted the Verified Motion is not supported by the record. Instead, the record shows that "Kristen" typed what Ms. Tracy dictated and then that was reviewed by Mr. Frantz. At that time, there was no evidence that Mr. Frantz possessed which would controvert any of the sworn statements made by Ms. Tracy.

[9] The record is unclear as to who or what position "Kristen" or "Christine" holds at Post Falls Law. However, that is because Mr. Frantz (and Post Falls Law) was not put on notice that their conduct was at issue. Had Mr. Frantz been aware of such, he certainly would have clarified the record. However, in light of the fact that the proceedings were against the Plaintiffs only, the position held and/or who Kristen is was not material or relevant.

Unfortunately, the district court got focused on whether or not the Verified Motion was misleading, not on whether Mr. Frantz *knew at the time he signed the Verified Motion* that it was misleading. *See Sun Valley Shopping Ctr. v. Idaho Power*, 803 P.2d 993, 1000-02 (Idaho 1991) ("we conclude that the focus the trial court gave to the make of the choice [to award sanctions] was incorrect."). This, of course, was all the result of the fact that Mr. Frantz did not have an opportunity to put on evidence as to his own understanding of the facts as he knew them at the time he filed the Verified Motion.

As testified to by Ms. Tracy, she dictated what was supposed to be written, and then she met with her attorney (presumably Mr. Frantz) regarding her testimony. Taking the court's example of paragraph one, when Mr. Frantz reviewed that paragraph what else was he required to do to verify the veracity of that statement? His client dictated it. It is not packed with legalese. Other than the paragraph numbering, it reads like a lay person's testimony. He had no evidence that supported any contrary understanding. What further investigation could/should Mr. Frantz have performed after reading paragraph one? There was never any discussion about how Mr. Frantz could or should have known that paragraph one was misleading at the time it was filed.

Since the focus of the trial court was in error (by failing to look at what Mr. Frantz knew at the time the Verified Motion was prepared), the district court abused its discretion in awarding sanctions against Mr. Frantz. Therefore, the judgment of the district court should be reversed.

***6.*** *Mr. Frantz was deprived of due process when sanctions were entered against him without notice.*

In *Rudd v. Rudd,*105 Idaho 112, 666 P.2d 639 (1983) this Court stated, "Due process of law is also guaranteed under the Idaho Constitution. It reads: 'No person shall be ... deprived of life, liberty or property without due process of law." Idaho Const. art. 1, § 13. The due process guarantees derived from both the United States Constitution and the Idaho Constitution are substantially the same. *State v. Peterson,* 81 Idaho 233, 340 P.2d 444 (1959).

The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. *See Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Mays v. District Court,* 34 Idaho 200, 200 P. 115 (1921)."

In the instant case, Mr. Frantz was essentially deprived of his property without giving him notice and an opportunity to be heard. A Judgment for $7,515 is against him without him even knowing he was a target for sanctions until the memorandum decision was entered by the district court. This is contrary to both the United States and Idaho Constitutions. Therefore, since the district court abused its discretion by failing to provide Mr. Frantz with notice and an opportunity to be heard, its judgment ordering sanctions against Mr. Frantz must be reversed.

*7. Mr. Frantz should be awarded his attorney's fees pursuant to I.C.§ 12-121*

Mr. Frantz should also be awarded his attorney's fees and costs pursuant to I.C. §12-121 because any defense to this appeal can only be brought without foundation. The Osborns were aware that they had not sought fees against Mr. Frantz; they acknowledged such in their oral arguments, and then in the same breath asked the district court to consider making its own motion for sanctions against Mr. Frantz when the clear, black letter law of both §12-123 and Rule 11 require notice and hearings thereon.

Moreover, at no point did the Osborns ever challenge the sufficiency or veracity of the evidence regarding the title. To suddenly now oppose those points, when they were unopposed by Osborns' below, would be unreasonable.

Therefore, this Court should enter an order granting attorney's fees to Mr. Frantz for his costs prosecuting this appeal pursuant to I.C. 12-121.

**CONCLUSION**

In conclusion, because the court failed to follow proper procedures, did not act consistently with the applicable legal standards, and failed to exercise reason when it reached its decision, this Court should reverse the judgment of the district court, which granted sanctions against Jonathon Frantz.

Respectfully submitted on the following date: January 27, 2020

POST FALLS LAW

By: _____

Jonathon Frantz,
Attorney for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on the following date I caused a true and correct copy of the foregoing to be delivered to the following person in the following manner:

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[X] Via iCourt.

Dated: January 27, 2020

Jonathon Frantz