No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

◆

DON ESSLINGER AND
JENNIFER ESSLINGER,
Petitioners,

SHAWN BASS AND LAREE BASS,
Respondents.

◆

On Petition for Writ of Certiorari to
The Supreme Court of Idaho

◆

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

◆

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Second Judicial District, Idaho County
Kathy Ackerman, Clerk of the Court
By: Deputy Clerk- Sickels, Nikki

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

SHAUN BASS and LAREE BASS, husband and wife, Plaintiffs, vs. DONALD ESSLINGER and JENNIFER ESSLINGER, husband and wife, and DOES I-X, Defendants.	) CASE NO.CV25-20-0513) Memorandum Opinion) Re: Various Motions

This matter before the Court is a property boundary dispute. Plaintiffs Shaun Bass and Laree Bass (hereinafter referred to collectively as Basses) and Defendants Don Esslinger and Jennifer Esslinger (hereinafter referred to collectively as Esslingers) own adjoining property. Prior to October 21, 2020, there was a fence separating the property On October 21, 2020, the Esslingers took that fence down. Declaration of Shaun Bass, filed May 28,

2021, ¶4. On following days, Esslingers took other actions such as taking down trees and removing rock jacks and moving soil on property the Basses believe they own. Id. ¶5. Esslingers do not denied that they have taken those actions, but assert that the property is theirs. Verified Answer and Counterclaim, ¶3.13 The property in dispute is 0.3469 acres and is described and depicted in Exhibit A of the Declaration of Hunter Edwards, filed June 3, 2021.

Before the Court on June 28, 2021 were six motions, which are listed below in the order in which they were heard.

1. Defendants' Motion for Continuance of Hearing on Plaintiffs' Motion for Summary Judgment.
2. Defendants' Motion to Take Judicial Notice of This Court's File in Case No. 2005-36855.
3. Motion to Deem Defendants' Motion for Summary Judgment and Related Pleadings Timely Filed.
4. Plaintiffs' Motion for Summary Judgment on all claims and counterclaims..
5. Defendants' Motion for Partial Summary Judgment.
6. Plaintiffs' Motion for Sanctions.

Argument was given on all Motions by Counsel for Plaintiffs, Sam Creason and Counsel for Defendants, Wesley Hoyt.

DEFENDANTS' MOTION FOR CONTINUANCE

Esslingers are invoking their 5th Amendment right to remain silent because of criminal trespass charges pending against them. The charges are based on allegations made by Basses. They assert they are unable to testify and rebut the claims made by the Basses in their motion for summary judgment and ask for a continuance until the criminal charges are resolved.

Basses argued at hearing that the motion is not timely, it was not noticed for hearing, and because no memorandum supporting the motion was filed, no legal basis was provided to support their request to continue the hearing.

Idaho Rules of Civil Procedure 7(b)(3)(A) requires motions to be filed at least 14 days prior to the hearing. This motion was filed on June 23. For that reason, as well as the fact that no legal basis was provided for the motion, the Court denied the motion.

DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE

Esslingers ask the Court to take judicial notice of the entire file for Idaho County District Court Case No. CV 2005-36855. This case was a quiet title matter, with Peg Marek as plaintiff and various members of the Large family as defendants. Peg

Marek was one of the predecessors in interest to the property now owned by the Esslingers.

This motion was also filed on June 23. Esslingers argue that the motion was timely under the two-day rule. [1]

Basses note that the Motion to take Judicial Notice was not timely filed. They further noted that Esslingers have to burden to present to the court what they want considered.

A request to take judicial notice of an adjudicative fact is governed by I.R.E. 201 and is evidentiary in nature. Fortin v. State, 160 Idaho 437, 442, 374 P.3d 600, 605 (Ct.

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[1] Esslingers did not provide authority for the "two day rule." The Court is left to surmise that Esslingers were referring to I.R.C.P. 7(3)(C), which provides that a reply brief or memorandum may be filed by the moving party until 2 days before the hearing. This motion was not a brief or memorandum.

App. 2016), citation omitted. The Court must take judicial notice if a party requests it and the court is supplied with the necessary information. I.R.E. 201(c)(2). If a party requests the court take judicial notice from a separate case, as the Esslingers are requesting, they must identify the specific items for which judicial notice is requested or offer to the court and opposing party copies of those items. Id.

Fortin v. State, supra, was an appeal of a summary dismissal of a post conviction case. Fortin

had asked the lower court to take judicial notice of the underlying district court and appellate records. The Court of Appeals held that the specificity requirement of I.R.E. 201 requires that a party provide more than a blanket reference to an entire case file when requesting the court take judicial notice of documents within it. Fortin, Id The party requesting judicial notice, the Court of Appeals said, is in the best position to identify and refer the court to relevant information that substantiates its claim. Id.

Esslingers did not identify specific items in the quiet title case they were requesting the court take judicial notice of, nor did they provide the court and Basses with the items they wanted considered[1]. The Court will not take judicial notice of the entire file for Idaho County District Court Case No. CV 2005-36855.

Timeliness is also an issue. Esslingers rely on what they call the two-day rule. However, the request was filed as a motion, and as stated above, motions must be filed 14 days prior to hearing.

DEFENDANTS' MOTION TO DEEM FILINGS TIMELY

Esslingers ask the Court to deem five documents filed on June 2, 2021 as timely filed.

[1] The record does contain the Decree from Case no. CV 2005-36855 as Exhibit A of the Declaration of Wesley W. Hoyt and Exhibit C of the Declaration of Hunter Edwards.

Those documents include Defendant's Motion for Partial Summary Judgment; Defendant's Memorandum in Support of Partial Summary Judgment; Declaration of Hunter Edwards; Declaration of Wesley W. Hoyt; and Notice of Hearing on Defendant's Motion for Partial Summary Judgment. Esslingers state that the documents were initially filed on June 1, 2021, but were rejected by the electronic filing system.

The Court granted the motion to deem that the five documents were timely filed.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Basses ask the Court to grant summary judgment and declare that what they call the "historic fence" is the true boundary between them and the Esslingers. They also ask the Court to grant their claim of civil trespass and to award damages.

Basses also ask that the Court to dismiss the Counterclaims the Esslingers have filed against them, including racketeering, breach of contract, unjust enrichment, and intentional interference with prospective economic advantage.

Summary judgment standard. Summary judgment is granted if the pleadings, depositions, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Berian v. Berberian, 168 Idaho 394, 483 P.3d 937, 944 (2020), citation omitted. See also I.R.C.P. 56(a). If there are no disputed issues of material fact, then only a question of law remains. Id.

The Court considers the pleadings and any depositions and admissions on file, as well as any affidavits submitted, to determine if summary judgment is appropriate. Path to Health, LLP v. Long, 161 Idaho 50, 383 P.3d 1220, 1224 (2016), citation omitted. The facts are liberally construed in favor of the non-moving party. Id But the non-moving party can not merely rely on allegations or denials of the pleadings, but must respond with affidavits that show there is an issue for trial. Id.

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. Benan, supra. If the moving party has demonstrated the absence of a question of material fact, the burden shifts to the nonmoving party to demonstrate an issue of material fact that will preclude summary judgment. The nonmoving party must present evidence contradicting that submitted by the movant, and which demonstrates a question of material fact. Id.

Declaratorv judgment as determined by "boundary by agreement." Basses pled, and provided

evidence in support of, their position that the historic fence is the boundary between their parcel and the Esslingers, under the legal theory of boundary by agreement.

A recent Idaho Supreme Court opinion outlines the proof of a boundary by agreement and shows that there is a long history of the theory:

> 'Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary.' *Cecil v. Gagnepin*, 146 Idaho 714, 716, 202 P.3d 1, 3 (2009) (quoting *Downey v. Vavold,* 144 Idaho 592, 595, 166 P.3d 382, 385 (2007)). 'A long period of acquiescence by one party to another party's use of the disputed property provides a factual basis from which an agreement can be inferred.' *Boyd-Davis v. Baker*, 157 Idaho 688, 693, 339 P.3d 749, 754 (2014) (quoting *Griffe/ v. Reynolds*, 136 Idaho 397, 400, 34 P.3d 1080, 1083 (2001)). However, acquiescence, by itself, does not constitute a boundary by agreement. [d. This Court has held that a fence or other visible demarcation is necessary to give later purchasers constructive notice of the agreed-upon boundary. *Cecil*, 146 Idaho at 717, 202 P.3d at 4; *Paurley v. Harris*, 75 Idaho 112, 117, 268 P.2d 351, 353 (1954); *Neideru Shaw*, 138 Idaho 503, 506, 65 P.3d 525, 529 (2003).

