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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN HASTINGS, Jr.,

Plaintiff-Counterdefendant-Appellant,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES, a political subdivision of the STATE OF IDAHO,

Defendant-Counterclaimant-Respondent.

Supreme Court Docket No. 50273-2022

Ada County District Court No. CV01-21-17825

IDWR'S RESPONSE BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Lynn Norton, District Judge, Presiding

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STATEMENT OF THE CASE

I. Nature of the case.

This is an appeal from the District Court's judgment on cross motions for summary judgment. The District Court granted summary judgment in favor of the Idaho Department of Water Resources ("Department"), holding the statute of limitations in Idaho Code § 42-3809 had not run when the Department filed its counterclaim to John Hastings Jr.'s ("Mr. Hastings") Action for Declaratory Judgment.

In his declaratory-judgment action, Mr. Hastings sought a determination that the Department could no longer enforce a Consent Order and Agreement ("Consent Order") the parties entered into regarding Mr. Hastings violation of the Stream Channel Protection Act (Idaho Code Title 42, Chapter 38).[1] Idaho Code precludes the Department from bringing a civil or enforcement proceeding to recover for a violation of an order "more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation." I.C. § 42-3809. Mr. Hastings argues he violated, or showed an intent to violate, the terms of the Consent Order more than two years before the Department filed its counterclaim.

[1] The Department is only seeking enforcement of the Consent Order in its counterclaim, not redress for the underlying violation of the Stream Channel Protection Act.

This Court should affirm the District Court's decision because all of Mr. Hastings' actions leading up to the filing of the action show he was following the Consent Order and working with the Department to resolve the matter. It wasn't until he filed the initial action that Mr. Hastings showed his intent not to comply with the terms of the Consent Order.

Mr. Hastings also appeals the District Court's decision to take judicial notice of Mr. Hastings' Stream Channel Alteration Permit as well as the District Court's denial of Mr. Hastings' motion to continue the summary judgment hearing to allow for further discovery. The Court should affirm these decisions because the District Court did not abuse its discretion when making them.

II. Statement of facts and course of the proceedings.

On September 11, 2017, the Department issued a Notice of Violation and Order to Cease and Desist the Unauthorized Alteration of the Big Wood River ("NOV") to Mr. Hastings. R. at 98, 127. To resolve the NOV, the Department and Mr. Hastings entered into the Consent Order on January 26, 2018. R. at 57, 127 (¶ 4).

The relevant terms of the Consent Order are:

> 1) By February 15, 2018, Respondent shall pay a civil penalty in the amount of $10,000 and submit a Joint Application for Permit[s] ("application") to the Department that proposes a plan to restore the stream bank at the subject lands. The restoration plan must be designed to reduce further erosion and help restore more functional riverine conditions and include the following minimum requirements:

a. bioengineering treatments to incorporate large woody material along the streambank (e.g. root wad engineered logjam and brush or tree revetment)

b. a planting plan to help re-establish a native riparian buffer between the Big Wood River and the upland parcel at the subject lands.

2) Respondent shall comply with the terms and conditions of any permit the Department issues subsequent to the submittal of an acceptable application and restoration plan pursuant to Order paragraph no. 1.

3) Respondent shall contact the Department immediately after completing the restoration plan at the subject lands. The Department shall inspect the completed work within 14 days after notification of completion to determine if the work meets the criteria and conditions of the restoration plan.

4) The Department agrees to refund Respondent $7,500 of the civil penalty if the Respondent successfully completes the restoration plan by December 31, 2018, and meets the requirements of Order paragraphs 1-3. If there are circumstances beyond the control of Respondent, he will contact the Department by November 30, 2018, to request an extension of the deadline stated above.

R. at 56.

Mr. Hastings paid the $10,000 civil penalty contemplated in the Consent Order on February 13, 2018. R. at 127 (¶ 5). Pursuant to Term 1 of the Consent Order, Mr. Hastings submitted a proposed restoration plan on February 14, 2018. R. at 127 (¶ 7). The Department rejected this plan. R. at 128 (¶ 8). Mr. Hastings submitted two revised plans which were also rejected by the Department. R. at 128 (¶¶ 9–12). All

these plans were rejected because the plans were not compliant with the Consent Order. R. at 128 (¶¶ 8, 10, 12).

As the parties were negotiating a restoration plan, Mr. Hastings sought, and the Department granted, an extension of the deadline found in Term 4 of the Consent Order (the "Financial Incentive Deadline"). Under this provision, Mr. Hastings had an opportunity to receive a partial refund of the civil penalty if he completed the work outlined in the restoration plan by December 31, 2018. In an email to Mr. Hastings' former attorney, the Department's Stream Channel Coordinator, Aaron Golart, granted an extension to March 15, 2019. R. at 128 (¶ 13). The e-mail reads, "With respect to the time extension you have requested, IDWR is willing to grant the request to extend the time to complete construction on the restoration until March 15, 2019." *Id*.

