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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN HASTINGS, Jr., Plaintiff/Counterdefendant/Appellant, vs. THE STATE OF IDAHO DEPARTMENT OF WATER RESOURCES, a Political Subdivision of the STATE OF IDAHO Defendant/Counterclaimant/Respondent.	Supreme Court Docket No. 50273-2022 Appeal from Ada Count Case No. CV01-21-17825 **APPELLANT'S REPLY BRIEF**

APPELLANT'S REPLY BRIEF

Appeal from District Court of the Fourth Judicial District for Ada County
HONORABLE LYNN NORTON
presiding

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I. INTRODUCTION

Respondent has attempted to utilize additional inadmissible unverified evidence and has provided other factually unsupported assertions in its *Response Brief on Appeal*. Respondent does so in order to paint a hypothetical storyline to add credence to the District Court's granting of summary judgment in favor of Respondent. Respondent's tale seeks to excuse its delay in filing an enforcement action in district court, seven months after the applicable statute of limitations had expired. Without this unverified hypothetical, Respondent's delay is inexcusable. The reason being, Respondent could have taken either judicial or administrative actions upon receipt of Appellant's Objection to the Permit Respondent issued back in May of 2019. Respondent's initiation of Administrative Proceedings two years and six months after Appellant not only missed a "construction completion deadline" Respondent imposed, but also followed shortly thereafter by Appellant's Objection to the Permit Respondent issued, is *prima facie* evidence that Respondent is solely responsible for delaying its initiation of an I.C. § 42-3809 enforcement action. (ROA 89-90). Afterall, if no additional action was required by Appellant to initiate an administrative hearing, following his May 2019 Objection to the permit Respondent issued, then based on the record of admissible evidence before the Court, Respondent had no legitimate excuse for its delay of two years and seven months in filing an enforcement action. There are no admissible facts in the record as to why an administrative hearing could not have taken place during that time. Likewise, there is no admissible evidence in the record as to why the permit respondent issued did not become a final order. Therefore, any conclusion excusing Respondent's delay is simply based on speculation – which is the crux of Respondent's arguments on appeal.

The fact remains, the parties stipulated to bifurcate this case and have the initial issue of the application of the statute of limitations contained in Idaho Code § 42-3809 decided on a prearranged narrow factual record. Respondent ignored the parties' stipulations below and

unfortunately it continues that same practice on appeal. Appellant's ability to respond to Respondent's inadequately supported allegations is hampered due to Appellant's continued adherence to the stipulations of the parties, the lack of discovery resulting from those stipulations, and Appellant's inability to inject new evidence into the record on appeal. Therefore, in the event this Court is inclined to ordain Respondent's unilateral attempts to pad the record with evidence favorable to its position, while having denied Appellant the same opportunity, Appellant encourages the Court to remand this case so that a more complete factual record can be developed through the discovery process. Thereafter, any enforcement action Respondent may still be contemplating must be reconciled with the recent US Supreme Court Decision in *Sackett Et Ux*. v. *Environmental Protection Agency Et Al.* U.S. Supreme Court Case No. 21–454 (May 25, 2023) which likely impacts Idaho's stream channel alteration regulatory scheme pursuant to I.C. §§ 39-3601, 42-3803, 42-3808 and this Court's holding in *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 478, 406 P.2d 113, 117, 1965 Ida. LEXIS 389, *13.

II. LEGAL ARGUMENT

1. Respondent Mischaracterizes the Events Leading up to the Granting of Summary Judgment in its Favor.

Respondent stands in the position of defending the District Court's granting of Summary Judgment in its favor based upon: 1) facts introduced by Respondent in violation of numerous stipulations of the parties, and 2) without regard for Appellant's IRCP 56(d) Motion seeking to permission and additional time to conduct discovery regarding the very issues raised by Respondent's improper unilateral padding of the record. This process denied Appellant the opportunity to not only apply facts gleaned in that discovery to Appellant's Affirmative Defenses, but also his constitutional right to have a jury of his peers decide aspects of the issue before this Court.

To bolster the District Court's error, Respondent now mischaracterizes the parties' stipulations so as to render them incongruous. Respondent, focusing on only one of two stipulations entered into for purposes of bifurcating and streamlining this case, asserts:

> Nowhere in the Stipulation [*Stipulation on Facts for Motion Practice Re: Statute of Limitations* (ROA 126-129)] 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. *Response Brief on Appeal* at 21.

