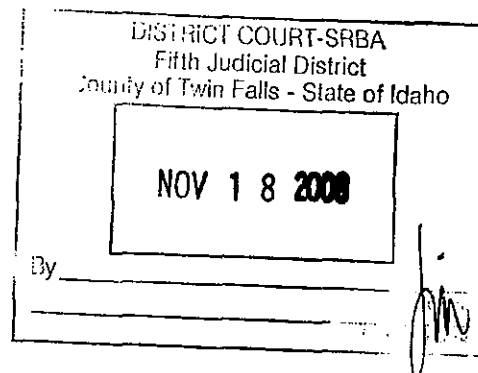


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Attorneys for Sarah Jane Smith

**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

Subcase No.: 63-7539

Case No. 39576

**SARAH JANE SMITH'S RESPONSE TO
 WHITTED'S MOTION TO DISALLOW COSTS
 AND FEES**

Respondent Sarah Jane Smith hereby responds to Objector Craig Whitted's Motion To Disallow Costs and Fees ("Motion to Disallow") as follows:

I. INTRODUCTION

In his Motion to Disallow, Mr. Whitted asks the Court to reconsider its Order requiring him to reimburse Ms. Smith for the costs and fees she incurred litigating Mr. Whitted's "trespass" theory that he dropped only after Ms. Smith filed a summary judgment motion challenging it. Mr. Whitted has not provided any adequate legal or factual basis requiring the Court to reconsider its award and has failed to establish Ms. Smith's claimed fees are unreasonable. The Court should deny Mr. Whitted's Motion to Disallow and award Ms. Smith her costs and fees in the full amount of \$23,456.71.

II. ANALYSIS

As an initial matter, it is important to note what Mr. Whitted did not do in his Motion to Disallow: 1) Mr. Whitted did not actually file a motion for reconsideration; 2) Mr. Whitted did not object to Ms. Smith's claimed discretionary or legal research costs; 2) Mr. Whitted did not

object to Ms. Smith's counsels' billing rates; 3) Although Mr. Whitted objected to the total amount of fees and specifically objected to fees incurred prior to the pretrial conference and after the filing of Ms. Smith's Motion for Summary Judgment, Mr. Whitted did not object to the time Ms. Smith's counsel spent researching and drafting her Motion for Summary Judgment; and 4) Mr. Whitted provided no analysis or criticism of any specific billing entries. Mr. Whitted has therefore waived any objections he may have had based upon those issues. I.R.C.P. 54(d)(6) ("Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed."); *Nanney v. Linella, Inc.*, 943 P.2d 67, 71 (Idaho App. 1997) ("Rule 54(d)(6) is designed to establish a deadline for informing the court of any objection to items claimed in the memorandum of costs and enables the trial court expeditiously to rule upon such objections and bring the case to a conclusion.") (citations and quotations omitted).

A. Legal Standard.

The calculation of a reasonable attorneys' fees award is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Lettunich v. Lettunich*, 185 P.3d 258, 261 (Idaho 2008). "The bottom line in an award of attorney fees is reasonableness." *Id.* at 262.

Mr. Whitted repeatedly reminds the Court he was not represented by counsel and acted *pro se* during most of this matter. Mr. Whitted's *pro se* status should not play any role in the Court's decision concerning the amount of Ms. Smith's costs and attorneys' fees. A *pro se* litigant is held to the same standard as a party represented by counsel and must adhere to the procedural rules, even though the *pro se* party may be unaware of the requirements. *Sammis v. Magnetek, Inc.*, 941 P.2d 314, 318 - 319 (Idaho 1997).

B. The Court Should Not Reconsider Its Order Awarding Ms. Smith Her Costs and Attorneys' Fees.

Mr. Whitted spends over half of his Memorandum inviting the Court to reconsider its ruling awarding Ms. Smith her costs and fees. Mr. Whitted did not, however, actually file a motion for reconsideration and has not presented the Court with any new facts or legal arguments that would justify reconsideration of its Order awarding costs and fees. *See Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho*, 800 P.2d 1026, 1037 (Idaho 1990)(explaining purpose of motion for reconsideration).

1. The Court Properly Exercised Its Discretion in Awarding Costs and Attorneys' Fees.

In its September 17, 2008 Order, the Court awarded Ms. Smith her costs and attorneys' fees based upon Idaho Rule of Civil Procedure 15(a). Rule 15(a) gives the Court the discretion to allow a party to amend a pleading and further allows the Court to "make such order for the payment of costs as it deems proper." *See also Curtis v. City of Ketchum*, 720 P.2d 210, 214 (Idaho 1986)(upholding the trial court's conditioning of filing an amended complaint upon payment of the attorney fees when substantial attorneys' fees had been incurred due to baseless allegations contained in the original pleading).