Mr. Hastings filed a third revised restoration plan on December 14, 2018. R. at 129 (¶ 16). Based on the third revised restoration plan, on March 15, 2019, Mr. Hastings filed a Joint Application for Permits to complete the restoration work. R. at 129 (¶ 17); *see* R. at 171–195. The Department issued its Conditional Approval of Joint Application for Permits ("Permit") on May 17, 2019. R. at 129 (¶ 18), 163.

Mr. Hastings, through his former attorney, submitted to the Idaho Water Resource Board[2] a Petition for Hearing on the Permit on May 21, 2019. R. at 59–61, 129 (¶ 19). Mr. Hastings objected to certain aspects of the conditional approval, contending they were inconsistent with the terms of the Consent Order. In his Petition for Hearing, Mr. Hastings requested informal discussions regarding the Permit: "In order to avoid unnecessary delay and litigation, and pursuant to IDAPA 37.01.01.100, Petitioners, its engineer, and attorneys are available and would be willing to participate in an informal meeting to discuss resolution of this matter." R. at 60.

The parties engaged in informal discussions until November 2021, when the Idaho Water Resource Board appointed a hearing officer for Mr. Hastings' requested hearing, R. at 97, and Mr. Hastings, through his current attorney of record, filed his Action for Declaratory Judgment, R. at 7, and subsequent First Amended Action for Declaratory Judgment, R. at 39, (collectively, "Action for Declaratory Judgment"). Mr. Hastings has not completed the stream bank restoration required by the approved restoration plan and Permit. R. at 129 (¶ 20).

[2] Under the Stream Channel Protection Act the Department is authorized to enforce the Act's provisions and issue permits. However, Idaho Code § 42-3805 authorizes the Idaho Water Resource Board to review permit decisions made by the Department, through a hearing.

In his Action for Declaratory Judgment, Mr. Hastings sought a declaratory judgment that the statute of limitations in Idaho Code § 42-3809 applies to the Consent Order and that the time for the Department to enforce the Consent Order has expired. R. at 51–52. The Department filed a counterclaim seeking an order of specific performance requiring Mr. Hastings to comply with the terms of the Consent Order. R. at 92.

The Parties agreed to bifurcate the proceedings and resolve the statute of limitations issue first. R. at 121–123. The Parties subsequently filed their Stipulation of Facts for Motion Practice Re: Statute of Limitations ("Stipulation"). R. at 126–130.

Mr. Hastings filed his motion for summary judgment asking the District Court to grant his request for declaratory judgment and to dismiss the Department's counterclaim. R. at 132–135. The Department filed a cross-motion for summary judgement. R. at 154–156. Along with the cross-motion for summary judgment, the Department filed a statement of facts, which included a request that the District Court take judicial notice of the Permit. R. at 157–195.

Mr. Hastings objected to the District Court taking judicial notice of the Permit and filed a Motion to Strike and Objection to Defendant's Request to Take Judicial Notice, R. at 211–213, and a Motion to Continue Filed in the Alternative, R. at 233–236. The Department opposed both motions. R. at 259–265. The District Court issued its Order Denying Motion to Strike and Granting in Part Motion to Continue without

a hearing. R. at 275–283. In that order, the District Court took judicial notice of the Permit, declining to strike it from the record. R. at 278. Further, the District Court granted Mr. Hastings' motion to continue in part by extending the summary judgment hearing and allowing Mr. Hastings to file supplemental briefing. R. at 282–283. Mr. Hastings then filed a motion for reconsideration, asking the District Court to grant him additional time to conduct discovery related to the Permit. R. at 284–286. The Department opposed the motion for reconsideration. R. at 302–304.

The District Court heard Mr. Hastings' motion continue and the parties' motions for summary judgement on July 25, 2022. During the hearing the District Court asked Mr. Hastings' counsel, "in this case, is the plaintiff actually asserting that the permit that's attached to the defendant's fax [sic] is not a true and correct conditional permit that was issued based on the application filed March 15th of 2019?" Tr. 5:14–18. In response, Mr. Hasting's counsel stated "I am not asserting that [Department employee] Aaron Golart submitted any sort of false permit, if that's what the Court is asking. That is not the assertion we're making…." Tr. 6:3–7.

On August 24, 2022, the Court issued its Memorandum Decision and Order on Cross Motions for Summary Judgment, in which the District Court denied Mr. Hastings motion for reconsideration and granted the Department's motion for summary judgment. Suppl. R. at 9–26. Upon Mr. Hastings' motion, *see* R. at 325–327,

the District Court certified its Partial Judgment as final pursuant to I.R.C.P. 54(b), R. at 357–358. Mr. Hastings appeals the Partial Judgment.