While Respondent is correct that the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* does not say the parties will not admit other evidence, the assertion directly contradicts the predicate stipulation immediately preceding it. The *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* (ROA 122) filed on February 4, 2022 provides:

> In the event the court agrees to issue an order bifurcating issues in this matter, the parties have agreed on a set of stipulated facts relevant to the statute of limitations issue and will file the same within 30 days of such an order and will simultaneously wave their rights to a court or jury trial on the Idaho Code § 42-3809 statute of limitations issue. ROA 122.[1]

The "set of stipulated facts" were agreed to by the parties prior to the filing of the *Joint Motion to Bifurcate*. *See* ROA 237-245. The circumstances giving rise to the stipulations and emails between counsel for the parties reinforces their understanding that summary judgment was being sought based on a narrow factual record for a single narrow issue of first impression. *Appellant's Brief on Appeal* at 32 and ROA 222, 237-246. *See Seward v. Musick Auction, LLC*, 164 Idaho 149, 159,

[1] The intention of the parties to limit each other's ability to introduce evidence beyond the stipulated factual record is reinforced and confirmed by the *Second Stipulation and Joint Motion for an Extension of Time to File Briefs and to Vacate and Reset Hearing* (ROA 205) which states "[w]hile these motions may be supported by Declarations of Counsel, as contemplated by the parties' *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* and *Stipulation of Facts for Motion Practice re: Statute of Limitations*, neither party will introduce extraneous facts in support of the limited issue before the court regarding the applicability of the Statute of Limitations found in Idaho Code § 42-3809. *See also Declaration of Counsel* ¶ 12. ROA 240.

426 P.3d 1249, 1259, 2018 Ida. LEXIS 179, *24-25, 2018 WL 4472732. Respondent likewise fails to address how Appellant could have "agreed to a set of stipulated facts" which included a Permit Respondent unilaterally padded the record with, several weeks after Appellant had already filed his *Motion for Summary Judgment*.

It is disingenuous for Respondent and unfortunately, the District Court (SROA 12-13) to assert Appellant should have conducted discovery during an expedited agreed upon summary judgment briefing schedule. The parties stipulated to request a briefing schedule, avoiding the need for extensive discovery, when they filed their *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* which states:

> Further, the parties request a briefing schedule and oral argument, on the issue of the applicability of the two-year statute of limitation contained in Idaho Code § 42-3809, be scheduled during the February 8, 2022 scheduling conference already set in this matter. (ROA 122)

The Court granted the parties Joint Motion, issued a tight briefing schedule, and set Oral Argument. ROA 131.

Pursuant to the Scheduling Order, Appellant's dispositive motion was due approximately 30 days after the Scheduling Order was issued. ROA 131. In addition to misrepresenting the combined effect of the stipulations of the parties, Respondent conveniently omits any mention of the impracticalities of its strawman argument on the availability of discovery to Appellant during the briefing schedule. Namely, Respondent would have this Court believe that after agreeing to present a bifurcated portion of the case on a stipulated factual record, early in the proceedings, Appellant could have conducted discovery on matters Respondent raised in its request for judicial notice, prior to Respondent's request for judicial notice being filed with the Court. Respondent would also have this Court conclude it would have been reasonable for Appellant to have framed arguments, based on its responses to that hypothetical discovery Appellant never served, within

the single day it could have received and reviewed written discovery responses from Respondent, under the 30-day response deadlines found in IRCP 33(b)(2) and 34(b)(2)(A). How and when Appellant could have scheduled depositions and had transcripts prepared in this timeframe is likewise left to conjecture by Respondent. Furthermore, Respondent neglects to mention the only opportunity for Appellant to include factual matters in the record in support of its *Motion for Summary Judgment* was at the time Appellant filed his opening brief – well before Respondent's request for judicial notice was filed and granted. *See* IRCP 56(b)(2) (requiring supporting documents to be filed with the opening brief).

Instead, once it became apparent that Respondent had no intention of honoring the stipulations of the parties and filed its *Defendant's Statement of Facts in Support of Crossmotion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* (ROA 157-162), Appellant did what any reasonable party would do under the applicable rules. Appellant simultaneously asked the District Court to: 1) Strike the materials included in Respondent's Request for Judicial Notice (ROA 211-229), and 2) in the alternative, asked to delay the hearing on the parties' dispositive motions pursuant to IRCP 56(d) (ROA 233-246) so that the District Court could determine whether discovery was necessary, now that Respondent violated the stipulations of the parties. *See* IRCP 56(b)(3) (permitting a court to alter time requirements) and IRCP 56(c)(4) (allowing a court to permit a party to file supplemental affidavits or conduct depositions in response to facts introduced in response to a Motion for Summary Judgment).