Mr. Whitted argues he was only obligated to provide a "short and plain statement of the claim showing that the pleader is entitled to relief" in his Objection pursuant to Idaho Rule of Civil Procedure 8(a)(1). Mr. Whitted then argues his original Objection was broad enough to allow him to completely shift legal theories mid-litigation and he was not required to amend his objection to change theories mid-litigation. There are numerous flaws in this logic. Perhaps, the foremost of which is that Mr. Whitted defined the scope of his pleadings by asserting his trespass theory from the start of this litigation.

2. *The Doctrine of Judicial Estoppel Prohibited Mr. Whitted From Asserting Contradictory Positions in the Litigation Without First Amending His Pleadings.*

Under the doctrine of judicial estoppel, a party cannot assume inconsistent and contradictory positions during the course of litigation, and the parties to the litigation are bound to those positions they assume. *See Sword v. Sweet*, 92 P.3d 492, 502 (Idaho 2004) (“Judicial estoppel, sometimes known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position” (citing *Risetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996))); *see also McKay v. Owens*, 937 P.2d 1222, 1227 (Idaho 1997) (“One may not assert a particular position in order to serve one purpose, then assert a wholly contrary position to serve another”). This doctrine prevents the parties from “playing fast and loose with the courts” and “protect[s] the integrity of the judicial process.” *Risetto*, 94 F.3d at 601.

Here, Mr. Whitted claimed and pursued a theory of the case premised solely on trespass. From the start, Mr. Whitted claimed Ms. Smith had no interest in the claimed point of diversion because he believed she had initiated her water right in trespass. Mr. Whitted advanced this theory of the case at the initial hearing concerning whether or not his late Objection should be allowed; he reaffirmed this position in response to discovery,¹ and yet again at the July 1, 2008 pre-trial conference, going so far as to stipulate to undisputed facts based upon this theory of the case. Contrary to his current argument, he was not free to change substantive legal theories and submit affidavit testimony contradicting stipulated undisputed facts to gain an advantage and avoid summary judgment once the Court and Ms. Smith had relied upon the representations he had made concerning the nature of his claim. *Sword*, 92 P.3d at 502.

3. *Ms. Smith Asserted She Owned the Point of Diversion or Had, at the Very Least, A Prescriptive Easement in the Point of Diversion From the Outset of This Matter.*

Mr. Whitted tries to draw attention away from the attorneys' fees issue by claiming it was Ms. Smith who asserted new facts and legal theories in filing her Motion for Summary Judgment. The record in this matter does not support this assertion. As the Court is aware and recognized in its September 17, 2008 Order, Ms. Smith claimed, at the very least, a prescriptive easement in the point of diversion from as early as the initial February 12, 2008 hearing to determine whether or not Mr. Whitted's late Objection should be allowed at all. In fact at that hearing, the parties discussed whether or not this Court was the proper forum and venue to address a prescriptive easement claim. Ms. Smith's representations to Mr. Whitted and the Court were always entirely consistent with her claim she owned the point of diversion or, at the very least, had prescriptive easement in it.

It is disingenuous for Mr. Whitted to now claim Ms. Smith did not properly raise this issue or that he somehow was not aware of Ms. Smith's prescriptive easement claim until her Motion for Summary Judgment.

4. *An Award of Costs and Attorneys' Fees is Proper Because Mr. Whitted Violated the Court's Order Setting the Deadline for Filing Dispositive Motions.*

In opposition to the Court's costs and fees award, Mr. Whitted claims he "has not violated any order of the court." Mr. Whitted's Memo. at p. 8. This statement is not true. Mr. Whitted fails to acknowledge he filed a Cross Summary Judgment Motion almost six (6) weeks past the deadline for the filing of dispositive motions that the parties had mutually agreed to and the Court had set in its July 2, 2008 Order. Mr. Whitted compounded his violation of the

¹ See Affidavit of J. Will Varin, dated September 12, 2008, filed in support of Ms. Smith's Motion to Strike, which contains as an exhibit a true and correct copy of Mr. Whitted's written discovery responses in which he again asserts

Court's July 2, 2008 Order by asserting new legal theories and disclosing previously undisclosed testimony and witnesses that contradicted stipulated undisputed facts in conjunction with his Motion. It is this dual violation of both the letter and the intent of the Court's Orders and the spirit of the litigation process and Rules Ms. Smith complained of in her Motion to Strike. Mr. Whitted violated the Court's Orders and should not be relieved from his obligations to pay Ms. Smith's costs and fees.