ISSUES PRESENTED ON APPEAL

Mr. Hastings did not specify his issues presented on appeal. The Department's formulation of the issues presented is as follows:

1. Did the District Court err when it granted summary judgment in favor of the Department, finding the statute of limitations in Idaho Code § 42-3809 had not run when the Department filed its counterclaim?

2. Did the District Court err when it took judicial notice of Mr. Hastings' Stream Channel Alteration Permit issued by the Department?

3. Did the District Court err when it denied Mr. Hastings' motion to continue to conduct additional discovery?

ARGUMENT

I. The District Court did not err when it granted summary judgment in favor of the Department, finding the statute of limitations in Idaho Code § 42-3809 had not run when the Department filed its counterclaim.

A. Standard of Review.

The Supreme Court reviews a district court's ruling on a motion for summary judgment using the same standard as the district court. *Robison v. Bateman–Hall, Inc.*, 139 Idaho 207, 209, 76 P.3d 951, 953 (2003). Summary judgment is appropriate only when the pleadings, depositions, affidavits, and admissions on file show that there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. I.R.C.P. 56(c); *see also Indep. Sch. Dist. Boise City v. Harris Family*

Ltd. P'ship, 150 Idaho 583, 587, 249 P.3d 382, 386 (2011) (citing I.R.C.P. 56(c)). "If the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this Court exercises free review." *Robison*, 139 Idaho at 209, 76 P.3d at 953.

B. There are no disputed material facts.

Mr. Hastings does not articulate an actual dispute of material fact. Instead, Mr. Hastings makes a conclusory statement that "the existence of disputed material issues of fact, [was] established in part by the verified pleadings of [Mr. Hastings] ...," with no explanation of what that dispute might be. Appellant's Br. 40. "Conclusory assertions unsupported by specific facts are insufficient to raise a genuine issue of material fact precluding summary judgment." *Mareci v. Coeur D'Alene Sch. Dist. No. 271*, 150 Idaho 740, 744, 250 P.3d 791, 795 (2011) (citing *Goodman v. Lothrop*, 143 Idaho 622, 627, 151 P.3d 818, 823 (2007)).

The parties submitted a set of stipulated facts. R. at 126–130. Mr. Hastings does not dispute these facts and spends several pages in his brief discussing how the parties are bound by the stipulation. *See* Appellant's Br. 29–34.

In addition, the Department asked the District Court to take judicial notice of the Permit. R. at 158. Mr. Hastings does not dispute the accuracy of the Permit ("I am not asserting that Aaron Golart submitted any sort of false permit, if that's

what the court is asking." Tr. 6:3–5.). Without a dispute regarding the facts, what remains is a question of law.

C. The statute of limitations in Idaho Code § 42-3809 begins to run when a party substantially violates the terms of a consent order.

The question before the Court is, when did the statute of limitations in Idaho Code § 42-3809 begin to run in relation to the Consent Order? "The statute of limitations does not begin to run until the cause of action has accrued." *Sallaz v. Rice*, 161 Idaho 223, 228, 384 P.3d 987, 992 (2016). The parties entered the Consent Order pursuant to Idaho Code § 42-1701B. R. at 22. Idaho Code § 42-1701B states, "[i]f a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and other relief as authorized by law." However, "no civil or administrative proceeding may be brought to recover for a violation of any...order issued...more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation." I.C. § 42-3809.

Under § 42-1701B, the Director of the Department has the discretionary authority to pursue a civil action to remedy a violation of any permit or order. The Director may bring a civil enforcement action in the district court "against any person who is alleged to have substantially violated any provision of title 42." I.C. § 42-1701(B)(5)(a). Thus, Idaho Code § 42-3809 requires the Department to bring a claim for any substantial violation of any consent order within two years of the violation.

Mr. Hastings suggests two alternate instances when he substantially violated the terms of the Consent Order. First, when Mr. Hastings did not complete the required restoration by March 19, 2019. Second, when Mr. Hastings requested a hearing on the Permit on May 21, 2019.

1. The March 19, 2019 Financial Incentive Deadline was not an overall deadline for Mr. Hastings to complete construction outlined in the restoration plan.

It is difficult to determine what argument Mr. Hastings is making regarding the Consent Order. There appear to be two different, intertwined arguments. Mr. Hastings first argues that the statute of limitations issue should be analyzed "based on caselaw interpreting the time for performance of a contract with no expiration date." Appellant's Br. 19. Based on this statement, it appears Mr. Hastings agrees with the Department that there is no deadline for completion of the project in the Consent Order. Then, in what appears to be a contradiction of the first argument, Mr. Hastings argues the Consent Order has a deadline for performance, which was extended by the Department. *Id*. at 23. Mr. Hastings further states, failure to complete the required restoration by the extended deadline was a "substantial violation" of the Consent Order triggering the Department's enforcement authority. *Id*. The Department will treat Mr. Hastings' argument as two separate arguments and address each separately.

