

COPY

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In re: SRBA

Case No. 39576

) Subcase No.: 63-7539

) **CRAIG WHITTED'S MEMORANDUM IN**
) **SUPPORT OF MOTION TO DISALLOW**
) **COSTS AND FEES**

COMES NOW Craig Whitted ("Mr. Whitted"), by and through his counsel of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman, P.A., and hereby files this memorandum in support of motion to disallow costs and fees.

I. INTRODUCTION

Mr. Whitted's entry to the present action came as the result of his objection, filed *pro se*, to Claimant Sarah Jane Smith's ("Ms. Smith") claim of a water right arising from a point of diversion on Mr. Whitted's land. Mr. Whitted's objection stated, in pertinent part, that Ms. Smith "has no rights on this property" on which the well is located.

At a pretrial hearing in which Mr. Whitted appeared *pro se*, the parties agreed that the disputed well was on Mr. Whitted's property, and that they were in agreement on the facts. *See Order Vacating Trial and Setting Deadline for Filing of Dispositive Motions*. Both parties filed motions for summary judgment.

In Ms. Smith's motion and supporting memorandum she raised a new issue, claiming that she had obtained easement rights by prescription to access the well on Mr. Whitted's property. *Sarah Jane Smith's Memorandum in Support of Motion for Summary Judgment*, p. 4-5 ("*Smith's Summary Judgment Brief*"). Ms. Smith's new claim necessarily required that she raise new issues of fact in order to meet her burden to prove the elements of a prescriptive easement. Specifically, these included demonstrating that her use of the well on Mr. Whitted's property was "(1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with actual or imputed knowledge of the owner of the servient tenement; (5) for the statutory period." *Smith's Summary Judgment Brief*, p. 4 (quoting *Beckstead v. Price*, ___ Idaho ___, ___, ___ P.3d ___, 08.13 ISCR 660, 2008 Slip Op. No. 84 (June 17, 2008)). Ms. Smith submitted the affidavit of David W. Vastine, M.D. in Support of Sara [sic] Jane Smith's Motion for Summary Judgment in order to lay a factual groundwork regarding past use of the well and the surrounding property for Ms. Smith's new prescriptive easement claim.

In his Memorandum in Support of Cross Motion for Summary Judgment, Mr. Whitted addressed Ms. Smith's new claim of a prescriptive easement and the associated new factual claims by pointing out that Ms. Smith was unable to meet

the elements of her prescriptive easement claim. Specifically, Mr. Whitted established that Ms. Smith's use of the well on his property, and that of her predecessors in interest, was permissive rather than by right.

Ms. Smith then filed a motion to strike Mr. Whitted's cross motion for summary judgment and supporting documents, arguing, in effect, that Mr. Whitted improperly raised new issues of fact by responding to Ms. Smith's newly asserted prescriptive easement claim and Ms. Smith's new asserted issues of fact.

A hearing was held on Ms. Smith's motion to strike, and the following day, September 17, 2008, the Special Master issued a written Order entitled "Order on Motion to Strike[;] Order re: Attorney Fees and Costs[;] Order Dismissing Objection[;] Order Vacating Hearing on Motions for Summary Judgment[;] Order Requesting Statement from Parties." (Henceforth "Order").

In that Order, Ms. Smith's motion to strike was denied. However, the Order also stated that because Mr. Whitted's memorandum in support of summary judgment had described Ms. Smith's use of the well as "permissive" rather than describing it as "trespass," that represented a change of theories. The Order appeared, therefore, to treat Mr. Whitted's cross motion for summary judgment as a request to amend the pleadings pursuant to Idaho Rule of Civil Procedure 15(a), to grant the request, but to order payment to Ms. Smith "for costs and attorney fees incurred in connection with prosecuting the case in response to Mr. Whitted's trespass theory[.]" See *Order*, p. 4.

The Order also, *sua sponte*, dismissed Mr. Whitted's Objection, and vacated the hearing on Ms. Smith's Motion for Summary Judgment. Ms. Smith was instructed to file a memorandum of costs. Although Mr. Whitted's Objection was dismissed in the Order, the Special Master also determined that the question of quiet title and Ms. Smith's prescriptive easement claim remained unresolved. The parties were instructed to confer to determine whether that remaining question would be resolved before the Special Master or in Canyon County District Court.

Ms. Smith submitted a verified memorandum of costs and attorney fees, accompanied by an affidavit in support from Ms. Smith's counsel. Ms. Smith is demanding \$58.01 in costs, \$169.70 in research fees, and \$23,229.00 in attorney fees.

II. ANALYSIS

A. An award of costs and attorney fees pursuant to I.R.C.P. 15(a) would be inappropriate because Mr. Whitted's broad pleading did not require amendment.