Owen v. Smith, 485 P.3d 129, 138 (Idaho 2021).

Basses have provide evidence showing that there was (1) an uncertain boundary and (2) a subsequent agreement fixing the boundary. They have also provided evidence that there was a fence present when Esslingers purchased the land that would provide them with constructive notice of an agreed-upon boundary.

Peg Marek, one of the predecessors in interest to the land that Esslingers now own testified in deposition that the property was not fenced[2] when she and her husband bought it in 1976. Declaration of Samuel T. Creason, Ex. B, p. 10. She continues to testify:

> Q. Okay. Do you know where the deeded property line at that end of the —south end of the property was when you bought it?
>
> A. No we didn't.
>
> Q. Do you know where the fence was built?
>
> A. (Nods head affirmatively.)
>
> Q. Tell me that.
>
> A. Yes. We met with Glen Wilkins [predecessor in interest of the Basses' property] and Babe Maynard, Lowell Maynard and Jack [Peg Marek's deceased husband] wanted to put it on the level ground there so that it wasn't down over the bank for the cattle

[2] Later in the deposition, she testifies that she does not remember whether there was a fence or not.

> to crowd, and it would be harder to maintain the fence.
>
> And he said, well, let's just put it right here on the level, on this level ground here. And Babe and Glen Wilkins and Jack and I, we all shook hands and agreed on that's where it would be. And Jack told them they could do — or have anything below the fence and do whatever they wanted to with it. ...

Id., p. 12 11,21-25, p. 13, ll. 1-12.

The Declaration of Laree Bass states that she helped to build the historic fence in the 1970s and that fence was built on the same line her great-grandfather had used to build a previous fence in the 1930s. Declaration of Laree Bass, 11 2. Laree Bass also declared that the historic fence was in place until it was taken down in October 2020 by the Esslingers. Id.

Esslingers maintain that Basses' claim of boundary by agreement was cut off by a Quiet Title decree entered in 2006 in Idaho County case CV2005-36855. Peg Marek was the plaintiff in this case; the defendants were various members of the Large family, from which she and her husband purchased the property that Esslingers now own. Declaration of Margaret "Peg" Marek (second declaration, filed June 14, 2021). The purpose of the quiet title action was to address an error in the legal description in a

deed and escrow agreement between the Mareks and the Larges. Id., 11 3.

Esslingers have presented no evidence to dispute the existence of the fence or any of the evidence the Basses have presented in regard to the fence. Their reliance on the 2006 quiet title action fails to recognize an important principle of the boundary by agreement legal theory, as explained by the Supreme Court case Griffin v. Anderson:

> Such an agreement does not effect a conveyance of land from one party to the other. *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990). Instead, it establishes 'the location of the respective existing estates and the common boundary of each of the parties.' Id. As a result, '[o]nce there is an agreed upon boundary, the parties to the agreement are no longer entitled to the amount of property provided for in their deeds and must absorb the effect of any increase or decrease in the amount of their property as a result of the new boundary.' *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001).

Griffin v. Anderson, 144 Idaho 376, 378, 162 P.3d 755, 757 (2007).

And, as Ms. Marek points out, the quiet title decree was not instigated to determine a boundary between the property in question and the Basses, but was correct an error in the legal description.

Declaration of Peg Marek (second), 11 3. The action did not present a claim that was adverse to Basses. Mareks were not claiming that they owned the disputed property. Id., T 5. The quiet title action has no effect on this lawsuit.

Basses have proved the elements of boundary by agreement. The Mareks, in the 1970s, did not know where the actual boundary was between what is now the Bass and the Esslinger property. They agreed with the Basses' predecessors-in-interest to have the fence be the boundary. The fence was in place when the Esslingers purchased the property, giving them constructive notice.

While Esslingers have provided no evidence to dispute Basses' proof of boundary by agreement, they have provided evidence to dispute Basses' claim of adverse possession. This evidence is that Mareks, the owners of the property after the Mareks and before Esslingers, and Esslingers have all paid property taxes for the disputed property. Basses have not pursued an adverse possession claim, but for the purposes of this summary judgment motion have relied on proving their case by boundary by agreement, which they have successfully done.

Damages. Basses have presented evidence to the Court regarding the damages that resulted from the Esslingers' actions. Esslingers have presented no evidence to dispute the damages amounts as

presented by affidavit[3]. As Esslingers have not addressed Basses' claims for damages, the Court can consider the facts undisputed.

I.R.C.P. 56(e)(2). Damages are awarded in the requested amount of $107,134.32. This amount is the amount requested to replace the trees and fence removed by

Esslingers, tripled in accordance with Idaho Code S6-202(3)(b). Esslingers entered on the property belonging to Basses without permission and caused damage in excess of $1,000.

Uniust Enrichment. Summary judgment is granted to Basses, making a claim for unjust enrichment not applicable.

Negligent Infliction of Emotional Distress. Basses are not seeking summary judgment under this claim.

Esslingers' counterclaim for racketeering. Esslingers claim that Basses acted in concert with other unnamed individuals to prevent them from selling their land by filing this lawsuit, intimidating the Esslingers' real estate agent, and destroying game cameras to video the activities of the Basses. See Verified Answer and Counterclaim, ¶

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[3] The Declaration of Russ Lindsley places the costs to replace the trees at $19,920.00-$22,400.00. Basses requested the higher amount, noting that the mature trees will be replaced with smaller trees, requiring greater maintenance. The Declaration of Adam Van Vleet places the cost to replace the fence at $14,311.44.

28 through 41. This, they assert, is racketeering in accordance with Idaho Racketeering Act, Idaho Code S 18-7801 et seq. They also assert their racketeering claim through the Declaration of Matthew McGary.

Basses deny that they have entered into any racketeering action through their declarations and assert that no reasonable jury would find that the evidence of racketeering presented by Matthew McGary rises to the level of racketeering.

That evidence is a Mr. Bradley yelled at Esslingers and McGary when he drove by, that Bradley met Carrie Marek on the road and they had an animated conversation which included the words "stop them" and that he observed another conversation between Bradley and Laree Bass in which the words "stop them" were uttered. They have provided no evidence to support their claim of intimidation of Esslingers' real estate agent or destruction of the game camera.

The Court agrees that such scant evidence of overheard conversations do not rise to the level of racketeering. Summary judgment is awarded for Basses against
Esslingers' counterclaim of racketeering.

Esslingers' counterclaim of breach of contract.

Esslingers claim that Shaun Bass entered a contract on November 7, 2020 when the surveyor established a boundary between the properties by placing a string from monument to monument. Counterclaim, 1123. Esslingers state that at that time, Bass agreed

that he recognized the string as boundary between the two properties. Id. Bass asserts that at no time did they agree with Esslingers as to the boundary between the properties. Declaration of Shaun Bass Esslingers have provided no evidence in support of their claim that a contract existed, other than their bare assertions in the Counterclaim. The Esslingers cannot merely rely on allegations or denials of the pleadings, but must respond with affidavits that show there is an issue for trial. See Path to Health, LLP v. Long, supra.

Summary judgment is awarded to Basses on Esslingers' counterclaim of breach of contract.

Esslingers' counterclaim for unjust enrichment. Esslingers claim that Basses interference with the potential sale of their property would unjustly enrich the Basses. Counterclaim, 56.

As stated above, Esslingers have provided no proof to support their claim that Basses interfered with the potential sale of their property. The Esslingers cannot merely rely on allegations or denials of the pleadings, but must respond with affidavits that show there is an issue for trial. See Path to Health, LLP v. Long, supra

Summary judgment is awarded to Basses on Esslingers' counterclaim of unjust enrichment.