Unfortunately, the District Court declined to strike materials Respondent introduced in violation of the parties' stipulations and also denied Appellant the opportunity to conduct discovery. This provided Respondent the opportunity to have the case decided in its favor based on a lopsided factual record, which Appellant was precluded from rebutting. Ultimately, this

resulted in Appellant's inability to refute certain factual assertions made by Respondent and to bolster some of his affirmative defenses to this aspect of Respondent's Counterclaim, such as the doctrine of waiver. ROA 112.

2. Respondent's Disregard of the Parties' Stipulations Paves the Way for Respondent to Makes Several Inaccurate or Unsupported Factual Assertions on Appeal.

Respondent's position as to why it waited 2 years and 7 months beyond its own self-imposed "construction completion deadline" is based upon speculation, which is unsupported by admissible evidence. The speculative arguments asserted by Respondent on appeal are addressed as follows.

1) Respondent contends "all of the [river restoration] plans [Appellant] submitted were rejected because the plans were not compliant with the Consent Order. R. at 128 (¶¶ 8, 10, 12)." *Respondent's Response Brief* at 3-4. In actuality, IDWR unilaterally contends the plans were not complaint with the terms of the Consent Order by citing to the Stipulated Facts where conflicting contentions are made by the parties as to the compliance of the restoration plans Appellant submitted. *See* ROA 128. Without the plans Appellant's engineer submitted to Respondent in the record, Respondent's assertion is impossible to verify.

Appellant's position, on the other hand, that the numerous river restoration plans his engineer submitted were compliant with the terms of the Consent Order, are verified. *See* ROA 44. This verification carries weight in the context of evaluating conflicting motions for summary judgment. The use of verified pleadings in the context of a motion for summary judgment was discussed by this court in *Esser Elec. v. Lost River Ballistics Techs*:

> Electric's counsel did not argue below that the verified complaint was sufficient to create a genuine issue of material fact precluding summary judgment. Therefore, we will not consider it on appeal. *Sprinkler Irrig. Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 85 P.3d 667 (2004) (argument that verified complaint

> furnished sufficient, material facts to rebut a motion for summary judgment would not be considered on appeal where it was not argued below).
>
> There is a valid reason for requiring a party to argue to the trial court that a verified pleading should be considered in opposition to a motion for summary judgment. To be considered, a verified pleading must satisfy the requirements of Rule 56(e), just as would an affidavit or deposition testimony. It must be "made on personal knowledge," "set forth such facts as would be admissible in evidence," and "show affirmatively that the affiant is competent to testify to the matters stated therein." In addition, the party offering the verified pleading must affirmatively show that the person who verified it is competent to testify about the matters stated therein. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002). Statements in a verified pleading that are conclusory or speculative would not satisfy either the requirement of admissibility or competency under Rule 56(e). *Id*. Requiring that the proponent of the verified pleading argue that it should be considered by the court gives an opposing party an opportunity to object to its consideration on the ground that it does not comply with the requirements of Rule 56(e). The trial court can then rule on its admissibility.
>
> *Esser Elec. v. Lost River Ballistics Techs., Inc*., 145 Idaho 912, 919, 188 P.3d 854, 861, 2008 Ida. LEXIS 98, *13-15

Here, Appellant's counsel repeatedly informed the trial court that his pleadings were verified in the context of the cross motions for summary judgment. ROA 19, 288, 300, and Tr at 25:13-19. Respondent on the other hand never objected that Appellant's verified statements did not meet the requirements of Rule 56(e).

In light of Appellant's verification of his pleadings, and Respondent's decision to use unverified pleadings, at a minimum, it factually established Appellant complied with the terms of the Consent Order requiring him to submit a river restoration plan. Likewise, Respondent has factually established, by stipulation, that Respondent disagrees with Appellant's alleged compliance with the terms of the consent order. This disagreement gives rise to several conclusions and inferences sufficient to defeat Respondent's *Cross Motion for Summary Judgment*, based on the admissible facts in the record.

First, Appellant was led on a wild goose chase for several years by Respondent. Second, and more importantly, for purposes of evaluating the application of the statute of limitations, if Appellant's plans were in fact not compliant with the terms of the Consent Order, as Respondent contends in its *Response Brief on Appeal*, then Respondent could have filed an enforcement action anytime Appellant allegedly submitted a non-compliant plan after February 15, 2018. *See Consent Order* ¶ 1 ROA 56. Thus, it is apparent Respondent continued its practice of jerking Appellant around with inconsistent representations, deliberate ambiguities, and long periods of unexplained delay. This leads to the natural conclusion that Respondent likely accrued a cause of action and subsequently missed the two-year statute of limitations in I.C. § 42-3809 at an even earlier date.