The Order awarding costs and attorney fees to Ms. Smith stated that it was entered pursuant to Idaho Rule of Civil Procedure 15(a), which concerns the amendment of pleadings. *Order*, p. 4. No other authority was cited, and therefore the appropriateness of the award hinges on whether Mr. Whitted could assert the arguments he made in relation to summary judgment without first being granted leave to amend his plea for relief.

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure. SRBA AO1 1(a). Under the Idaho Rules, a pleading requesting relief need only

contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" I.R.C.P. 8(a)(1); *Gillespie v. Mountain Park Estates, LLC*, 138 Idaho 27, 30, 56 P.3d 1277, 1280 (2002). "A party's pleadings should be liberally construed," and "[w]ith the advent of notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings." *Id.* It is not necessary for a pleading requesting relief to "include a statement of the various legal theories" upon which it relies. *Quinto v. Millwood Forest Products, Inc.*, 130 Idaho 162, 187, 938 P.2d 189, 194 (Ct.App. 1997).

For the purposes of the SRBA, a "pleading" is defined to include "[a]ll documents defined as pleadings by the I.R.C.P., objections, responses to objections, and notices of claims. SRBA AO1 2(r) (emphasis added). Therefore, in the present case Mr. Whitted's December 31, 2007 Objection ("Objection") to Ms. Smith's water rights claim constitutes the "pleading" at issue with respect to whether an amendment to the pleading was sought or required pursuant to I.R.C.P. 15(a). No other submission by Mr. Whitted in this action constitutes a "pleading" to which Rule 15(a) would apply. See I.R.C.P. 7(a); I.R.C.P. 15(a); SRBA A01 2(r).

To determine whether Mr. Whitted's argument that Ms. Smith did not possess prescriptive easement rights or adversely possess Mr. Whitted's property required an amendment to the pleading pursuant to Rule 15(a), it is necessary to review the text of the pleading itself, *i.e.*, Mr. Whitted's Objection. Mr. Whitted lodged a "Standard Form 1 Objection" in which, under "Reasons Supporting Objection(s)" he attached a sheet stating in pertinent part that "The

water right holder has no rights on this property, SWSE 14152 W. BM.” Mr. Whitted’s Objection does not reference “trespass,” or articulate any particular legal theory, and there is no requirement that it do so. *Quinto*, 130 Idaho at 167, 938 P.2d at 194.

Contrary to Ms. Smith’s position, I.R.C.P. 15(a) does not provide a basis for an award of costs or attorney fees in this case. Ms. Smith’s argument, in brief, is that Mr. Whitted asserted that no water right existed because a water right cannot be initiated by trespass, and later altered his position by arguing that Ms. Smith had no prescriptive rights to the well and surrounding property because her use of the well and surrounding property was permissive rather than of right.

However, even if Mr. Whitted had altered his position it would not require an amendment to his Objection. The Objection states nothing about “trespass” – it simply states that the putative water right holder has no rights on his property. That statement is equally consistent with either trespass or permissive use. The Objection, liberally construed, placed Ms. Smith on notice that Mr. Whitted contested that she had any rights to the well and surrounding property. See *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241, 246-47, 178 P.3d 606, 611-12 (2008). Under either a theory of “trespass” or of “permissive use,” Ms. Smith would be without rights to the property in dispute.

The “trespass” theory and the “permissive use” theory arguably could have different legal results with respect to water rights, but the potentially different outcomes has no relevance to the question of whether or not a Rule

15(a) amendment to the pleading was required. Given the appropriately broad language of Mr. Whitted's Objection, it was not.

Fundamentally, Ms. Smith's argument and the logic of the Order itself appear to be grounded in something other than the question of whether Mr. Whitted's Objection was broad enough to encompass a permissive use argument without first being amended. The difficulty, instead, appears to have arisen from a perception that Mr. Whitted asserted a trespass theory at a July 1, 2008 pre-trial conference, and later articulated a permissive use argument which was seen to be in conflict. *See Sarah Jane Smith's Motion to Strike Cross-Motion for Summary Judgment and All Supporting Documents*, p. 2 (moving "for appropriate sanctions, including costs and attorneys' fees, caused by Objector Craig Whitted's violation of this Court's Order . . . [by articulating a permissive use argument] that contradict[ed] Whitted's previous representations and stipulations to this Court, made on the record at the July 1, 2008 pre-trial conference"); see also *Order*, p. 1-4.

Crucially, Mr. Whitted's Objection does not reference a trespass argument, and no one has suggested that it does. The only allegation is with respect to a perceived contradiction between what was raised at a pre-trial conference (at which Mr. Whitted appeared *pro se*) and what was later argued on summary judgment. In other words, Mr. Whitted appears to have been sanctioned not for failing to amend his pleadings, but rather for allegedly changing his position from that taken during the pretrial conference. However, Idaho Rule of Civil Procedure 15(a) concerns only amendments to pleadings – it

has no connection to the imposition of sanctions for an alleged failure to comply with a stipulation or a pretrial order. See I.R.C.P. 15(a).