Esstingers' counterclaim for intentional interference with prospective economic benefit. Esslingers claim that Basses interfered with the listing of their propeny for sale and the prospective economic benefit from the sale of their property. Counterclaim, ¶ 58.

Esslingers have provided no proof to support their claim that Basses interfered with the potential sale of their property. The Esslingers can not merely rely on allegations or denials of the pleadings, but must respond with affidavits that show there is an issue for trial. See Path to Health, LLP v. Long, supra.

Summary judgment is awarded to Basses on Esslingers' counterclaim of intentional interference with prospective economic benefit.

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

Esslingers ask the Court to dismiss Basses' claim for adverse possession, based on the fact that they have not paid property taxes on the disputed property.

In accordance with Idaho law, Basses have proved that they own the disputed property by providing evidence of a boundary by agreement. Under that legal theory, they did not have to show that they paid property taxes on the property.

Even if they did pursue an adverse possession theory, Esslingers have not provided admissible evidence to show that Esslingers and their predecessors-in-interest paid the property taxes on the disputed property.

Esslingers' Motion for Partial Summary Judgment is denied.

MOTION FOR SANCTIONS

Basses have asked the Court to impose sanctions on the Esslingers because of Jennifer Esslinger's refusal to answer most questions posed at her deposition on April 8, 2021. Basses assert that Esslingers did not mention any Fifth Amendment concerns until the deposition started. Sanctions requested include an award of fees and costs relating to the deposition and preparing the motion for sanctions and an order prohibiting Esslingers from arguing their defenses and counterclaims.

Esslingers claimed her Fifth Amendment privilege against self-incrimination because they have been subject to numerous criminal prosecutions by the Basses which were not resolved at the time of the deposition.

The imposition of sanctions for discovery violations is within the discretion of the court. Roe v. Doe, 129 Idaho 663, 666, 931 P.2d 657, 660 (Ct. App. 1996)

The Fifth Amendment "accords [ ] a privilege against answering official questions in other

proceedings, civil or criminal, where the answers might be used to incriminate [ ] in a future prosecution." *McPherson v. McPherson*, 112 Idaho 402, 404, 732 P.2d 371, 373 (Ct. App. 1987), citation omitted.

Esslingers acknowledge that Basses "suffered some inconvenience" by their assertion of the privilege. See Defendants' Response and Memorandum in Opposition to Motion for Sanctions. That inconvenience could have been alleviated by Esslingers through simple measures as a discussion with Basses' counsel prior to the deposition or filing for a protection order. Further, the responsibility for weighing the reasonableness of the claim of a Fifth Amendment privilege lies with the Court, not with the party. *McPherson*, supra.

The Court, in its discretion, declines to impose sanctions. Even though Esslingers' conduct is not to be condoned, Basses have received the relief that they have requested through this Memorandum Opinion.

CONCLUSION

1. Esslingers' Motion to Continue was denied at hearing.
2. Esslingers' Motion to Take Judicial Notice is denied.
3. Esslingers' Motion to Deem Filings Timely was granted at hearing.
4. Basses' Motion for Partial Summary Judgment is granted and Basses are awarded the sum of $107, 134.32.

5. Esslingers' Motion for Partial Summary Judgment is denied.
6. Basses' Motion for Sanctions is denied.

DATED: 7/20/2021 2:50:06 PM

s/ Gregory FitzMaurice .
Gregory FitzMaurice, District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Opinion re: Various Motions was served by iCourt E-Service to:

Samuel T. Creason samc@cmd-law.com

Wesley W. Hoyt hoytlaw@hotmail.com

Dated this 20 day of July, 2021

Clerk of the District Court
By: s/ Nikki Sickels

Filed: 09/14/2021 13:24:20
Second Judicial District, Idaho County
Kathy Ackerman, Clerk of the Court
By: Deputy Clerk- Sickels, Nikki

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

SHAUN BASS and LAREE BASS, husband and wife, Plaintiffs, vs. DONALD ESSLINGER and JENNIFER ESSLINGER, husband and wife, and DOES I-X, Defendants.	) CASE NO.CV25-20-0513) Memorandum Opinion) Re: Motion to Reconsider

Defendants Donald Esslinger and Jennifer Esslinger[1] have filed a Motion for Reconsideration of the Summary Judgment Opinion entered by the Court on August 10, 2021. The Motion was heard August 30, 2021 via Zoom. Participating were Wes Hoyt, counsel

[1] The Defendants will hereafter referred to collectively as "Esslingers„" Also, the Plaintiffs will be referred to as Basses."

for the Esslingers and Sam Creason, counsel for the Basses. Having heard argument and considering the briefing and the file, the Court hereby renders its decision.

This matter is a property boundary dispute. The Court found, in the August 10 Opinion, that the Basses proved the elements of boundary by agreement and that the historic fence line was the boundary between Basses' property and Esslingers' property. Esslingers ask the Court to reconsider that finding.

APPLICABLE LAW

A motion for reconsideration of an interlocutory order is considered under IRCP 11(a)(2)(B). A court can take into account any new facts or new law presented by the movant that affect the correctness of the original order. *Int'l Real Estate Solutions, Inc. v. Arave*, 157 Idaho 816, 819t 340 P.3d 465, 468 (2014). However, new facts or new law are not required. *Arreguj v Gallegos-Main*, 153 Idaho 801, 808, 291 P.3d 1000, 1007 (2012).

DISCUSSION

Esslingers' Motion for Reconsideration centers on the 2006 quiet title action between Peg Marek and her predecessors-in-interest, the Larges. In 2006, Marek owned the property now owned by Esslingers. It is undisputed that the quiet title case concerned a parcel of land which contained, in part, the 0.364 acres in dispute in this action. Esslingers maintain that the 2006 quiet title action granted the disputed parcel to Marek, and as a predecessor in interest to the Esslingers, is dispositive in this case. Esslingers have not introduced any new facts or new law for the Court to consider.

Esslingers take issue with the Court's determination that the quiet title case had no effect on this lawsuit and maintain that if the Court had taken judicial notice of the entire file in that case, as they had requested, the Court would have found in favor of Esslingers.

The Court declined to take judicial notice of the quiet title case, Idaho County Case No. CV 2005-36855, citing the untimeliness of the motion and Esslingers' failure to identify with specificity which documents they requested the Court to take notice of.

The Court now notes that Esslingers did specifically request the Court note the decree in the quiet title case. See Defendant's Motion to Take Judicial Notice of this Court's file in Case No. 2005-36855, ¶ 10. However, Esslingers were not prejudiced by the Court not taking judicial notice of the decree, because, as the court noted in the Memorandum Opinion, the decree was part of the record in this case as Exhibit A of the Declaration of Wesley W. Hoyt and Exhibit C of the Declaration of Hunter Edwards. Memorandum Opinion, fn. 2. Thus, the Court did consider the document that Esslingers asked the Court to note.

Esslingers did not address the timeliness issue. Motions must be filed 14 days prior to the date set for hearing. I.R.C.P. 7(b)(3)(A). This motion was filed 5 days prior to the hearing, and was untimely.

Esslingers argue that Peg Marek and her deceased husband did not own the disputed parcel when they made the fence line agreement in 1976 because it was not transferred to them by legal document. Therefore, they could not agree with their neighbors that the fence would be the boundary. Esslingers have provided no evidence that Larges, the previous owners, laid any claim to or had any

possessory interest in the parcel in 1976 such that Mareks could not enter and allege ownership and agree to a fence line boundary.

Notwithstanding that fact, the evidence shows that Mareks, after they gained quiet title in 2006, continued to honor the fence line boundary between them and Basses, affirming the agreement.

Esslingers also assert that the agreement was that the historic fence was a pasture fence, not a boundary fence. Esslingers provided no authority that makes such a distinction dispositive.

