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### Frizzell v. DeYoung Appellant's Reply Brief Dckt. 47543

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## I. INTRODUCTION

This Court has heard this matter before, with the same parties on substantively the same issues. Unfortunately, the trial court refused to follow the law of the case even after this court made it perfectly clear in *Frizzell v. DeYoung*, 163 Idaho 473 (2018) (“*Frizzell I*”).

What this Court decided—the law of the case—was this:

[T]he provisions in the TEDRA agreement exculpating Edwin from liability **are enforceable only to the extent they settle past claims** of negligence and breach of fiduciary duty committed before the agreement was executed in 2014. To the extent the provisions purport to exculpate Edwin from liability for future negligence or breaches of fiduciary duty occurring after the TEDRA agreement, such provisions are void as against public policy.

(R. 16-17) (emphasis added).

Put simply, the trial court proceeding was limited to deciding issues between Donald Frizzell (“Frizzell”) on one side and Edwin and Darlene DeYoung (collectively, the “DeYoungs”) on the other that occurred after October 2014. The matter was tried before a jury beginning on July 22, 2019. (R. 8). The jury should never have heard anything about disputes between Frizzell and the DeYoungs prior to October 2014, except as needed for context.

Unfortunately, this trial court allowed the DeYoungs to put on a case that attempted to:

- Relitigate issues already decided in prior lawsuits against Edwin that were irrelevant to the issues at hand;
- Present a narrative about the formation of the Frizzell Trust, referencing incidents that allegedly occurred a full three years before a single incident that was the subject of the current case;
- Characterize Frizzell as litigious and uncaring; AND
- Direct focus away from the breaches of the TEDRA Agreement raised by Frizzell.

The DeYoungs succeeded with the help of the trial court's critical and incorrect rulings on evidentiary objections that: (1) limited Frizzell from questioning Edwin about pre-TEDRA trust issues already raised by other witnesses related to claims that the trust was "cash poor"; (2) allowed the DeYoungs' former attorney to tell the jury what he believed the trust said – a belief that directly contradicted this court's holding in *Frizzell I*; and (3) prohibited Frizzell's attorneys from questioning the DeYoung's former attorney about the Supreme Court's holding as to these parties and this dispute.

As argued in Frizzell's opening brief, not only was this last question about the law of the case relevant to the proceeding – it was critical to the proceedings. The exclusion of this evidence left the jury with just M. Gregory Embrey's explanation of what the TEDRA Agreement meant. As the drafter of the TEDRA Agreement and the DeYoung's

former attorney, the jury was left with no choice but to believe his explanation. Unfortunately, Embrey's explanation was the exact opposite of this Court's ruling on the meaning of the TEDRA Agreement.

The result was a non-unanimous jury verdict that contradicted starkly with what this case was actually about – breaches of a settlement agreement (created under a specific trust statute) that occurred after October 2014. After the jury verdict was entered, the trial court failed to follow required statutory language and entered an attorneys' fee award for the DeYoungs that did not bother to reference any review or analysis by the Court.

The trial court committed reversible error that cannot be corrected without a new trial, consistent with the law of the case.

## **II. ARGUMENT**

### **A. CORRECTIVE JURY INSTRUCTIONS ARE INSUFFICIENT WHERE THE TRIAL COURT FAILED TO FOLLOW THE LAW OF THE CASE.**

The DeYoungs mistakenly believe that a corrective jury instruction was sufficient for the jury to understand the law of the case. (*Respondents' Brief* at 8-10). At the outset, Frizzell has not assigned error to any of the jury instructions in his opening brief in this appeal and is not doing so now. Regardless of the lack of objection, the DeYoungs claim that the standard Idaho jury instructions regarding contractual claims somehow cure the

inclusion of Mr. Embrey’s testimony regarding the scope of the TEDRA Agreement. (*Respondents Brief* at 9).

There was not a jury instruction presented about the scope of the TEDRA Agreement at issue in this case. (R. 102-127). The DeYoungs identified a number of jury instructions that they believe correctly state the “law of the case,” including:

Jury Instruction No. 7: ... 4. The TEDRA Agreement is a contract between the parties that modified provisions of the Trust.