Should the Court not reverse the decision of the District Court, a remand is appropriate. Discovery could shed light on this discrepancy as to who is to blame for most, if not all of the delay in Respondent filing its enforcement action and whether Respondent's cause of action accrued as early as February 15, 2018.

2) Respondent asks the Court to ignore a clear and unambiguous "construction completion deadline" its lead employee assigned to the matter imposed. *Respondent's Response Brief* at 14-15. Why this unambiguous deadline language was used by Respondent's lead representative is not explained by Respondent. However, Respondent's latter-day change of heart appears to be a ploy to have the court ignore the obvious, it was on notice of a violation of the Consent Order in May of 2019. That awareness of a viable claim for the initiation of an enforcement action triggered its ability to file either a judicial or administrative action and began the running of the statute of limitations under Idaho Code § 42-3809. Afterall if, as Respondent contends, the Consent Order did not have a specified completion deadline, then Respondent's imposition of a unilateral deadline

establishes a disputed factual issue as to what that time for completion should have been. *See Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 43, 382 P.2d 906, 908 (1963).

3) Respondent makes the factually unsupported assertion, "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." *Respondent's Response Brief* at 5. To bolster this position, Respondent improperly cites to an exhibit to its unverified *Answer*. To make matters worse, the statement about alleged "ongoing negotiations" in the unverified exhibit is IRE 802 inadmissible hearsay. Appellant hereby objects to Respondent's improper citation to inadmissible evidence pursuant to IRCP 56(c)(2) and IRE 802.

With only a lopsided factual record, it is equally plausible that IDWR simply neglected to follow up on this issue due to being preoccupied with other matters, water supply issues caused by pervasive drought, personnel changes, COVID 19 shutdowns, etc. It is also equally plausible that Appellant reserved his rights, including invocation of the two-year statute of limitations contained in Idaho Code § 42-3809, while he attempted to seek a resolution with Respondent, based on the assumption that Respondent was aware of its right to file an enforcement action to toll the soon to expire statute of limitations. Delay may also have occurred due to Respondent's refusal to protect and/or clear title to this section of riverbed as required by its public trust obligations. ROA 47 ¶ 59. Finally, the delay could have occurred because no contractor was interested in working on this project due to the issues created by the cloud on the title of the riverbed, and Respondent's awareness of the same. However, the inability to conduct discovery or for Appellant to introduce other relevant evidence, due to his ongoing adherence to the stipulations of the parties, precluded Appellant from raising and supporting these factual issues.

4) Respondent makes the unverified assertion that "[t]he 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." *Respondent's Response Brief* at 12. There is absolutely no evidence in the record establishing Respondent's practices in drafting or entering into consent orders. Case in point, Respondent does not cite to any evidence in the record to support this proposition. Afterall, there are no other consent orders in the record. There are likewise no IDWR policy manuals or testimony from relevant IDWR employees in the record. Instead, this assertion is purely inadmissible speculative character evidence hypothecated by Respondent. *See* IRE 404(a)(1). The purpose appears to be to distract the Court from the simple fact that Respondent delayed two years and 7 months in filing an enforcement action once its "construction completion deadline" was missed.

5) Respondent asserts:

> 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. *Respondent's Response Brief* at 21-22.

This statement by Respondent is misleading. Paragraphs 13-15 of the *Stipulation of Facts for Motion Practice Re: Statute of Limitations* provide:

> 13. 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."
> 14. The actual terms of the Consent Order were not modified, nor was a new consent order signed.
> 15. The Department contends an amended or new consent order was not required because the Department considered Mr. Golart's email an official extension of the construction deadline in the Consent Order.

Contrary to Respondent's assertion in its *Response Brief on Appeal*, Respondent in no uncertain terms stipulated in Paragraph 15 that it considered Mr. Golart's email to be an official extension of the construction deadline in the Consent Order – a deadline Respondent now contends does not exist. The stipulation dose not say, Mr. Golart had no authority to impose a construction completion deadline. The stipulation likewise does not say that Mr. Golart misspoke or that his construction completion deadline was taken out of context. Likewise, there is no stipulation that another later construction completion deadline was provided. Moreover, there is no mention that the construction completion deadline Mr. Golart imposed on behalf of Respondent was only put in place as a "financial incentive deadline." Pursuant to the holding in *Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 43, 382 P.2d 906, 908 (1963), which established a test to determine when a contract with no expiration date should be completed, Appellant contends March 15, 2019 is the only date supported by admissible evidence which could be utilized to begin the running of the two year statute of limitations.