Esslingers further assert that the Declaration of surveyor Hunter Edwards, regarding the surveyed line between the properties was sufficient to raise an issue of material fact. There has been, and is no dispute that the surveyed line between the properties, according to the concerned deeds, is the same in all the deeds and does not coincide with the historic fence line. However, the general rule is that lines marked on the ground control over calls for courses and distances, as long as those lines reflect the intention of the parties:

> 'The fundamental principle underlying all of the rules of construction of deeds, as well as all other contractual instruments, is that the courts must seek and give effect to the intention of the parties . . . The general rule is that monuments, natural or artificial, or lines marked on the ground, control over calls for courses and distances.'

Nielson v. Talbot, 163 Idaho 480, 485-6, 415 P.3d 348, 353-4 (2018), quoting *Campbell v. Weisbrod*, 73 Idaho 82, (89, 245 P.2d 1052, 1057 (1952) (internal citations omitted.) And, as noted in the recent Nielson case and as stated in the Court's Memorandum Opinion, once there is an agreement as to the boundary, the parties are no longer entitled to the amount of property provided for in their deeds. *Nielson*, 163 Idaho at 488, 415 P.3d at 356.

Esslingers have provided no evidence that shows that the intent of the prior owners of their parcel intended the boundary to be the metes and bounds description.

There is no dispute that the historic fence was in place when the Esslingers purchased the property, giving them notice of the altered property line. See Nielson, (it was undisputed that there was an agreement upon the altered property line, and the monuments on the ground gave notice of the altered property fine.) 163 Idaho at 487, 415 P.3d at 355.

Esslingers also take issue with the Court's consideration of the Declarations of Peg Marek, saying that her declaration violated the parol evidence rule and the Court used her statements to modify a court order. This Court has not modified the Decree issued in the 2005-6 quiet title case. Further, the Court can consider the issue waived if it is first mentioned in a motion for reconsideration, which this was. *ABK LLC v. MidCentury Ins. Co.*, 166 Idaho 92, 101-02, 454 P.3d 1175, 1184-85 (2019).

Finally, Esslingers assert that Basses are bound by the quiet title action because they had constructive notice of the suit by service by publication. Although the record does not show when Basses became the owners of their property, the record does show that the property has been in Mrs. Bass's family since 1927 and certainly the ownership

of that property would be easily ascertainable by Mareks through county records. Due process would require that Basses received actual notice, not constructive notice. Idaho law allows service by publication only if the person to be served cannot be found after due diligence. Idaho Code 5-508.

CONCLUSION

Esslingers have provided no new facts or law in their motion for reconsideration. The argument they present does not show that there is a genuine issue of material fact that defeats summary judgment. The Motion for Reconsideration is denied.

DATED: 9/14/2021 12:13:38 PM

s/ Gregory FitzMaurice .
Gregory FitzMaurice, District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Opinion re: Motion to Reconsider was served by iCourt E-Service to:

Samuel T. Creason samc@cmd-law.com

Wesley W. Hoyt hoytlaw@hotmail.com

Dated this 14 day of September 2021

Clerk of the District Court
By: s/ Nikki Sickels

Shaun BASS and Laree Bass, Husband and Wife,
Plaintiffs-Counterdefendants-Respondents,
v.
Donald ESSLINGER and Jennifer Esslinger,
Husband and Wife, Defendants-
Counterclaimants-Appellants,
And Does I-X, Defendants.
Docket No. 49240
Supreme Court of Idaho, Boise, January 2023 Term.
Opinion Filed: March 2, 2023
525 P.3d 737

Summaries:Source: Justia

This appeal involved a dispute over ownership of one-third of an acre of land between two parcels near Slate Creek, Idaho. The disputed one-third acre was located south of a fence erected in the 1970s by the family of the current owners of the southern parcel, the Basses, and the predecessors-in-interest to the northern parcel's current owners, the Esslingers. The district court granted summary judgment for the Basses, declined to take judicial notice of a case file from a 2006 quiet title action concerning the northern parcel, found that a boundary by agreement existed at the historic fence line, denied a motion to continue the summary judgment hearing pending criminal trespass charges against the Esslingers, and granted the Basses $107,134.32 in treble damages. After review, the Idaho Supreme Court affirmed the district court's decisions.

Law Office of Westley Hoyt, Clearwater, for Appellants. Wesley Hoyt argued.

Creason, Moore, Dokken & Geidl, PLLC, Lewiston, for Respondents. Samuel T. Creason argued.

BRODY, Justice.

[525 P.3d 740]

This appeal involves a dispute over ownership of one-third of an acre of land between two parcels near Slate Creek, Idaho. The disputed one-third acre is located south of a fence erected in the 1970s by the family of the current owners of the southern parcel, the Basses, and the predecessors-in-interest to the northern parcel's current owners, the Esslingers.

The district court granted summary judgment for the Basses, declined to take judicial notice of a case file from a 2006 quiet title action concerning the northern parcel, found that a boundary by agreement existed at the historic fence line, denied a motion to continue the summary judgment hearing pending criminal trespass charges against the Esslingers, and granted the Basses $107,134.32 in treble damages. Today, we affirm the decisions of the district court. We also award attorney's fees to the Basses for part of the appeal under Idaho Code section 12-121.

I. FACTUAL AND PROCEDURAL BACKGROUND

Outside Slate Creek, Idaho, Shawn and Laree Bass own a five-acre parcel of land off highway 95. To the north of the Bass's land, Donald and Jennifer Esslinger own three parcels of land. The southern

boundary of one of those parcels is the northern boundary of the Bass land. Along this boundary line, there is one-third of an acre that both the Basses and the Esslingers contend they own. The Basses claim that the land is theirs because of a fence that existed on the northern side of the disputed land, while the Esslingers claim that the fence is not the correct boundary and that they own the property just to the south of the fence.

The Bass family has owned the southern parcel since at least the 1940s. The fence that they believe marks the boundary line between their property and the Esslingers' property was most recently built in the 1970s by the Bass family and the prior owners of the Esslinger parcel, the Mareks. When the fence was built, it was agreed by the owners of both parcels that it was the boundary between the two parcels.

The Esslingers purchased the northern parcel in 2019. In preparing to sell the property in late 2020, the Esslingers hired a surveyor to mark the exact boundaries between the two properties. The surveyor determined that the actual boundary between the two properties was just south of the [525 P.3d 741] fence and included the one-third acre now in dispute.

On the day of the survey, the Basses and the Esslingers were both present. The Esslingers contend the Basses understood where the actual boundary was located, while the Basses maintain that they understood the fence line to be the correct division between the two properties. The Esslingers subsequently took down the fence, cut down trees,

removed underbrush, and mowed the area. Despite the Basses' objections, the Esslingers continued to remove trees and vegetation from the disputed land over the next month.

A. History of the Esslinger Parcel

The Large family owned the northern parcel, along with two other nearby parcels, until 1976. The Marek family purchased the land at that time and owned it until 2007. When the Mareks purchased the land from the Larges, the families entered into a financial agreement, (the "Escrow Agreement,") that provided that after the down payment, the Mareks would make yearly payments to the Larges until the total purchase price had been paid. In that agreement, the Mareks agreed to "keep the property in the same condition that it then was."

The purchase price was paid off and a warranty deed in favor of the Mareks was recorded in 1999. The three parcels remained in the Mareks' possession without issue until 2005, when it was discovered that title to the parcels was incomplete because the warranty deed previously recorded lacked a legal description for the northern parcel. The Mareks filed suit to quiet title to the northern parcel in their names. Because the elder Larges who had sold the Mareks the property had since passed away and the location of the Larges' heirs was unknown, the Mareks filed a motion asking for permission to publish notice of the quiet title action in the local newspaper as authorized by Idaho Code section 5-508. The notice was published in the Idaho County Free Press for a month and provided notice to

the Larges and "their creditors (known or unknown), unknown heirs, devisees, or legatees, their successors in interest," or "any other parties who might claim in interest in or to the" disputed property.

Without response from any adverse parties, the Mareks successfully quieted title to the northern parcel in their names. The Basses did not participate and were not named as parties in the quiet title action ("the Quiet Title Litigation").