First, Mr. Hastings concedes that the Consent Order does not have an express performance deadline and cites *Curzon v. Wells Cargo* for the standard used to determine when a contract with no express time for performance should be performed. *Id*. at 19. "Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance." *Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 43, 382 P.2d 906, 908 (1963). The issue then is what is a reasonable time for performance of the Consent Order.

Mr. Hastings argues that the Consent Order "could and should have been performed by the spring of 2019 …." Appellant's Br. 19. Mr. Hastings' brief lacks clarity as to why, based on "the subject matter of the contract, the situation of the parties, and the circumstances attending the performance," spring of 2019 was the deadline to complete the project. In fact, those factors suggest spring of 2019 was not any sort of completion deadline.

The Department does not set fixed completion deadlines in its consent orders because it knows that it often takes time to work through the various approvals for projects and that is what happened here. From February 14, 2018 to December 14, 2018, the Department and Mr. Hastings were negotiating a restoration plan. R. at 127–129 (¶¶ 7–16). The restoration plan was only part of what the Department

needed to approve Mr. Hastings moving forward with the restoration work. Mr. Hastings also needed to submit a Joint Application for Permits. *See* R. at 22 (Term 1). Mr. Hastings submitted his application March 15, 2019. R. at 129 (¶ 17). The Department issued the Permit on May 17, 2019. R. at 129 (¶ 18). Further, Mr. Hastings requested a hearing on the Permit and asked to participate in informal discussions related to the Permit. R. at 25-27, 129 (¶ 19). Given "the subject matter of the contract, the situation of the parties, and the circumstances attending the performance" it is reasonable for performance to have extended beyond spring 2019. Accordingly, spring 2019 was not the deadline to complete restoration.

Second, Mr. Hastings tries to suggest the Consent Order had an explicit deadline to complete construction. Mr. Hastings states "[m]issing the March 15, 2019 construction completion deadline should have put IDWR on notice that [Mr. Hastings] would not comply with the terms of the Consent Order." Appellant's Br. 21–22. Mr. Hastings' view ignores the plain language of the Consent Order. "An unambiguous contract will be given its plain meaning." *Shawver v. Huckleberry Ests., L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004).

Term 4 of the Consent Order states "[t]he Department agrees to refund [Mr. Hastings] $7,500 of the civil penalty if [Mr. Hastings] successfully completes the restoration plan by December 31, 2018 and meets the requirements of Order paragraph 1-3." R. at 22. The December 31, 2018 deadline was for Mr. Hastings to

receive a partial refund of the civil penalty for completing the work by a date certain—i.e., a financial incentive deadline. This financial incentive to get the work done sooner does not constitute a final deadline to complete construction as outlined in the restoration plan. The District Court agreed with the Department's reading of the Consent Order, holding "[a]lthough Term 4 imposed a "deadline" of December 31, 2018, the unambiguous meaning of Term 4 was not a deadline to complete the overall project. Suppl. R. at 21.

Mr. Hastings also points to paragraph 13 of the parties' Stipulation to support his contention that the Consent Order contained a final deadline. Paragraph 13 states, "On November 2, 2018, the Department's Stream Channel Coordinator, Aaron Golart, granted an extension stating in an email to Plaintiff's former attorney Chris Bromley, 'With respect to the time extension you have requested, IDWR is willing to grant the request to extend the time to complete construction on the restoration until March 15, 2019.'" R. at 128.

Mr. Hastings apparently reads paragraph 13 to mean the Department agrees there was a final deadline.[3] However, the only deadline available in the Consent

[3] Regarding paragraph 13 of the stipulated facts, Mr. Hastings spends some time in his opening brief discussing the binding effect of stipulations. Appellant's Br. 21–22, 30–31. The Department does not disagree that the stipulation of facts is binding on both the Department and Mr. Hastings. The Department admits that Mr. Golart granted an extension to Mr. Hastings' financial incentive deadline. The Department,

Order to extend, was the Financial Incentive Deadline. To read the Financial Incentive Deadline as anything else tortures the plain language of the Consent Order and goes against this Court's standards of contractual interpretation. "When interpreting a contract this Court begins with the plain language of the agreement." *Kelly v. Kelly*, 171 Idaho 27, 518 P.3d 326, 338 (2022). Again, the District Court agreed, holding Mr. Hastings' "financial incentive in exchange for the benefit of completion did not invoke a mandatory date for completion of performance to comply with the Consent Order." Suppl. R. at 21.