The official extension provided by Mr. Golart specifically contemplated the completion of construction of the river restoration project by March 15, 2019. Based on the admissible evidence in the record and the stipulations of the parties, this statement by Respondent is not and cannot be explained away to raise a factual issue sufficient to defeat Appellant's *Motion for Summary Judgment*. "A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment." *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001). Appellant contends, once that "construction completion deadline" was missed, Respondent was on notice that it could file an enforcement action.

6) Respondent has provided speculative factually unsupported arguments seeking to excuse its delay in initiating both an Administrative Hearing in response to Appellant's May 21, 2019 Objection as

well as an Enforcement Action. *See Respondent's Response Brief* at 16-18. Neither argument to excuse this delay is supported by admissible evidence in the Record.

Respondent admits the Permit Appellant objected to was issued pursuant to Idaho Code § 42-3805. *Respondent's Response Brief* at 16. Idaho Code § 42-3805 states:

> Within fifteen (15) days of the date of mailing of the decision, the applicant shall notify the director if it refuses to modify its plans in accordance with such decision or that it requests a hearing before the board thereon….If requested, such hearing shall be held in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules adopted by the board.

Here, Appellant notified Respondent that he objected to the Permit and refused to modify his plans (for a fifth time) because he viewed Respondent's imposition of new terms as repugnant to the terms of the Consent Order. ROA 59-60. Appellant's Objection also requested a hearing. Id. However, despite the mandate in I.C. 42-3805 to Respondent that a hearing "shall be held," no hearing was initiated by Respondent for two years and 6 months.

There is no admissible evidence cited by Respondent establishing why Respondent did not act to schedule a hearing. First, despite the existence of administrative rules authorizing a stay in informal proceedings, there is no evidence whatsoever of a stay being imposed which would justify Respondent's delay of 2 years and 6 months in initiating an administrative hearing, following Appellant's May 21, 2019 Objection. The applicable rules provide:

> IDAPA 37.01.01.101.03. Stay of Informal Proceedings. During informal proceedings the agency may stay the contested case at the request of the applicant or petitioner, upon stipulation of the parties, when the agency determines that such delay will assist the agency in resolving or deciding the contested case, or when an agency moratorium prevents consideration of the application or petition.

Second, once Appellant had filed his Objection to the Permit on May 21, 2019, pursuant to IDAPA 37.01.01.102 Respondent was required to initiate a formal hearing on those objections.

> IDAPA 37.01.01. 102.FORMAL PROCEEDINGS. When the agency determines that informal proceedings are unlikely to resolve a contested case, the agency will initiate formal proceedings by issuing a Notice of Prehearing Conference and identifying a presiding officer. Representation of parties and other persons in formal proceedings is governed by Rule 201.02

Where no admissible evidence substantiates any excuse for Respondent's delay of 2 years and 7 months in bringing an enforcement action or 2 years and 6 months in initiating an administrative hearing, Summary judgment should have been granted to Appellant.

Respondent inaccurately contends Appellant's request for a hearing prevented the Permit from becoming final until it was reviewed by the Idaho Water Resource Board pursuant to Idaho Code § 42-3805. *Respondent's Response Brief* at 17. If this was true, then any aggrieved party could halt an administrative action in perpetuity by simply filing an objection and never requesting a hearing. This would be unworkable since it would bring the administrative state to a grinding halt based on an objection from a party alleged to be in violation of a rule or law. Instead, Respondent could and should have followed the informal stay procedures permitted in IDAPA 37.01.01.101.03. Respondent's failure to do so is fatal to its factually unsupported position that Appellant bears any blame for Respondent's delay.

Respondent further contends the Permit was a preliminary order pursuant to Idaho Code § 67-5243(1)(b) and that the permit could not become final until it was reviewed in accordance with I.C. 67-5245. *Respondent's Response Brief* at 17. However, I.C. § 67-5245 contains no such prohibition tolling the effectiveness of a permit or preliminary order. Rather, I.C. § 67-5245 allows a preliminary order to become final and for the agency head upon his own motion to review a preliminary order. In fact, that review by the agency head could have occurred within 14 days of Appellant's May 21, 2019 Objection, pursuant to I.C. 67-5245(3). Respondent cites no admissible evidence excusing its delay in pursuing any of these statutorily authorized options.