B. Procedural History

After the Esslingers entered the northern parcel, took down the fence, and removed the trees, the Basses filed their initial complaint, requesting a restraining order to prevent further damage, asking for injunctive relief to quiet title to the disputed property based on boundary by agreement, and alleging trespass and timber trespass against the Esslingers. With their answer, the Esslingers filed counterclaims alleging criminal racketeering, unjust enrichment, and breach of contract, among others. Around the same time, the Esslingers learned that criminal trespass charges were also being brought against them based on the same facts pled in the Basses' civil complaint. These charges included the possibility of jailtime for both Esslingers.

Following the initial filings and an agreement not to make use of the property until the case was resolved, the parties scheduled depositions of the Esslingers in Grangeville, Idaho. The parties traveled to Grangeville in April 2021, to complete the Esslingers'

depositions. About half an hour into the first deposition, Jennifer Esslinger invoked her Fifth Amendment right against self-incrimination under the United States Constitution and stopped answering questions. Don Esslinger's deposition was over in minutes because he also invoked his Fifth Amendment right. Based on the pending criminal charges, the Esslingers later explained, they were unable to answer any questions during the depositions because they were concerned that they would be offering testimony that would be misconstrued against them as direct or circumstantial evidence of criminal conduct that had not occurred.

After the depositions, the Basses filed a motion for summary judgment against the Esslingers and a motion for sanctions against [525 P.3d 742] the Esslingers' attorney, alleging that the "objections and refusals to answer went far beyond particular aspects regarding the transcripts." The Esslingers also filed a motion for summary judgment and a hearing was set for late June 2021.

Two days before the hearing and nearly two months after the depositions, around 10:00 p.m., the Esslingers filed a motion to continue the hearing because, based on the pending criminal trespass charges, "Defendants [had] exercised their Fifth Amendment right to remain silent and by remaining silent, they [would be] deprived of the opportunity to testify and rebut the false allegations against them raised in Plaintiff's Motion for Summary Judgment." They also filed a motion for judicial notice, asking the

district court to "take judicial notice of all documents including but not limited to the pleadings, notices, judgment, Order and Decree" from the earlier Quiet Title Litigation. The district court, citing both timeliness issues and substantive problems with the Esslingers' motions, denied the motions and granted summary judgment for the Basses on the boundary by agreement claim. The Esslingers filed a motion for reconsideration, which was also denied, and this appeal followed.

II. ANALYSIS

A. The district court did not err in denying the Esslingers' motion to continue the summary judgment hearing.

The Esslingers challenge the district court's denial of their motion to continue the summary judgment hearing, contending that the invocation of their Fifth Amendment rights precluded them from submitting material evidence in opposition to the Basses' motion for summary judgment. The district court denied the motion because it was untimely and also because the Esslingers had failed to provide legal authority supporting their position.

"The decision to grant or deny a motion for continuance is within the discretion of the judge." *State v. Payne*, 146 Idaho 548, 567, 199 P.3d 123, 142 (2008). The criminal charges were initiated in November of 2020, and the Esslingers did not file their motion until two days before the summary judgment hearing in June 2021. Idaho Rule of Civil Procedure

7(b)(3)(A) requires motions to be filed at least fourteen days prior to the hearing. The district court's decision to deny a continuance on timeliness grounds was consistent with the time standards set forth in Rule 7. As such, the Esslingers have failed to demonstrate an abuse of discretion.

B. The district court did not err when it declined to take judicial notice of the entire file from the Quiet Title Litigation.

The Esslingers requested that the district court take judicial notice of "all documents including but not limited to the pleadings, notices, judgment, Order and Decree" from the Quiet Title Litigation. The district court denied that request, finding that "the Esslingers did not identify specific items in the [Quiet Title Litigation file] they were requesting the court take judicial notice of." Moreover, the district court pointed out that the timeliness of the motion for judicial notice was an issue; it was filed two days before the hearing, while Idaho Rule of Civil Procedure 7(b)(3)(a) states that a motion must have been filed two weeks prior. We hold that even if timeliness was not an issue, the Esslingers have not provided the necessary information required for the court to take judicial notice of the Quiet Title Litigation.

Whether a district court erred in taking or not taking judicial notice is an evidentiary question we review under the abuse of discretion standard. *Rome v. State*, 164 Idaho 407, 413, 431 P.3d 242, 248 (2018) ; see also *Bolognese v. Forte*, 153 Idaho 857, 863–64, 292 P.3d 248, 254–55 (2012) (asking whether the district court

abused its discretion by failing to take judicial notice of ordinances and administrative rules but not specifying the particular judicial notice rule at issue). Idaho Rule of Evidence 201 provides the general rule for judicial notice of "adjudicative facts." An "adjudicative fact" is a "[a] controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding [525 P.3d 743] and that helps the court or agency determine how the law applies to those parties." *State v. Lemmons*, 158 Idaho 971, 974, 354 P.3d 1186, 1189 (2015) (internal quotation marks omitted) (quoting Black's Law Dictionary 610 (7th ed. 1999)). Idaho Rule of Evidence 201(c) provides:

The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed. When a party requests judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the party must identify the specific items for which judicial notice is requested or offer to the court and serve on all parties copies of those items. I.R.E. 201(c).

While we have not previously examined the standard for taking judicial notice of an entire case file in the civil context outside of post-conviction proceedings,

our precedent shows that a party must be specific in their requests for notice because "judicial notice is intended to preserve judicial efficiency by recognizing facts that are easily and objectively verifiable." *State v. Lemmons*, 158 Idaho 971, 979, 354 P.3d 1186, 1194 (2015); *Rome v. State*, 164 Idaho 407, 416, 431 P.3d 242, 251 (2018).

In *Rome v. State*, a jury had convicted the defendant of aiding and abetting a burglary. 164 Idaho at 410, 431 P.3d 242. The defendant requested judicial notice of seven items, including "The Clerk's Record on Appeal" from his direct appeal, the court's complete file from his underlying criminal case, and the "court file" in another criminal case. Id. at 414, 431 P.3d at 249. None of his requests asserted that they pertained to adjudicative facts, and most of them failed to specify what the district court was supposed to take notice of. Id. at 415, 431 P.3d at 250. This Court considered what standard to use in reviewing the district court's decision and whether the defendant met the specificity requirements in his requests. Id. In considering the specificity requirements, we explained that "[p]roviding the 'necessary information' means supplying the court with a specific reference to the adjudicative fact or facts contained in the designated record, exhibit, or transcript that is relevant to the cause of action or specific claim before the court." Id. at 414, 431 P.3d at 249.

In this case, the Esslingers have failed to specify what adjudicative facts would have been relevant to the cause of action. They highlighted that the case file

they requested notice of was "very small," and that "literally, every one of the six (6) pleadings in this file is relevant to the Esslingers' case and should have been available for them to use and argue in the defense against summary judgment." The district court, in making its decision, considered the decree from the Quiet Title Litigation, along with Peggy Marek's explanation of the case in her declaration. The Esslingers do not explain what, if any, additional substance the district court would have gleaned had it considered the rest of the record. Instead, they maintained that Peggy Marek's assertion that she owned the disputed land, the caption and paragraphs naming the parties involved in the Quiet Title Litigation that do not include the Basses, and the other documents are "of relevance," but do not explain why.

Similar to *Rome v. State*, the specificity burden has not been met here. It 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. Thus, the district court did not abuse its discretion in concluding that the Esslingers did not properly request judicial notice.

C. The district court did not err when it granted summary judgment for the Basses.

The district court granted summary judgment in favor of the Basses, holding the historic fence line is the boundary between the two parcels at issue based on the legal [525 P.3d 744] doctrine of boundary by

agreement. The Esslingers challenge that determination on two grounds. First, they contend the Quiet Title Litigation precludes the Basses from litigating the boundary. And second, they contend the Escrow Agreement between the Esslingers' predecessors-in-interest prohibited the Mareks from agreeing to a boundary at the fence line. The Esslingers' arguments are not well taken.

To put the Esslingers' arguments in context, we have to go back to the history of their parcel. The Mareks purchased the land from the Larges pursuant to the terms of an Escrow Agreement that provided that after the down payment, the Mareks would make yearly payments to the Larges until the total purchase price was paid in full. In that agreement, the Mareks agreed to "keep the property in the same condition that it then was."