Since the Consent Order did not contain a final construction deadline, only the Financial Incentive Deadline, Mr. Hastings failure to complete restoration by March 15, 2019, does not constitute a violation of the Consent Order. Failure to meet the Financial Incentive Deadline in no way put the Department on notice that Mr. Hastings did not intend to comply with the terms of the Consent Order. The statute of limitations in Idaho Code § 42-3809 did not start to run on March 15, 2019.

2. Mr. Hastings' objection to the Permit did not provide the Department notice he intended to violate the Consent Order.

Mr. Hastings claims his request for hearing on May 21, 2019, repudiated the Consent Order and therefore the Department had actual knowledge of a breach on that date. Appellant's Br. 26. Mr. Hastings supports his claim by citing one of the

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however, disagrees with Mr. Hastings' assertion that the Department agreed there was a final deadline to complete restoration.

provisions of the Consent Order which states, Mr. Hastings "shall comply with the terms and conditions of any permit the Department issues…." R. at 22. Based on that language, Mr. Hastings argues when he requested a hearing on the Permit, he substantially violated the Consent Order. This argument ignores the statutory and regulatory framework behind the permit process.

The Permit was issued pursuant to Idaho Code § 42-3805. R. at 163. Idaho Code § 42-3805 states "[w]ithin fifteen (15) days of the date of mailing of the decision, the applicant shall notify the director...that it requests a hearing before the board thereon." The Stream Channel Alteration Rules state, "[a]ny applicant who is granted a limited or conditioned permit, or who is denied a permit, may seek a hearing on said action of the Director by serving on the Director written notice and request for a hearing before the Board within fifteen (15) days of receipt of the Director's decision." IDAPA 37.03.07.70. In addition, Mr. Hastings was notified he had a right to a hearing in the Permit itself. *See* R. at 167.

It is unreasonable to assume the Department was on notice that Mr. Hastings did not intend to comply with the terms of the Consent Order when he requested a hearing on the Permit. The District Court was also unpersuaded by Mr. Hastings' argument, finding "Hastings's use of an appeal right provided for by regulatory rule to object to certain terms of the Conditional Permit was not a violation of the Consent Order." Suppl. R. at 23. The District Court further held "[t]he Petition for Hearing

only put the Department on notice that Hastings disagreed with certain terms outlined in the Approval but that Petition did not put the Department on notice that Hastings was refusing to complete construction or comply with the Consent Order." Suppl. R. at 23–24.

Mr. Hastings was entitled to a hearing by law and agreeing in the Consent Order to comply with the conditions of the Permit is not an explicit waiver of his right to a hearing. "As a general rule, constitutional rights—including the right to due process—may be waived. However, the waiver of any fundamental constitutional right is never presumed. Rather, the waiver must be affirmatively demonstrated." *Glengary-Gamlin Protective Ass'n, Inc. v. Bird*, 106 Idaho 84, 90, 675 P.2d 344, 350 (Ct. App. 1983) (citing *Shepard v. Barron*, 194 U.S. 553, 24 S.Ct. 737, 48 L.Ed. 1115 (1904) and *Emspak v. United States*, 349 U.S. 190, 75 S.Ct. 687, 99 L.Ed. 997 (1955)).

In addition, Mr. Hastings' request for a hearing prevented the Permit from becoming final until reviewed by the Idaho Water Resource Board pursuant to Idaho Code § 42-3805. The Permit is a preliminary order pursuant to Idaho Code § 67-5243(1)(b). An order which is not issued by the agency head and "becomes a final order unless reviewed in accordance with section 67-5245, Idaho Code" is a preliminary order. Idaho Code § 67-5243(1)(b). A preliminary order shall include "[a] statement that the order will become a final order without further notice" along with

details of the "actions necessary to obtain administrative review of the preliminary order." Idaho Code § 67-5245(1).

The Permit was not issued by the Director of the Department, and contained the statements required by Idaho Code § 67-5245. "If you object to the decision issuing this permit with the above conditions, you have 15 days in which to notify this office in writing that you request a formal hearing on the matter. If an objection has not been received within 15 days, the decision will be final under the provisions of IDAPA 37.03.07.70 (Rule 70)." R. at 167.

Since the Permit is not final, Mr. Hastings was still in compliance with the terms of the Consent Order when he filed his Action for Declaratory Judgement. Since Mr. Hastings was still in compliance with the terms of the Consent Order, the Department had not accrued a cause of action against Mr. Hastings related to the Consent Order. Since the Department had not accrued a cause of action, the statute of limitations in Idaho Code § 42-3809 had not started to run. Based on the undisputed facts in the record, the Department did not accrue a cause of action until Mr. Hastings filed his Action for Declaratory Judgement.

II. The District Court did not err when it took judicial notice of Mr. Hastings' Stream Channel Alteration Permit issued by the Department.

Mr. Hastings claims the District Court was in error taking judicial notice of the Permit and asks this Court to remand to the District Court. Appellant's Br. 36.