Jury Instruction No. 8: For Plaintiff’s breach of contract cause of action, the plaintiff has the burden of proving each of the following propositions:

1. A contract existed between plaintiff and defendant;
2. The defendant breached the contract;
3. The plaintiff has been damaged on account of the breach; and
4. The amount of damages.

Jury Instruction No. 9: A “material breach of contract,” as that term is used in these instructions, means a breach that defeats a fundamental purpose of the contract.

Jury Instruction No. 12: Mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or **vital fact upon which the bargain is based.**

(*Respondents Brief* at 8-9; R. 102-104, 107) (emphasis added). None of these instructions cured the Court’s inclusion of Mr. Embrey’s testimony that what the TEDRA “meant” was that it “not only resolv[ed] the current dispute as it existed back in this point, October

2014, **but future disputes.**” (TR Vol. IV, p. 790, L. 8-25) (italics and emphasis added).

The instructions may have stated the law of contracts, but not the law of this contract as determined by this court in 2018. Assuming the jury accepted Mr. Embrey’s testimony as true, then the TEDRA Agreement cannot be breached as to violations of the agreement by Edwin. This is the precise verdict reached by the jury after inclusion of Mr. Embrey’s testimony. (*Respondents’ Brief* at 1).

It is true that even when a jury instruction is erroneous, the error is only reversible if the jury instructions taken as whole mislead or prejudice a party.” *MacKay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755 (2011). But this appeal is not about jury instructions – it is about admission of evidence in contravention of the law of the case. The opinion of this Court is the “ultimate and final termination of the case.” *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 955, 812 P.2d 253 (1991) (J. Bistline concurrence). The opinion of Embrey was not.

The DeYoungs’ argument that jury instructions corrected the inclusion of evidence contrary to the decided law of the case is simply a ruse to divert from the trial court’s failure to properly keep evidence related to the wrong interpretation of the TEDRA from the jury. “Corrective” jury instructions or not, when a district court neglects to follow the law of the case, remand for a new trial is appropriate. *Suitts v. First Security bank of Idaho*, 110 Idaho 15, 22, 713 P.2d 1374 (1985).

An error in admitting evidence can be cured by a proper instruction from the district court. *Cook v. Skyline Corp.*, 135 Idaho 26, 32, 13 P.3d 857, 863 (2000). Evidence admitted that is highly prejudicial cannot be corrected with a curative instruction. *Id.* None of the instructions to the jury raised by the DeYoungs in their response cured the admission of evidence regarding the scope of the TEDRA Agreement and the scope of the actual jury trial. Even if one of the instructions could be seen as curative, the admission of evidence contrary to the law of the case cannot be corrected with a mere jury instruction.

**B. THE DISTRICT COURT’S REFERENCE TO THE SUPREME COURT RULING, OUTSIDE OF THE PRESENCE OF THE JURY, DOES NOT CORRECT THE COURT’S REVERSIBLE ERROR.**

Respondents contend the court understood the law of the case and this Court’s binding ruling regarding the TEDRA’s scope by acknowledging the Court in when ruling on Respondents’ motion for a directed verdict. (*Respondents’ Brief* at 4). The jury is not present for a directed verdict motion and ruling. The entire basis for granting or denying a directed verdict is an analysis of whether sufficient evidence exists to “sub[mit] the claim[s] to the jury.” *Todd v. Sullivan Constr. LLC*, 146 Idaho 118, 124, 191 P.3d 196 (2008). Such an analysis cannot be conducted in front of a jury, and it was not in this trial either.

The directed verdict motion was rightly “outside of the presence of the jury.” (Tr. Vol. III, p. 70, L. 13-17). During argument on that motion, Frizzell’s counsel reminded the trial court that Frizzell’s breach of contract claims were about a “separate contract that the Supreme Court said Mr. Frizzell can pursue his claims against.” (Tr. Vol. II, pp. 705-706, L. 23-25, 1-2). While the trial court made passing reference to the this Court’s ruling, the judge still felt compelled to comment that “in [her] view, it’s very, very close, and frankly, I would lean toward granting a motion for directed verdict, but I’m not going to.” (Tr. Vol. III, p. 711, L. 12-14).