The purchase price was paid off and the warranty deed in favor of the Mareks was recorded in 1999. The three parcels remained in the Mareks' possession without issue until 2005, when they discovered that title to the parcels was incomplete because the warranty deed previously recorded lacked a legal description for the parcel that is now owned by the Esslingers. The Mareks filed suit to quiet title to the land in their names and published notice to the Larges and "their creditors (known or unknown), unknown heirs, devisees, or legatees, their successors in interest," or "any other parties who might claim in interest in or to the " disputed property in the Idaho County Free Press. Without response from any

adverse parties, the Mareks successfully quieted title to the northern parcel, allegedly including the disputed property, in their names.

The Esslingers contend the Quiet Title Litigation conclusively established the boundary for their parcel and the Basses' parcel, and that the Basses were precluded from raising the doctrine of boundary by agreement. Res judicata, or claim preclusion, "bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made." *Hindmarsh v. Mock,* 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). A claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action. *Berkshire Invs., LLC v. Taylor,* 153 Idaho 73, 81, 278 P.3d 943, 951 (2012). When the three elements are established, claim preclusion bars "every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit." *Monitor Fin., L.C. v. Wildlife Ridge Ests., LLC*, 164 Idaho 555, 560–61, 433 P.3d 183, 188 (2019), (citing *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993) (quoting *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242–43 (1922))). The Esslingers essentially argue that,

because the Basses should have been parties to the Quiet Title Litigation, they are now precluded from this litigation. We disagree.

While the Quiet Title Litigation resulted in a final judgment on the merits—which meets the first element of the res judicata doctrine—the Basses were not parties to the Quiet Title Litigation and this appeal does not arise out of the same transaction or series of transactions as the Quiet Title Litigation. Because the second and third elements are not met, res judicata does not apply and the Basses are not barred from bringing this litigation.

The Esslingers argue that, even though the Basses were not parties to the Quiet Title Litigation, they were on notice of the suit because of the service through publication. This is incorrect; for the reasons explained below, the Basses were not on notice of the Quiet Title Litigation and, because they were not designated parties to that case, are not barred from litigating this one.

In general, "'one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to [525 P.3d 745] which he has not been a made a party by service of process.'" *Carter v. Gateway Parks, LLC*, 168 Idaho 428, 437, 483 P.3d 971, 980 (2020) (quoting *Richards v. Jefferson Cnty., Alabama*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996)). Idaho law allows service through publication with permission from the court for parties who are out of state, unknown, or otherwise cannot be found after due diligence: resides outside of the state,

or has departed from the state, or cannot after due diligence be found within the state, or conceals himself therein to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier or secretary within this state, or where any persons are made defendant by the style and description of unknown owners, or unknown heirs or unknown devisees of any deceased person and the names of such unknown owners or heirs or devisees are unknown to the complainant in the action. I.C. § 5-508. Thus, if a party's status is not enumerated in the statute, service through publication, even if proper for some defendants, would not be proper on a party not included in the list.

The service through publication in the Quiet Title Litigation was for Samuel C. Large, Rosalie M. Large Frieburger, James Large, Cleo Large, their creditors (known or unknown), unknown heirs, devisees, or legatees, their successors in interest, or "any other parties who might claim in interest in or to the" disputed property. The Esslingers hinge their arguments on "any other parties who might claim in interest in or to the disputed property," but offer no explanation as to why the Basses were not specifically named or served personally, how they had an interest in the property disputed in that case, or how, under the law, they would be properly included in the service by publication when they are not within the bounds of the statute allowing said service.

Furthermore, the Quiet Title Litigation did not involve the same claim as this appeal. The "same

claim" requirement bars both "matters offered and received to defeat the [initial] claim," and "every matter which might and should have been litigated in the first suit." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 126, 157 P.3d 613, 620 (2007). The Quiet Title Litigation was initiated to correct a missing legal description. At no point in that case was there a boundary dispute or a question of where the southern perimeter of the northern parcel was located.

Because the Basses were not parties to the Quiet Title Litigation, were not served through publication, and the Quiet Title Litigation involved a different claim than this appeal, the Esslingers' res judicata argument fails. The Esslingers also contend the terms of the Escrow Agreement between the Larges and the Mareks for the disputed property were breached by the Mareks; thus, Peggy Marek's testimony concerning the ownership of the land was invalid. The Escrow Agreement contained a provision requiring the Mareks to keep the property in the same condition until the terms of the agreement were complete and payment was fulfilled. According to the Esslingers, Peggy Marek's handshake "[gave] away 1/3 of the land" which "amounts to a subdivision of the land and a transfer of real property...which would have been a breach of contract with the Large family, leading to dire consequences for the Mareks."

This argument is also without merit. A breach of contract claim must be between the parties to that claim or their third-party beneficiaries. *Campbell v. Parkway Surgery Ctr., LLC*, 158 Idaho 957, 963, 354

P.3d 1172, 1178 (2015) (citing *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984) ("[I]t is axiomatic in the law of contract that a person not in privity cannot sue on a contract.")). "Privity" refers to "those who exchange the [contractual] promissory words or those to whom the promissory words are directed." *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984).

The Esslingers were not parties to the Escrow Agreement, do not have contractual privity with the parties to that agreement, and are not third-party beneficiaries of that agreement. Any remedy for breach of the agreement between the Larges and the Mareks potentially available for that breach has no bearing on the Esslingers' claim to the [525 P.3d 746] land in question in this case. Because the Esslingers' challenges to the district court's grant of summary judgment are without merit, we affirm the district court's decision.

D. Attorney's fees are awarded to the Basses.

The Basses request attorney's fees pursuant to Idaho Code section 6-202(3)(b)(ii), which authorizes an award in any action brought to enforce a civil trespass claim. We held in *Fischer v. Croston,* 163 Idaho 331, 342, 413 P.3d 731, 742 (2018), that where the primary claim involves land ownership and the incidental claim is civil trespass, attorney's fees must be apportioned to reflect the work done only in connection with the trespass claim. We have a similar situation in this case. Here, the difference is the Esslingers have not challenged the district court's

rulings on the trespass claim except to the extent those rulings reflect an erroneous ownership decision. Said differently, the work done on this case relates to the ownership dispute, not the trespass claim. As such, attorney's fees are denied under the civil trespass statute.

The Basses also request a partial award of attorney's fees under Idaho Code section 12-121. Idaho Code section 12-121 allows fees for claims brought "frivolously, unreasonably or without foundation." I.C. § 12-121. The Basses contend that the Esslingers presented their claims regarding the motion for judicial notice and motion for continuance without properly researching and responding to the district court's decisions. We agree.

The Esslingers' challenges to the district court's denial of their motion to continue the summary judgment hearing and motion to take judicial notice of the entire record from the Quiet Title Litigation were without legal or factual foundation. As explained above, the motions were clearly untimely under the Idaho Rules of Civil Procedure and no motions to shorten time were made. In addition, on appeal, the Esslingers failed to provide any legal analysis of how the district court abused its discretion in denying these motions. Accordingly, we award reasonable attorney's fees to the Basses for the work and time spent on the motion to continue the summary judgment and motion to take judicial notice of the entire record from the Quiet Title Litigation. We also

award costs pursuant to I.A.R. 40 as a matter of course.

III. CONCLUSION

The decisions of the district court are affirmed. The Basses are awarded reasonable attorney's fees for a portion of the appeal pursuant to Idaho Code section 12-121. The Basses are awarded costs pursuant to I.A.R. 40.

Chief Justice BEVAN, and Justices STEGNER, MOELLER and ZAHN concur.

Bass v. Esslinger, 525 P.3d 737 (Idaho 2023)

Ex parte COASTAL TRAINING INSTITUTE,
Elizabeth Kammer, and Joe Cameron.
(Re Leslie SAWYER)
v.
COASTAL TRAINING INSTITUTE, et al.)
1900850.
Supreme Court of Alabama.
583 So.2d 979, 69 Ed. Law Rep. 644

July 26, 1991.