A. Standard of Review.

"Whether a district court erred in taking or not taking judicial notice is an evidentiary question we review under the abuse of discretion standard." *Bass v. Esslinger*, ___ Idaho ___, 525 P.3d 737, 742 (2023). In reviewing a district court's exercise of discretion, this Court must consider "whether the district court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Van v. Portneuf Med. Ctr., Inc.*, 156 Idaho 696, 701, 330 P.3d 1054, 1059 (2014). "Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling is a manifest abuse of the trial court's discretion and a substantial right of the party is affected." *Burgess v. Salmon River Canal Co.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

B. The District Court appropriately exercised its discretion when it took judicial notice of the Permit.

In the District Court's *Order Denying Motion to Strike and Granting in Part Motion to Continue*, R. at 275–283, the District Court identified that "Idaho Code § 9-101(3) permits courts to take judicial notice of public and private official acts of the executive departments of Idaho. Idaho Rule of Civil Procedure 44(a) requires the court to take judicial notice as required by law." R. at 279. The District Court held "that the Permit is an official document of the Department that was issued pursuant

to the Department's authority in Chapter 38, Title 42, of Idaho Code, and that it is appropriate for judicial notice under Idaho Code § 9-101(3)." *Id.* The District Court further held, "the Permit is proper for judicial notice under Idaho Rule of Evidence 201...." *Id.* The District Court's analysis of the Permit and standards for judicial notice shows that the District Court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Van v. Portneuf Med. Ctr., Inc.*, 156 Idaho 696, 701, 330 P.3d 1054, 1059 (2014).

1. The Stipulation did not preclude the Department's introduction of the Permit into the record.

Despite the District Court's exercise of reason, Mr. Hastings believes the District Court taking judicial notice of the permit was improper because of the parties' Stipulation. Mr. Hastings states that the parties are bound by the Stipulation and cannot challenge the facts presented in it, and when the Department asked the District Court to take judicial notice of the Permit, it was challenging the facts presented in the Stipulation. Appellant's Br. 33. The Department agrees that the parties are bound by the Stipulation and cannot challenge the facts presented in it. However, the Department does not agree that taking judicial notice of the Permit was challenging the facts presented in the Stipulation.

Mr. Hastings claims the Stipulation precluded either party from admitting additional evidence. To support his claim, Mr. Hastings cites to email communications between counsel regarding the Stipulation. Appellant's Br. 32. It is irrelevant what the emails say, since "[a]n unambiguous contract will be given its plain meaning." *Shawver v. Huckleberry Ests., L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004). Mr. Hastings is attempting to offer parol evidence as to the meaning of the Stipulation. "Under the parol evidence rule, when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract." *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007).

Nowhere in the Stipulation does it say the parties will not admit other evidence. Since the plain meaning of the Stipulation controls, without language prohibiting the parties from admitting other evidence, the Department did not violate the Stipulation when it asked the District Court to take judicial notice of the Permit.

Mr. Hastings also claims citing the Permit contradicts the Stipulation because "[t]he Parties stipulated as to the existence and legal effect" of paragraph 13 of the Stipulation. Appellant's Br. 30. The Department is not attempting to contradict paragraph 13 of the Stipulation. The plain language of the Stipulation does not say

anything about the legal effect of the extension. Mr. Hastings' assertions about the meaning and significance of the Stipulation also ignore the plain language of the Consent Order which does not have a final construction deadline.

2. Taking judicial notice of the Permit is not contrary to the Stipulation.

Mr. Hastings, allegedly quoting *Fisher v. Fisher*, 84 Idaho 303, 305, 371 P.2d 847, 848 (1962), argues "This Court's holding in *Fisher* precluded the District Court from entering a Judgment in favor of IDWR based on facts introduced in violation of the stipulations of the parties." Appellant's Br. 29. The language quoted is not language from the decision authored by Justice McFadden but is part of the appellant's restatement of issues.[4] The quoted language is not an accurate representation of the Idaho Supreme Court's holding in *Fisher*. To the extent Mr. Hastings is attempting to use *Fisher* to argue that a district court cannot rely on evidence in contraction of a stipulation, the fact here is that taking judicial notice of the Permit is not contrary to the Stipulation.