There is no evidence in the record excusing Respondent's delay of two years and 6 months before it initiated an administrative hearing on Appellant's May 21, 2019 *Objection* in November of 2021. The only admissible evidence in the record and the applicable law leads to the conclusion that Respondent had sole control over the initiation of an administrative hearing or otherwise converting the preliminary order into a final order. A cause of action accrued once Respondent received Appellant's *Objection* to a Consent Order, which specifically required his compliance with the terms of any permit issued pursuant thereto. *See* ROA 56 term 2.

Respondent has no excuse as to why it waited 2 years and 7 months to file an enforcement action. Accordingly, Summary Judgment should have been granted to Appellant.

3. The District Court Erred in Denying Appellant's IRCP 56(d) Motion to Continue by Ignoring the Fact that Appellant was Denied the Opportunity to Conduct Meaningful Discovery.

This Appeal Arises from The District Court granting Summary Judgment to Respondent. Because there is a disputed factual record arising from Respondent's introduction of documents beyond the stipulated factual record, and because Appellant was denied the opportunity to conduct discovery on issues raised thereby, a remand is warranted.

Respondent has taken a myopic view of the implications of its disregard of the stipulations of the parties. Respondent contends Appellant's affirmation that it did not contend the permit Respondent submitted with its *Statement of Facts in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* (ROA 157-195) was falsified, justifies a wholesale denial of Appellant's opportunity to conduct further discovery. *Respondent's Response Brief* at 7.

Respondent's position ignores the fact that it has supplied an incomplete record of what it now alleges were ongoing unconditioned negotiations. Respondent's position also ignores the fact that its introduction of these extraneous records gave Respondent the opportunity to make

arguments supported by what it claims to be an undisputed factual record. In actuality Appellant was denied the opportunity to conduct discovery to develop his own record. Providing Appellant the opportunity to question Respondent's witnesses about when it knew Appellant would not comply with the terms of the Consent Order, why it delayed 2 years and 7 months to file an enforcement action, and numerous other issues addressed in Appellant's briefing in opposition to Respondent's *Cross Motion for Summary Judgment* (*See* ROA 244, 292-293) is a bedrock principle of due process.

This court has held, in the context of evaluating the granting of summary judgment over and above an IRCP 56(d) motion, "one of the objectives of the summary judgment rules is to ensure that a diligent party is given a reasonable opportunity to prepare his case. *Christiansen v. Potlatch #1 Fin. Credit Union*, 169 Idaho 533, 542, 498 P.3d 713, 722, 2021 Ida. LEXIS 174, *25. Here, any assertion that Appellant was anything but diligent, requires a disregard of the terms and context of the stipulations of the parties to present a narrow prearranged factual record. The Court in *Christiansen* went on to issue a remand to allow the Appellant to complete the discovery he had been improperly denied when the trial court declined to grant his IRCP 56(d) motion, pending the results of a motion to compel. The Court in *Christiansen* stated:

> Under the circumstances of this case, the failure to first address Christiansen's motion to compel created a risk that defendants may prevail on the merits despite unreasonably resisting discovery. The district court's failure to rule on Christiansen's motion to compel no doubt affected its decisions on Christiansen's motion to continue and Respondents' motions for summary judgment. *Christiansen v. Potlatch #1 Fin. Credit Union*, 169 Idaho 533, 543, 498 P.3d 713, 723, 2021 Ida. LEXIS 174, *28-29

Here, Respondent's disregard of the stipulations of the parties created a situation where Respondent prevailed on Summary Judgment by unreasonably denying Appellant the opportunity to conduct discovery into facts and arguments related to the documents Respondent improperly

injected into the record. Whether by ignoring discovery requests, necessitating a motion to compel, or a party's disregard of a stipulated factual record at a time where the opposing party had no opportunity to either conduct discovery or introduce his own facts, the result is the same. Disposing of a case on summary judgment where one party was denied his right to discovery is a denial of due process. If this Court is not inclined to reverse the decision of the trial court, a remand on the grounds that Appellant's IRCP 56(d) Motion should have been granted is warranted.

4. Respondent is Not Entitled to an Award of its Attorney's fees on Appeal of this Narrow Issue of First Impression.

Idaho Code § 12-117(1) allows 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." Here, Appellant not only expects to prevail, but he also had a good faith basis in law and fact to initiate this action. The same is true with respect this appeal, to address an issue of first impression regarding the applicability of the two-year statute of limitations in I.C. 42-3809 where Respondent imposed a "construction completion deadline" which expired 2 years and 6 months prior to the initiation of this case. "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). Neither factor is present on this appeal of an issue of first impression.