David A. Hamby, Jr. and Thomas H. Nolan, Jr. of Brown, Hudgens, P.C., Mobile, for appellants.

Marc E. Bradley, Mobile, for appellees.

MADDOX, Justice.

The issue presented in this petition for a writ of mandamus is whether, given the principles of the Fifth Amendment privilege against self-incrimination, the trial court abused its discretion in denying the petitioners' motion for a stay of civil proceedings while there is a possibility of a criminal action being brought against them arising out of an ongoing investigation.

In February 1990, Leslie Sawyer was employed by Coastal Training Institute ("Coastal"). Elizabeth Kammer, a petitioner in this case, was the owner of Coastal and its president. Joe Cameron, another petitioner, was also an officer of Coastal.

Sawyer's complaint includes allegations that Coastal improperly withheld Pell grant refunds that

belonged to the students. He allegedly notified the F.B.I., the inspector general of the Department of Education, SouthTrust Bank, and First American Savings of Longmont, Colorado, of these alleged improprieties. According to Sawyer, the petitioners engaged in various kinds of tortious conduct towards him when they learned that he had reported them to the authorities for the alleged improprieties in handling the Pell grant refunds.

Sawyer filed a civil action against the petitioners, alleging outrageous conduct, trespass, false imprisonment, and defamation, all arising out of an incident that allegedly occurred on the premises of [Page 980] Coastal in 1989. He sued Kammer individually and as agent of Coastal. He sued Cameron only as the agent of Coastal.

In October 1990, when Sawyer noticed the deposition of Kammer and Cameron, they filed a motion to quash the depositions and to stay the proceedings, asserting their Fifth Amendment privilege against self-incrimination. See U.S. Const., amend. V; Ala. Const.1901, art. I, § 6. They maintained that they were the target of an F.B.I. investigation, presumably based upon the report by Sawyer. The judge denied the motion. Two months later, Sawyer proceeded to take their depositions. Upon the advice of counsel, both Kammer and Cameron invoked the Fifth Amendment and refused to answer any questions concerning the substance of the case.

The attorney for the petitioners then filed a motion to reconsider the denial of the stay of

proceedings. In that motion, the attorney contended that he could not present a defense to Sawyer's claims against his clients because his clients would be unable to testify at trial because of the alleged ongoing criminal investigation. The judge also denied this motion. The petitioners state that the trial judge indicated that his reason for denying their motion for a stay was that no actual criminal charges had been filed against them. This petition followed.

By order of this Court entered March 30, 1991, all proceedings in the trial court have been stayed pending a disposition of this petition.

The petitioners request a stay of discovery and all proceedings before the circuit judge in the civil action in which they are defendants. They contend that they cannot defend themselves against Sawyer's claims without surrendering their constitutionally protected privilege against self-incrimination. They contend that their privilege against self-incrimination will be violated unless this Court grants the relief requested.

In answer to the petitioners' arguments that the trial court's refusal to stay the proceedings violates their privilege against self-incrimination, Sawyer argues that the writ of mandamus should not issue because the trial court has not abused its discretion. He says:

"[T]he Petitioners have not attached any document either from the Office of the United States Attorney for the Southern District of Alabama, nor from the United States District Court for the Southern District of Alabama to indicate that a criminal

investigation is ongoing or that criminal proceedings have actually been instituted against the Petitioners. In addition, there has been no factual showing by the petitioners that the stated criminal investigation actually involves or is related to the subject matter of the subject lawsuit."

The Fifth Amendment to the Constitution of the United States provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." We recognize that cases hold that the Fifth Amendment privilege also applies in civil proceedings, including depositions. See *Ex parte Baugh*, 530 So.2d 238 (Ala.1988) (citing *Wehling v. Columbia Broadcasting System,* 608 F.2d 1084, 1086 (5th Cir.1979), citing with approval *Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977); *McCarthy v. Arndstein*, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924)). Years ago, Justice Brandeis wrote:

"The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

McCarthy v. Arndstein, 266 U.S. at 40, 45 S.Ct. at 17.

While the Constitution does not require a stay of civil proceedings pending the outcome of potential criminal proceedings, a court has the discretion to postpone civil [Page 981] discovery when "justice requires" that it do so "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c), Ala.R.Civ.P. The scope of discovery in a civil case is broad and requires nearly total mutual disclosure of each party's evidence before trial. See Rule 26. In contrast, criminal "discovery" is highly restricted. "The broad scope of civil discovery may present to both the prosecution, and at times the criminal defendant, an irresistible temptation to use that discovery to one's advantage in a criminal case." *Afro-Lecon, Inc. v. United States,* 820 F.2d 1198, 1203 (Fed.Cir.1987). In *Afro-Lecon*, the court pointed out some of the dangers presented by this situation:

"Such unconstitutional uses may begin with the surreptitious planting of criminal investigators in civil depositions ... and end with passive abuses, such as when the civil party, who asserts fifth amendment rights, is compelled to refuse to answer questions individually, revealing his weak points to the criminal prosecutor. This point-by-point review of the civil case may lead to a 'link in the chain of evidence' that unconstitutionally contributes to the defendant's conviction. *Hoffman v. United States*, 341 U.S. 479, 486 [71 S.Ct. 814, 818, 95 L.Ed. 1118] (1951)."

In contrast to the opinion of the trial court and to Sawyer's contentions, the pendency of criminal charges is not necessary to the assertion of the

privilege. It is a general rule that the petitioner need not be indicted to properly claim the Fifth Amendment privilege. *Ex parte Baugh*, 530 So.2d 238; *Wehling*, 608 F.2d 1084; *Lefkowitz*, 431 U.S. 801, 97 S.Ct. 2132; *McCarthy*, 266 U.S. 34, 45 S.Ct. 16; *Savannah Sur. Associates, Inc. v. Master*, 240 Ga. 438, 439, 241 S.E.2d 192, 193 (1978); *In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir.1974).

This Court has adopted this general rule in several recent cases. In Baugh, Deborah Baugh failed to appear for her deposition and, instead, invoked her privilege against self-incrimination in light of a possible grand jury investigation against her. This Court held that the trial court abused its discretion by denying Baugh's motion for a protective order until the resolution of the potential criminal proceedings against her. The Court expressed the rule as follows:

"If a party reasonably apprehends a risk of self-incrimination, he may claim the Fifth Amendment privilege although no criminal charges are pending against him and even if the risk of prosecution is remote."

Baugh at 240, n. 2, citing *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir.1979).

In *Ex parte White*, 551 So.2d 923 (Ala.1989), this Court followed Baugh and again held that the privilege against self-incrimination required that the petitioner's civil action be stayed until the criminal process against him was completed. The Court noted that in balancing the interests of the parties, we must favor the constitutional privilege against self-

incrimination over the interest in avoiding the delay of a civil proceeding.

In urging us to hold that the trial court did not abuse its discretion by the terms of its order dated February 19, 1991, Sawyer correctly points out that under the rules of civil procedure, broad power is vested in the trial court to control the use of the discovery process. However, as we noted in Baugh, "[t]hese state-court procedural considerations must at all times yield ... to relevant federal constitutional principles. Baugh at 242.

Weighing the petitioners' interest in postponing the civil action against the prejudice that might result to Sawyer because of the delay, we are compelled to postpone it. From the facts presented on this petition, there is no doubt that most of the material facts in this civil action would also be material and potentially incriminating in the criminal action. As we stated in *Ex parte White*, "This solution is the only method of guaranteeing [the petitioners'] Fifth Amendment privilege." *Ex parte White* at 925. [Page 982]

Sawyer argues that "utter chaos would ensue" if we adhered to the position taken by the petitioners in this case. He says:

"In the future, all a civil defendant has to do is assert that he or she apprehends that he or she is or may be subject to a criminal investigation and invoke the Fifth Amendment privilege. Then, the trial judge would be required to stay the case, perhaps indefinitely, until someone advises the court that the criminal matter has been resolved or that the

applicable criminal statute of limitations has expired."