Mr. Hastings also argues, "Idaho Rule of Civil Procedure 56(c)(1)(A) is clear, the only facts which should have been considered by the District Court when ruling

[4] The published opinion found on Westlaw.com does not include the quoted language. However, the version of the case published in Idaho Reports, Vol. 84 by West Publishing Co. does contain the language quoted by Mr. Hastings. The language quoted does not come from the decision authored by Justice McFadden, but comes from the summary of the argument presented by appellants.

on the parties' cross motions for summary judgment are 1) verified pleadings and 2) facts the parties' stipulated to." Appellant's Br. 28. Mr. Hastings misrepresents I.R.C.P. 56(c)(1). The rule states:

> *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

I.R.C.P. 56(c)(1) discusses how a party can assert that a fact is not true or genuinely disputed, not which facts the court can consider on a motion for summary judgment. Further, I.R.C.P. 56(c)(1) says nothing about verified pleadings. Pleadings do not need to be verified unless a statute or rule specifically states otherwise. I.R.C.P. 11(a). Mr. Hastings does not cite a rule or statute requiring verification in this matter, nor does the Department know of one.

The District Court did not err in taking judicial notice of the Permit.

3. The Department sufficiently identified the adjudicative facts it found relevant in the Permit.

In addition, Mr. Hastings claims "IDWR failed to specify the adjudicative facts it was asking the Court to take judicial notice of. This conduct is contrary to a recent

holding of this Court in *Bass v. Esslinger*." Appellant's Br. 35. The Court in *Bass* was considering whether the district court had abused its discretion when it declined to take judicial notice of the entire case file from a previous litigation. *Bass v. Esslinger*, ___ Idaho ___, 525 P.3d 737, 742–743 (2023). The Court upheld the district court's denial noting the requesting party did "not explain what, if any, additional substance the district court would have gleaned had it considered the rest of the record" and "[i]t is not enough to simply claim that documents are relevant; the party requesting judicial notice must articulate the specific adjudicative facts to be taken notice of and reference to an entire case file is not sufficient." *Id.* at 743.

The Department's request that the District Court take judicial notice of the Permit is distinguishable from the situation in *Bass*. Here, the Department asked the District Court to take judicial notice of one document, not an entire case file. Furthermore, the Department also made specific reference to that one document, the Permit, and what the Department found relevant in the Permit in its Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment. Specifically, the Department highlighted that the Permit was issued pursuant to Idaho Code § 42-3805 and that the Permit informed Mr. Hastings he could request a hearing. R. at 200.

The District Court did not abuse its discretion when it took judicial notice of the Permit. And even if it had, Mr. Hastings has not shown he was prejudiced by the

decision, a requirement to find the District Court erred. Mr. Hastings admitted the Permit was accurate, Tr. 6:3–5, and he has not demonstrated the Department made an argument in contravention of the stipulated facts.

III. The District Court did not err when it denied Mr. Hastings' motion to continue to conduct additional discovery.

Mr. Hastings argues "[t]he District Court's decision to preclude Appellant from conducting discovery on issues related to the application of the Statute of Limitations prejudiced his ability to respond to IDWR's Cross Motion for Summary Judgment and has raised material issues of disputed facts as to the date IDWR was placed on notice of Appellant's substantial violation of the Consent Order." Appellant's Br. 37.

A. Standard of Review.

I.R.C.P 56(b)(3) states that a court may alter or shorten time periods or continue the summary judgement hearing "for good cause shown." When the continuance is to seek additional discovery, the party requesting the continuance bears the burden to establish "what further discovery would reveal that is essential to justify [a continuance] making clear 'what information is sought and how it would preclude summary judgment.'" *Fagen, Inc. v. Lava Beds Wind Park, LLC*, 159 Idaho 628, 631, 364 P.3d 1193, 1196 (2016) (citing *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005). The Court may consider the moving party's lack of diligence in pursuing the discovery. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 105, 294 P.3d 1111, 1117 (2013). A trial court's denial of a motion

to continue will be upheld so long as the trial court "recognized it had the discretion to deny the motion, articulated the reasons for so doing and exercised reason in making the decision." *Fagen*, 159 Idaho at 633; 364 P.3d at 1198.

B. Mr. Hastings has not demonstrated a need for additional discovery.

Mr. Hastings did not demonstrate a need for additional discovery before the District Court which noted "the Plaintiff has failed to specifically show how additional discovery will aid Plaintiff in addressing the statute of limitations and how it applies to the dates outlined in the Permit." R. at 281.

Before this Court, of the eleven items in Mr. Hastings' list of issues he wants to further explore in discovery, only one of them relates to the statute of limitations question, issue 11. That issue, "the point in time when IDWR had actual or constructive knowledge of the substantial violation of the Consent Order, as originally drafted or as extended by [Department Employee] Arron [sic] Golart," has nothing to do with the substance of the Permit. Appellant's Br. 39. Mr. Hastings is entitled to ask Department employees about when the Department thought Mr. Hastings was in breach of the Consent Order. However, Mr. Hastings asked for a continuance to the stipulated time for a summary judgment hearing to inquire further into the substance of the Permit,

> "Plaintiff hereby requests this Court continue the hearing on [the parties' motions for summary judgment] until such time as Plaintiff has completed its discovery regarding the documents attached to [the

> Department's statement of facts] as they relate to the applicability of the Statute of Limitations found in I.C. § 42-3809."