None of the trial court’s comments outside the presence of the jury could correct the trial court’s repeated admission of evidence contrary to the law of the case while in the presence of the jury. The trial court’s awareness of the Supreme Court ruling does not change the fact that in the presence of the jury, the trial court refused to admit or exclude evidence in line with this Court’s ruling.

The trial court declined to overrule Embrey’s testimony about the meaning of the TEDRA agreement and the scope of a waiver therein. This matter was critical to the appeal in *Frizzell I*.

Frizzell was entitled to a trial consistent with the law of the case. He did not receive one, and comments by the Court outside of the presence of the jury do not change that. Awareness is not implementation. A new trial will be granted if an error in the

proceeding impacted a party's substantial right. *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

**C. THE TRIAL COURT FAILED TO FOLLOW THE ATTORNEYS' FEE STATUTE BEFORE ENTERING AN AWARD.**

Again, the DeYoungs misunderstand and misconstrue Frizzell's assignment of error in his appeal. The DeYoungs contend that Frizzell waived his right to appeal an attorneys' fee award because Frizzell did not object to the trial court's attorney fee award. (*Respondent's Brief* at 15-17). Frizzell could not have object to the trial court's analysis of the I.R.C.P. 54(a)(3) factors because there is none. The court never detailed its attorneys' fee analysis other than entering a number in a judgment – Frizzell has nothing to object to prior to this appeal because the trial court did nothing. (R. 9, 182-184).

This Court well knows that the word shall is imperative or mandatory versus may which is permissive. *Med. Recovery Svcs., LLC v. Siler*, 394 P.3d 73, 77 (2017). The use of the word shall is nondiscretionary. *Id.* It is not necessary for the district court to address all the factors in writing, “the record must clearly indicate the court considered all the factors.” *Johannsen v. Utterbeck*, 146 Idaho 423, 432-33, 196 P.3d 341, 350 (2008) (emphasis added). In the absence of a clear explanation from the district court, this Court will find an abuse of discretion. *Id.* Nothing in the record shows the trial court considered any factors.

Nothing.

The trial court is also required by I.R.C.P. 54(e)(7) to “enter an order” setting the fee amount, whether or not an objection to a fee petition is raised. There is no attorney fee order anywhere in the record. (R. 2-9).

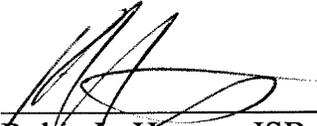
Frizzell’s appeal is an appropriate objection to the lack of analysis in the record and the lack of any attorney fee award order.

### V. CONCLUSION

This is not Frizzell’s first Idaho Supreme Court rodeo. He should not have had to saddle up again. This Court established the law of the case for these parties in this action. The trial court chose not to follow it on multiple, critical occasions. The district court committed reversible error in admitting and declining to admit certain testimonial evidence, committed plain error in inappropriately commenting during an evidentiary ruling so as to confuse the jury, and failed to enter an appropriate order—or any order—on attorneys’ fees. While the remedy is extraordinary, justice requires that this Court remand this case for a new trial following the law of the case.

DATED this 7<sup>th</sup> day of June 2020.

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CERTIFICATE OF SERVICE

I, Robin L. Haynes, hereby certify that on June 7, 2020, I have personally served two copies of the Appellant's Reply Brief to the below person(s) in the manner(s) indicated below:

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Scot D. Nass, Attorney at Law, PLLC  
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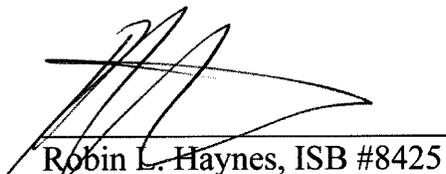
*Via U.S. Mail, Postage Prepaid*

A courtesy copy was emailed to Mr. Nass at: [scotnass@nasslawcda.com](mailto:scotnass@nasslawcda.com);  
[jody@nasslawcda.com](mailto:jody@nasslawcda.com) on the same date.

On that same date, I personally served the original, bound Appellant's Reply Brief to the below persons(s) in the manner(s) indicated below:

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P.O. Box 83720  
Boise, ID 83720

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