A pre-trial hearing is not a pleading, and an Order or Stipulation arising from such a hearing is also not a pleading. See I.R.C.P. 7(a). Conferences, Orders, or stipulations, or the compliance or failure to comply with Orders or stipulations are not the subject of Idaho Rule of Civil Procedure 15(a). Rule 15(a) was the only asserted basis for the award presently at issue, but it provides no authority whatsoever to support such an award. Accordingly, an award of costs and attorney fees pursuant to Rule 15(a) would be inappropriate.

B. Mr. Whitted did not violate any order of the court, and absent a clear violation of an express order no imposition of sanctions against Mr. Whitted is warranted.

Even if the award of costs and attorney fees in the Order had relied on some other provision of the Idaho Rules of Civil Procedure besides Rule 15(a), such an award would nevertheless be inappropriate.

Mr. Whitted has not violated any order of the court, and thus the imposition of sanctions against him would be unwarranted. Punishing Mr. Whitted for failure to comply with a court order would require the identification of a violation of a clearly expressed order of the court. *State v. Rogers*, 143 Idaho 320, 322, 144 P.3d 25, 27 (2006). Here, however, no such violation of a specific order of the court has been identified.

Ms. Smith asserts that Mr. Whitted violated the Court's July 2, 2008 Order Vacating Trial and Setting Deadlines for Filing of Dispositive Motions by arguing "permissive use," which, Ms. Smith contends, contradicted Mr. Whitted's previous

representations at the July 1, 2008 pretrial conference. *Sarah Jane Smith's Motion to Strike Cross-Motion for Summary Judgment and All Supporting Documents*, p. 2. The text of the July 2, 2008 Order does not support Ms. Smith's contention.

The difficulty with Ms. Smith's assertions is that the court's July 2, 2008 Order Vacating Trial which she references does not contain any order clearly prohibiting the parties from revising their arguments or raising issues of fact. The July 2, 2008 Order states in pertinent part that "Based upon the comments of the participants at the pretrial conference, it appears that the issues involved in this subcase are legal issues that might well be decided on summary judgment, as opposed to factual issues to be decided at trial." *Order Vacating Trial and Setting Deadline for Filing of Dispositive Motions*, p. 1. That equivocal language summarizes an understanding that the parties were in agreement as to the facts, but it stops well short of commanding the parties to remain silent if such issues arise as the case develops.

The July 2, 2008 Order simply explains the decision to vacate the trial date because it "appear[ed]" that the case "might well" be decided on summary judgment. Absent a clear violation of an express command of the court, the July 2, Order does not support an award of sanctions. *Rogers*, 143 Idaho at 322, 144 P.3d at 27.

C. Mr. Whitted should not be sanctioned for responding to new issues of fact raised by Ms. Smith.

Even if the July 2, 2008 Order had contained an explicit instruction commanding the parties not to raise issues of fact as the case developed, it

would be Ms. Smith, ironically, that would have violated such an order. The issues addressed in Mr. Whitted's Cross-Motion and supporting documents were those already raised by Ms. Smith herself. As a result, Ms. Smith appears to be arguing that she can raise new issues, but that Mr. Whitted is prohibited from offering a response.

It was Ms. Smith who raised the issue of prescriptive rights in her Memorandum in Support of Motion for Summary Judgment. *Smith's Summary Judgment Brief*, p. 4-5. Doing so necessarily required her to also raise a whole series of issues of material fact regarding whether her use and those of her predecessors was open and notorious, continuous and uninterrupted, adverse and under a claim of right, with actual or imputed knowledge of the owner of the servient tenement, and for the statutory period. See *Smith's Summary Judgment Brief*, p. 4. Notably, these questions would be genuine issues of material fact precluding summary judgment regardless of whether Mr. Whitted were arguing "trespass" or "permissive use." Under either legal theory, the factual basis of Ms. Smith's newly raised prescriptive claim – the pattern of past use of the well and surrounding property – would be in dispute. Indeed, Ms. Smith's awareness that she was raising new issues of material fact is further revealed by her choice to accompany her motion for summary judgment with the Affidavit of David W. Vastine, in which he testifies to past use of the well and surrounding property.

Mr. Whitted's discussion of permissive use was in response to Ms. Smith's new assertions of prescriptive rights to his property. If raising new issues of fact were sanctionable conduct under the Court's July 2, 2008 Order, then it was Ms.

Smith that violated that Order by raising new issues. It would be improper to permit Ms. Smith to raise new issues of fact and then sanction Mr. Whitted for offering a response.