C. The Amount of Ms. Smith's Requested Attorneys' Fees Is Reasonable.

In *Lettunich*, the Idaho Supreme Court analyzed in detail a district court's attorneys' fee award. 185 P.3d at 261-64. *Lettunich* arose out of dispute between two brothers, Edward ("Ed") and Mike Lettunich, involved in a limited partnership. The litigation was hotly contested, and after Mike succeeded at trial, the trial court awarded Mike attorneys' fees of \$175,854. Ed appealed and the Supreme Court upheld the award of attorneys' fees, but remanded the case for further findings concerning the reasonableness and amount of the award. *Lettunich v. Lettunich*, 111 P.3d 110 (Idaho 2005) (*Lettunich I*).

On remand, the trial court reviewed affidavits submitted by the parties and held an evidentiary hearing to explore the amount of a proper attorneys' fees award. After reviewing the evidence the trial court awarded Mike \$168,662 in attorneys' fees prior to appeal and \$15,193.13 for attorneys' fees following remand. Ed appealed again.

Ed argued, among other things, the time Mike's counsel spent was "excessive and that it included time spent on redundant efforts." *Lettunich*, P.3d at 263. The Court rejected this argument. *Id.* The Court further acknowledged the trial court properly considered Ed's actions in determining the amount of time reasonably required by Mike's attorneys. *Id.*

his trespass theory.

Here, Mr. Whitted argues Ms. Smith's counsel spent exorbitant time and energy in defending her interests. A review of the previously submitted time sheets does not support this argument. For the Court's convenience, Ms. Smith divided her counsel's time based upon various segments of the litigation, i.e., before the pre-trial conference, preparing the Motion for Summary Judgment, after the Motion for Summary Judgment, and time spent reviewing the timesheets and preparing the application for costs and attorneys' fees. (See Verified Memorandum of Costs and Attorneys' Fees, filed October 1, 2008).

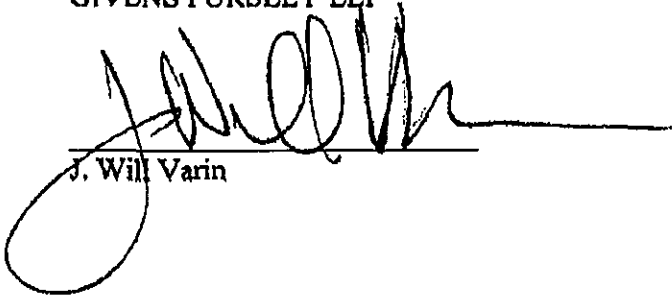
A review of each of these categories reveals time was properly spent developing the facts and legal theories of this case. As Mr. Marshall explained in his October 1, 2008 Affidavit and the Court recognized in its initial Order Granting Motion to File Late Objection, the legal questions involved in determining the effect of having a point of diversion on another individual's property potentially without authorization were novel and their appeared to be little established law on the subject. Therefore, in-depth research and analysis was required to confirm the state of the law and find analogous and persuasive case law. Further, this case involved a history of almost forty (40) years, which in turn, required significant factual investigation and development to determine the history of the point of diversion and the parties' and their predecessors-in-interests' relationships. In an attempt to keep fees reasonable, associate attorneys performed factual investigation, research, analysis, and drafting tasks at a lower billing rates whenever feasible. All time spent was reasonably and necessarily incurred in protecting Ms. Smith's interests, and Mr. Whitted has not established any basis to reduce the attorneys' fees Ms. Smith claims by any amount.

III. CONCLUSION

For all of the foregoing reasons, Sarah Jane Smith respectfully requests the Court deny Mr. Whitted's Motion to Disallow and awards her the full amount of her costs and attorneys' fees.

Dated this 18th day of November, 2008.

GIVENS PURSLEY LLP



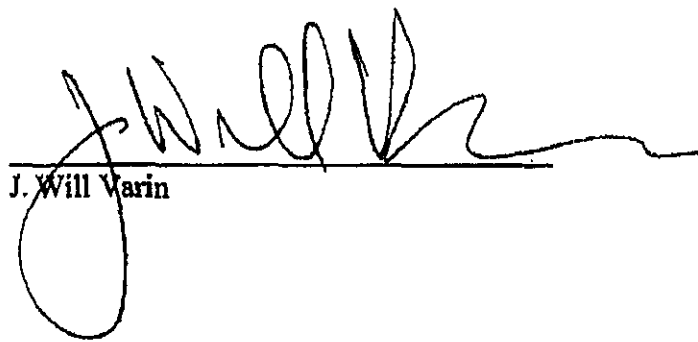
J. Will Varin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Kimball D. Gourley
Reid W. Hay
Trout Jones Gledhill Furhman, P.A.
225 N. 9th Street, Suite 820
PO Box 1097
Boise, ID 83701-1097

☐ U.S. Mail
☐ By hand
☐ Overnight
☒ Facsimile



J. Will Varin