Respondent correctly indicates 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.* It is undisputed this Court has not addressed the application of the two-year statute of limitations in Idaho Code § 42-3809. Respondent similarly

and correctly notes that "[w]hen 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).

To support its request for an award of its fees and costs on appeal, Respondent makes two arguments that Appellant mischaracterized discrete portions of applicable law cited on appeal. It does not appear Respondent makes the contention that Appellant misrepresented any facts. Rather, Respondent takes issue with Appellants interpretation of Respondent's own admissions – as they are applied to interpreting the Consent Order.

Respondent's first assertion in support of its request for an award of its fees and costs on appeal is that Appellant mischaracterized the holding of this Court in *Fisher v. Fisher*, 84 Idaho 303, 308, 371 P.2d 847, 850, 1962 Ida. LEXIS 213, *9-10. Respondent contends Appellant improperly cited to a summary portion of the issues on appeal in *Fisher*, which precedes the actual decision authorized by Justice McFadden. *Respondent's Brief* at 22 and compare to *Appellant's Brief* at 29.[2] Respondent is correct that Appellant's counsel improperly utilized the word "held" prior to quoting the indented single-spaced portion of page 29 his brief. This oversight improperly framed the citation to the relevant holdings of other cases which followed thereafter, as though they were derived from the text of the Court's opinion in *Fisher*. The oversight appears to have arisen from cutting and pasting the language of an older formatting style utilized by Lexis for old cases into an outline for Appellant's brief. For this Appellant's counsel apologizes and accepts responsibility.

However, the quoted language Appellant improperly attributed to the actual verbiage of the decision in *Fisher v. Fisher* accurately cites to the underlying holdings of the cases referenced

[2] Appellant's counsel utilizes Lexis for his online legal research, not Westlaw as Respondent seems to contend. *See* citation to *Fisher* at Appellant's Table of Authorities and to *Fisher* on Page 29 of his Brief on Appeal.

therein, which are the crux of the citation. Furthermore, and more importantly, the overall holding of *Fisher v. Fisher* comports with the legal point Appellant was seeking to convey regarding the ultimate holding of *Fisher*. Specifically, Appellant relied upon *Fisher* to support the following argument:

> 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 Brief* at 29.

The decision in *Fisher* establishes the following rule, with respect to the binding nature of stipulations of the parties.

> This decree, is based on the stipulation of the parties, and is limited by their agreement, subject to the continuing jurisdiction of the court in matters concerning the welfare of the child, and subject to its continuing jurisdiction to modify support payments under changed conditions. I.C. §§ 32-705, 32-706. Consent decrees must conform to the agreement of the parties, subject to such inherent powers of the court. *Wright v. Wright*, 235 Ky. 387, 31 S.W.2d 614; *Insurance Service Co. v. Finegan*, 196 Okl. 441, 165 P.2d 620. *See also: Strode v. Miller*, 7 Idaho 16, 59 P. 893.
> *Fisher v. Fisher*, 84 Idaho 303, 308, 371 P.2d 847, 850, 1962 Ida. LEXIS 213, *9-10.

Therefore, the actual decision authored by Justice McFadden in *Fisher* does in fact support Appellant's position that the parties were bound by their stipulations in this case to have the case decided based on a predetermined narrow factual record. Therefore, at best, while the misquotation was admittedly unfortunate; this was a harmless error and Appellant had a reasonable basis in law to support his arguments.

The second assertion Respondent makes in support of its request for an award of its fees and costs on appeal is that Appellant mischaracterized I.R.C.P. 56(c)(1). *See Respondent's Brief* at 22-23. First, this assertion seems to be based on a misunderstanding of Appellant's arguments. Respondent frames its arguments around a strawman. Namely, Appellant has not and does not make the contention that all pleadings need to be verified. Rather, as this court is undoubtedly

aware, verification of pleadings is simply good practice. Lawyers apply the law to their clients' facts and other admissible evidence. Verification of pleadings allows the statements made therein to be cited as evidence to be accorded the same weight as statements made in an affidavit.

