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DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR -4 2021	
By _____	Clerk
	Deputy Clerk

Attorneys for Mountain Home Irr. Dist.

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

In Re SRBA

Case No. 39576

Subcase Nos. 61-248 and 61-10419

**MHID'S MEMORANDUM IN
 SUPPORT OF MOTION TO STRIKE
 EXHIBIT 1, EXHIBIT 2, AND
 FOOTNOTE 2 TO WEITZ'S
 RESPONSE TO MHID'S MOTION FOR
 SUMMARY JUDGMENT**

COMES NOW Mountain Home Irrigation District ("MHID"), through its counsel of record McHugh Bromley, PLLC, and files this Memorandum in Support of its Motion to Strike Exhibit 1 and Exhibit 2 attached to *Weitz's Response to MHID's Motion for Summary Judgment* ("Weitz Response"), as well as footnote 2 on page 4 of the same.

I. INTRODUCTION

Exhibit 1 and Exhibit 2, which were attached to the Weitz Response, as opposed to an affidavit or declaration, are not evidence that can be considered by the Court on summary judgment. Accordingly, Exhibit 1 and Exhibit 2 to the Weitz Response should be stricken from

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the record. Furthermore, footnote 2 on page 4 of the Weitz Response is inadmissible hearsay that should be stricken from the record.

II. LEGAL STANDARD

“Summary judgment proceedings are decided on the basis of admissible evidence.’ *Campbell v. Kvamme*, 155 Idaho 692, 696, 316 P.3d 104, 108 (2013). ‘The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial.’ *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). ‘This Court applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible.’ *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007). ‘A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason.’ *O’Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008).” *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 804, 353 P.3d 420, 425 (2015).

“When a ‘trial court is being asked to admit or to strike evidence, the initial question . . . [is]: Is the evidence relevant?’ *State v. Hocker*, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct.App. 1989). ‘Evidence that tends to prove the existence of a fact of consequence in the action, and has any tendency to make the existence of a fact more probable than it would be without the evidence, is relevant.’ *Id.* ; I.R.E 401. ‘All relevant evidence is admissible . . . [e]vidence which is not relevant is not admissible.’ I.R.E. 402. Relevant evidence can be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, . . . waste of time, or needless presentation of cumulative evidence.’ I.R.E. 403.” *Elliott v. Murdock*, 161 Idaho 281, 287, 385 P.3d 459, 465 (2016).

III. ARGUMENT

A. Because Exhibit 1 And Exhibit 2 Are Not Evidence That Can Be Considered By This Court They Should Be Stricken From The Record

Weitz may defeat MHID’s Motion for Summary Judgment by presenting “[e]vidence that tends to prove the existence of a fact of consequence in the action” *Elliott* at 287, 385 P.3d at 465 (emphasis added). In summary judgment, evidence comes into the record in the form of affidavits, declarations, or depositions. “‘The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial.’ *La Bella Vita* at 804, 353 P.3d at 425 (emphasis added).

Here, Exhibit 1 and Exhibit 2 were attached to the Weitz Response as an apparent attempt to establish facts as to how IDWR may or may not have viewed MHID’s SRBA claim for 61-10419. The SRBA claim was previously made part of the record in this case by MHID. *Exhibit 6 to Verified Petition for Declaratory Judgment*. The citations to Exhibit 1 and Exhibit 2 in the Weitz Response are shown in underline, below:

Not only did the claim reflect the collective appropriation of six rights, *id.*, ¶ 6, IDWR confirmed the aggregate diversion by illustrating the rate attributable – both in cubic feet per second and the antiquated miner’s inches – to each individual right. *Adjudication Claim Verification Report*, p. 7, attached hereto as Exhibit 1.

....

Accordingly, MHID’s contention that the other defining elements of 61-248 have not been decreed into another water right, *id.*, p. 8, is irrelevant. With the exception of the date of priority,¹ MHID is also incorrect[.]

....

The place of use identified for 61-248, Water Right Claims Proof Reading Report, attached hereto as Exhibit 2, falls within current MHID boundaries, which is the designated place of use for all of MHID's water rights, including 61-10419, pursuant to Idaho Code 42-219(5). Exhibit 6 to *Petition*, ¶ 10.

¹ MHID's Notice of Claim for 61-10419 designated May 1, 1886 to correspond with the latest dates of priority among the six rights that were combined under the single claim. The original priority date for 61-248 was April 8, 1885, as recognized in the 1914 Elmore County District Court case *Bennett v. Nourse*. See also Exhibit 1, p. 2.

Weitz Response at 3 (including footnote 1).

By attaching Exhibit 1 and Exhibit 2, Weitz appears to be attempting to create an issue of material fact as to how IDWR may have viewed MHID's SRBA claim for 61-10419. Had Weitz included Exhibit 1 and Exhibit 2 in a declaration or affidavit submitted with its original Motion for Summary Judgment, the contents of the documents could have been understood by MHID and probed in its response. Weitz had every opportunity to include the documents that make up Exhibit 1 and Exhibit 2 for consideration by the Court through affidavit or declaration yet did not. Moreover, there are no statements made in the Weitz Response as to where the documents that make up Exhibit 1 and Exhibit 2 came from, when they were obtained, and whether they are in fact true and correct copies. *See* I.R.E. 602, 603, and 901. There is simply no basis in the Idaho Rules of Civil Procedure or Idaho Rules of Evidence to attach exhibits to an unverified memorandum for purposes of establishing genuine issues of material fact to defeat summary judgment. Because of this, Exhibit 1 and Exhibit 2 are not "evidence" that can be considered by the Court and should be stricken.

B. Footnote 2 Should Be Stricken As Inadmissible Hearsay

In footnote 2 located on page 4 of the Response, Weitz states: "Based on Weitz's belief, and in the absence of information requested from MHID that might prove otherwise, Weitz is the

only irrigator within the Northwest quarter of Section 26, T03S R06E receiving water from MHID." *Weitz Response* at 4, fn. 2. Weitz does not support this statement with an affidavit or declaration asserting any of the sentence as fact. As such, this statement is hearsay and should be stricken as inadmissible. I.R.E. 802. Moreover, the statement in footnote 2 is not made upon personal knowledge, in violation of I.R.E. 602, and is not made under penalty of perjury in violation of I.R.E. 603. Thus, the statement made in footnote 2 is not evidence that can be considered by the Court when ruling on summary judgment. *La Bella Vita* at 804, 353 P.3d at 425. At best, the statements made in footnote 2 are factually unsupported arguments of counsel.

IV. CONCLUSION

For the foregoing reasons, the Court should grant MHID's *Motion to Strike* from the record Exhibit 1, Exhibit 2, and footnote 2, page 4 from *Weitz's Response to MHID's Motion for Summary Judgment*.

DATED this 4th day of March, 2021.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY
Attorneys for MHID

CERTIFICATE OF SERVICE

I certify that on this 4th day of March, 2021, I caused to be served a true and correct copy of the foregoing upon the following persons by the following methods:

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