R. at 234.

Mr. Hastings failed to explore when the Department thought Mr. Hastings was in breach before he agreed to the Stipulation. And additional discovery related to the Permit will not provide Mr. Hastings with his desired information. If Mr. Hastings wanted to explore that issue prior to summary judgment proceedings, he could have done so but did not. In its decision issued August 24, 2022, the District Court addressed this stating "the Court notes Plaintiff has still not served any discovery requests, even since the Court's denial of this issue on May 9, 2022." Suppl. R. at 12–13.

Mr. Hastings failed to meet his burden when asking for a continuance before the District Court. The District Court found Mr. Hastings was not diligent in pursuing discovery. The District Court "recognized it had the discretion to deny the motion, articulated the reasons for so doing and exercised reason in making the decision." *Fagen*, 159 Idaho at 633; 364 P.3d at 1198.

ATTORNEYS' FEES ON APPEAL

The Department requests attorneys' fees on appeal pursuant to Idaho Code § 12-117 and I.A.R. 41. Idaho Code § 12-117(1) requires the Court to award attorneys' fees to the prevailing party "in any proceeding involving as adverse parties a state agency...and a person" where the "nonprevailing party acted without a reasonable

basis in fact or law." "The Court employs a two-part test to determine if I.C. § 12–117 is invoked on appeal: (1) the party seeking fees must be the prevailing party and (2) the nonprevailing party must have acted without a reasonable basis in fact or law." *Rammell v. State*, 154 Idaho 669, 678, 302 P.3d 9, 18 (2012). Attorneys' fees are not available when the non-prevailing party presents a legitimate question for the Court to address. *Kootenai Cnty. v. Harriman-Sayler*, 154 Idaho 13, 20, 293 P.3d 637, 644 (2012). "While the standard is low, it does require the nonprevailing party to support its claim." *Id.*

This Court has not addressed the application of the statute of limitations in Idaho Code § 42-3809. "When dealing with an issue of first impression, this Court is generally reluctant to find an action unreasonable." Ciszek v. Kootenai Cnty. Bd. of Comm'rs, 151 Idaho 123, 135, 254 P.3d 24, 36 (2011). However, "an issue of first impression is not a 'free pass' to bring unreasonable arguments." Owens v. Ada Cnty Bd. of Comm'rs, No. 49537, slip op. at 14 (Idaho S. Ct. March 15, 2023).

The Department requests attorneys' fees because Mr. Hastings provides arguments that ignore the plain reading of the Consent Order and Stipulation, advances nonsensical arguments which are not relevant to the statute of limitations issue, and misrepresents the relevant law in two instances.

This Court has awarded attorneys' fees "[i]n instances where parties to appeals before this Court have advanced arguments based upon a disregard for plain

language…" because the parties "acted without a reasonable basis in law." *Jayo Dev., Inc. v. Ada Cnty. Bd. of Equalization*, 158 Idaho 148, 154, 345 P.3d 207, 213 (2015). As discussed above, Mr. Hastings' arguments disregard the plain meaning of the Consent Order and the parties' Stipulation. This is further supported by the District Court which noted that Mr. Hastings' assertion that the Consent Order contained a construction completion deadline went against the plan language of the Consent Order and Permit: "The Court finds the Consent Order's plain, unambiguous language does not impose a construction completion date," Suppl. R. at 21; and "[s]ince the plain language of both the Application and the Conditional Permit extended past both March 2019 and May 2019 timeframes, then the Department could not have reasonably been on notice that Hastings' Petition for Hearing in March 2019 was a violation of the Consent Order." Suppl. R. at 25.

Mr. Hastings also mischaracterizes the law in two instances. As discussed above, Mr. Hastings misquotes and attributes a different meaning to *Fisher v. Fisher*. Mr. Hastings also inserts standards into I.R.C.P. 56(c)(1) that don't exist and mischaracterizes the circumstances when the rule applies.

By ignoring the plan language of the Consent Order and the Stipulation and mischaracterizing the law, Mr. Hastings arguments were presented without a reasonable basis in fact or law. The Court should award the Department attorneys' fees.

CONCLUSION

The District Court correctly ruled in the Department's favor on summary judgment when it held the statute of limitations in Idaho Code § 42-3809 had not run when the Department filed its counterclaim. The District Court also did not abuse its discretion when taking judicial notice of the Permit or denying Mr. Hastings' motion to continue to conduct additional discovery. Further, the Department should be granted attorneys' fees because Mr. Hastings' appeal was filed without a reasonable basis in fact or law.

DATED this 10th day of May 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

MEGHAN M. CARTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May 2023, I caused to be served a true and correct copy of the foregoing State's Brief via iCourt E-File and Serve, upon the following:

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