D. Ms. Smith's claim for costs and attorney fees is excessive.

An award of costs or attorney fees entered as a sanction for alleged violations of a pretrial order must be reasonable. I.R.C.P. 16(i). "A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney." *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App. 1985) (upholding the determination of the trial court that attorney fees in the amount of \$9,000 incurred in prosecuting a \$2,000 claim were not reasonable). Likewise, "[a]n attorney cannot 'spend' his time extravagantly and expect to be compensated" by the losing party. *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct.App. 2000). Thus, "a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney 'churning.'" *Id.*

In the present case, Ms. Smith is asking for an award of \$23,456.71, of which \$23,229.00 is for attorney fees. *Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, p. 5. That claim of fees is excessive. Of the claimed attorney fees, at least \$7,286 (and possibly as much as \$8,437.00 depending how certain fee entries are interpreted) are for fees incurred before the pretrial conference in which Mr. Whitted was said to have asserted trespass, and thus outside the Special Master's award of costs and fees incurred "in response to Mr.

Whitted's trespass theory[.]” *Order*, p. 4 (emphasis added). Accordingly, the text of the Order does not support an award for those “pre-pretrial” fees.

Further, the grant of fees was based on the theory that “counsel for the claimant would not have filed for summary judgment regarding trespass if the objector had initially framed the case in terms of permissive use.” *Order*, p. 4. Nevertheless, Ms. Smith claims another \$2,870.50 for fees she describes as “Attorney Fees Incurred Following Summary Judgment.” *Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, p. 4. Moreover, these fees were comprised largely of expenses wholly unrelated to the summary judgment, such as for advice regarding an incident in which of Ms. Smith's employee entered Mr. Whitted's property to cut a hose belonging to Mr. Whitted which had been attached to the disputed well. The Special Master's Order does not support a claim for fees incurred subsequent to those expenses related to summary judgment, and certainly not for unrelated fees stemming from self-help acts by Ms. Smith's employees. See *Order*, p. 4.

In addition, Ms. Smith claims an astonishing \$1,930.50 in attorney fees simply for creating the verified memorandum of costs and attorney fees and the supporting affidavit of counsel. *Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, ex. A, p. 7. Attorney fees for requesting attorney fees are not customarily granted or even requested, and the Special Master's Order does not support such a claim. Even if attorney fees for requesting attorney fees were somehow available, \$1,930.50 in fees for preparing such a request is unreasonable.

Finally, and when viewed as a whole, Ms. Smith's claim of attorney fees is excessive and unreasonable. Ms. Smith's request for \$23,456.71 is out of proportion to the scale of the dispute and the sum of the actual work required in this instance. The amount of attorney fees claimed is, for example, several times the cost of drilling a new well to replace the one in dispute. The briefing generated by Ms. Smith's counsel has not been extensive, discovery has been quite limited, and no depositions have been conducted. Nonetheless, Ms. Smith's counsel is asserted to have expended 118.5 hours at a billing rate of, variously, \$225.00 and \$170.00 per hour. *Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, ex. A.

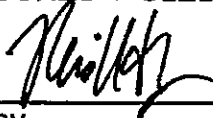
There is a difference between zealous advocacy and unreasonable extravagance. Ms. Smith's request for fees falls squarely into the latter category. Any award of costs and fees must be reasonable, and a court is not required to "blindly accept the figures advanced by the attorney." *Craft Wall of Idaho*, 108 Idaho at 706, 701 P.2d at 326. Accordingly, in the event an award of fees is permitted in this case, the Court is urged to follow the guidance of the Court in *Craft Wall of Idaho, supra*, and limit such an award to that which is reasonable and proportionate to the case at hand.

III. CONCLUSION

For the reasons stated above, Mr. Whitted respectfully requests that there be no award of costs or attorney fees in case, and/or that the Court limit any such award to that which is reasonable and proportionate to the present dispute.

DATED this ¹³~~10th~~ day of October, 2008.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

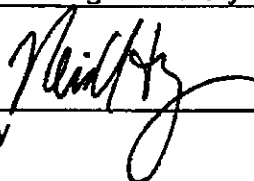


Reid W. Hay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ¹³~~10th~~ day of October, 2008, a true and correct copy of the foregoing document was served as follows:

John M. Marshall J. Will Varin GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83701-2720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery
Idaho Department of Water Resources, c/o Nicholas B. Spencer 322 E. Front Street Boise, Idaho 83720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery



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TO: J. Will Varin @ GIVENS PURSLEY --388-1300
Nicholas B. Spencer - IDWR -- 287-6700

FROM: Kimbell D. Gourley/Reid W. Hay

DATE: October 1⁴, 2008

RE: SRBA Case No. 39576; Subcase 63-7539

DOCUMENTS SENT: Motion to Disallow Costs and Attorneys' Fees
Craig Whitted's Memorandum in Support of Motion To Disallow
Costs and Fees

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