> A motion for summary judgment can be countered by sworn statements in the record that comply with Rule 56(e) of the Idaho Rules of Civil Procedure. *McCoy v. Lyons*, 120 Idaho 765, 820 P.2d 360 (1991). Those statements can be in affidavits, depositions, or in a verified pleading. *Id*. *Esser Elec. v. Lost River Ballistics Techs., Inc*., 145 Idaho 912, 918, 188 P.3d 854, 860, 2008 Ida. LEXIS 98, *9-10

Respondent elected to proceed to Summary Judgment on unverified pleadings and a stipulated factual record. Respondent's counsel accepted the risks of doing so. Consequently, Respondent cannot rely upon statements made in unverified pleadings as facts when seeking or opposing summary judgment. That conduct is likewise improper on appeal. *See Respondent's Response Brief* at 5 (regarding alleged "ongoing negotiations" between Respondent and Appellant).

Appellant properly cited to IRCP 56(c)(1) for the proposition that "an adverse party cannot produce admissible evidence to support the fact" because Respondent's unverified pleadings, and exhibits thereto, are not admissible evidence. *See also* IRCP 56(e). Likewise, Appellant contends the district court erred in taking judicial notice of certain records introduced by Respondent in violation of the stipulations of the parties. Appellant contends the stipulations of the parties, and their conduct leading up to the stipulations as described in the *Declaration of Counsel* (ROA 237-246), establishes that the parties agreed not to admit extraneous evidence beyond that which was stipulated to. This is not a frivolous argument as it accurately reflects numerous holdings of this Court regarding the binding nature of stipulations. *See Firmage v. Snow*, 158 Idaho 343, 348, 347 P.3d 191, 196, 2015 Ida. LEXIS 97, *10; *Fisher v. Fisher*, 84 Idaho 303, 305, 371 P.2d 847, 848, 1962 Ida. LEXIS 213; *Seward v. Musick Auction, LLC*, 164 Idaho 149, 159, 426 P.3d 1249, 1259, 2018 Ida. LEXIS 179, *24-25, 2018 WL 4472732.

Finally, Respondent makes an ironic argument about Appellant's interpretation of the deadline for completion of the Consent Order, because the district court found the Order unambiguously did not impose a construction completion deadline. Respondent's conclusory arguments about the merits of Appellants position are undercut by Respondent's own briefing. Respondent's *Memorandum in Support of its Cross Motion for Summary Judgment and in Opposition to Appellant's Motion for Summary Judgment* asserted:

> Furthermore, the Consent Order does not have a specified time for full performance. "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). ROA 201.

The parties agree the Consent Order does not have a specified deadline for completion of construction. Respondent's assertion that Appellant lacked any basis in fact or law to assert that the deadline lapsed in the spring of 2019 is nothing short of a state actor seeking to impose a gag order on an opposing litigant. Taken to its logical conclusion, the State seems to assert that it was the only party allowed to introduce evidence and make arguments as to the "subject matter of the contract, the situation of the parties, and the circumstances attending the performance." *See Curzon supra*.

In this case, the Consent Order does have several benchmarks which frame the "subject matter of the contract, the situation of the parties, and the circumstances attending performance." Likewise, Respondent's imposition of a "construction completion deadline" by email, is evidence which the Court can utilize to determine what a "reasonable time" for completion of construction was. This argument is far from nonsensical. It's a reasonable interpretation of the context of Respondent's own Consent Order, which inexplicitly contained no final deadline, when juxtaposed with explicit direction from its lead employee to get moving asap, or else.

II. CONCLUSION

Respondent's fingers were crossed at every stage of this process. From the outset when it represented that an after the fact permit would be issued, when it placed general tangible conditions in a consent order only to overly complicate those simple conditions with highly technical bureaucratic busywork, when it imposed a construction completion deadline, to its representations that it would uphold its public trust responsibilities to clear title to this section of the beds and banks of the Big Wood River, to convincing Appellant to waive its constitutional right to a jury trial, to its agreement to have a portion of the case decided on a limited factual record; over and over again Respondent set out to deceive Appellant. When trust in government is at an all-time low, Respondent's actions only serve to further undermine public confidence. Those actions should not be rewarded with a decision to uphold the District Court's granting of summary judgment based on a lopsided factual record. Appellant asks this Court to reverse the decision of the trial court and hold that the two-year statute of limitations in I.C. § 42-3809 expired prior to Respondent's initiation of an enforcement action as a counterclaim herein. Alternatively, the decision of the trial court to deny Appellant's IRCP 56(d) motion should be reversed and a remand should be issued to enable the parties to engage in discovery.

_/s/ J. Kahle Becker_____
J. Kahle Becker
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _21st_ day of June, 2023, I caused to be served the foregoing *Appellant's Reply Brief* on the following persons:

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_____/s/ J. Kahle Becker_____

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