This particular concern was expressly addressed in *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). Clearly, it is not for the witness, but for the court to determine whether the fear of incrimination is well founded:

"[T]his protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.' However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' " (Citations omitted.)

341 U.S. at 486-87, 71 S.Ct. at 818.

What were the circumstances that the trial court should have considered in ruling upon the petitioners' claim of privilege? As indicated by the petition, although the trial judge indicated that his reason for denying the petitioners' motion was that no actual criminal charges had been filed, the trial judge had sufficient evidence before him to clearly reveal that a criminal investigation was ongoing. Attached to the petitioners' motion to quash the depositions and to stay the proceedings were the affidavits of attorney Richard D. Horne, who represents Coastal and Kammer in the federal investigation, and attorney David A. Hamby, Jr., who represents the petitioners in the civil action.

Horne's affidavit stated that representatives of the Department of Education and the F.B.I. seized "most if not all documents of Coastal Training Institute including computers and memory" as a part of their criminal investigation "into certain activities of Elizabeth Kammer and Coastal Training Institute." Hamby's affidavit stated:

"I have been informed by Mrs. Kammer that there is currently a federal criminal investigation pending in the U.S. Attorney's office concerning certain allegedly illegal activities of Elizabeth Kammer and Coastal Training Institute. According to Attorney Richard Horne, ... most, if not all of Coastal's records and files were seized by the F.B.I., Department of Justice, or both. The discovery of potential witnesses and defense counsel's efforts to investigate the claims of Mr. Sawyer in his civil action have been seriously impeded due to the fact not only that the documents are unavailable to counsel, but

that several potential witnesses have stated to counsel that they have already been questioned by the F.B.I. (or the Justice Department) concerning the criminal investigation and expressed their desire not to get involved in the lawsuit involving Les Sawyer and Coastal Training Institute.

"Lastly, but more importantly, the information sought to be obtained by the plaintiff from Coastal's 30(b)(6) deponent is in no way relevant to the claims made [Page 983]the basis of his lawsuit and is merely an attempt to cloud the issues in this case and prejudice the defendants." 1

The information supplied in the affidavits regarding the seizure of records and the ability to defend the civil lawsuit was undisputed. A reading of the affidavits and other portions of the record makes it obvious that the material facts in this civil action would also be material and potentially incriminating in the criminal action. Certainly, there is the possibility that the information sought in the civil action may provide a "link in the chain of evidence" against the petitioners in a subsequent criminal action. See *Hoffman*, 341 U.S. at 486, 71 S.Ct. at 818.

We hold that it was an abuse of discretion for the trial court to deny the petitioners' motion to stay the proceedings. Accordingly, we grant the writ of mandamus and instruct Judge Edward McDermott to vacate his February 19, 1991, order and to enter an appropriate protective order consistent with this opinion.

WRIT GRANTED.

HORNSBY, C.J., and HOUSTON, KENNEDY and INGRAM, JJ., concur.

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1 Sawyer's notice of deposition provided in pertinent part that he would take a pre-trial discovery deposition with regard to the following matters:

"1. The policies and procedures of Coastal Training Institute with respect to refunding to students at Coastal Training Institute any monies received from said students pursuant to Pell Grants and not exhausted by said students for tuition, books, fees, supplies and related lawful expenses.

"2. The policies and procedures of Coastal Training Institute with respect to the retention of Pell Grant monies received from students but not exhausted by said student for lawful purposes such as tuition, books, fees and supplies.

"3. The policies and procedures of Coastal Training Institute with respect to the disposition of the excess funds described in Paragraphs One (1) and Two (2), supra.

"....

"5. The status of any governmental investigation of Coastal Training Institute with respect to the handling of Pell Grant monies by Coastal Training Institute."...
Ex parte Coastal Training Institute, 583 So.2d 979 (Ala. 1991)

DECLARATION OF DON ESSLINGER

My name is Don Esslinger. I am over the age of 18 years, I am competent to testify and I have personal knowledge of the matters set forth herein and this declaration is made under the penalty of perjury pursuant to 28U.S.C.§1746.

1. In 2019 my wife, Jennifer and I purchased land (herein "7-Ac." tract including the parcel that became known as the "Disputed Area" or "Disputed Parcel" during this lawsuit) located across the road from our home in Slate Creek, Idaho overlooking the Salmon River.
2. From our home, I have had an unobstructed view of the Disputed Area for over 30 years.
3. The Disputed Area is a narrow stip of land approximately 40 feet wide and 100 feet long with an extremely steep rocky slope unsafe to traverse even for herd animals such as cattle.
4. During the past 30 years, the respondents never set foot on the Disputed Area, never placed any 'No Trespassing' signs or other marks on or near the Disputed Area and never indicating in any way that they owned or had a claim of ownership to that property.
5. The Disputed Area is at the South of and contains approximately 1/3 of an acre and is connected to and a part of the 7-Ac. tract my wife and I purchased in 2019.
6. As the registered title owner of the 7-Ac. tract, the State of Idaho, by its Department of Agriculture ordered Jennifer and I to remove and eradicate the

noxious weeds and all invasive species of plants allowed to accumulate unchecked in the Disputed Area for 30 years.

7. After 2007, the 7-Ac. tract became a strip mine site with deep pits, trenches and tall tailing mounds.
8. In 2018 Jennifer and I leased the 7-Ac. tract from its owner and commenced reclaiming the land after the strip-mining operation was finished.
9. For the first year and four months after purchase Jennifer and I continued cleaning up the 7-Ac. tract including the Disputed Area getting it ready for subdivision, development and resale.
10. During the period of the 2018 lease and for the first year and four months after purchase the respondents (the Basses) did not make contact with us to make a claim to the Disputed Area as we proceeded with the cleanup of the property which was easily viewed and accessible to them by being adjacent to and immediately north of the five-acre parcel on which the respondent's residence is located.
11. A professional survey was performed that required almost a year starting in June 2019 and continuing until June 2020 that identified the southern boundary of the 7-Ac. tract on the same line as the northern boundary of the Basses acreage (herein "Property Boundary").
12. In prior communications with the Basses they acknowledged that their property line was on the Property Boundary, such as the time when the Bass horse died in 2016 and Shawn Bass asked me to bury the animal that had fallen and was lying across the Property Boundary line. His request

was that I should not bury any part of the horse in what is now known as land within the Disputed Area to avoid trespassing on what they perceived then as their neighbor's land to the north; which, it turns out is part of the 7-Ac. tract that Jennifer and I purchased in 2019.

13. When Jennifer and I took possession of the 7-Ac. tract under the 2018 lease to clean up the property from mining activity there was an old fence that ran in an arc generally in an east-west direction along the brow of a hill.
14. In my background and for 50 years I kept a string of pack mules and served as the guide for members of the US Forest Service who needed 'on-foot' access to the back country of Idaho.
15. As part of my history with excavation and land management and with herd animals, such as mules and cattle, I was trained in the craft of fence building.
16. Fences are built for different purposes, such as boundary fence and pasture fences.
17. The old fence on the 7-Ac. tract was not a boundary fence as it was not built on the boundary line as called out in the legal description in the deed passing title to the Basses, nor was it on the same boundary line that was called out on the deed passing title to the 7-Ac. tract sold to Jennifer and me in 2019.
18. The old fence that existed on the 7-Ac. tract at the brow of the hill was built with railroad ties as uprights and used 4" hog wire panels between the posts, and was designed to be like a coral to prevent cattle from migrating down the rocky hill

so that, as testified to by Peg Marek[1], her cattle would not be cornered by the fence at the bottom of the hill (i.e., the actual boundary fence, built on the survey line between the properties).

19. Because the old fence was installed in an irregular arc-like pattern along the brow of the hill it showed from its construction and location that it was a pasture fence or a fence intended to keep cattle on the pasture and to keep them from straying off the pasture.
20. If the old fence had been a boundary fence, it would have been straight across, east to west following a surveyed line to delineate the boundary between two properties.
21. When Jennifer and I took possession of the 7-Ac. tract, I was fully aware of the old fence, its rotted out condition and the danger it posed to humans because it was rusted and the posts were deteriorated and it needed to be removed as a safety hazard.
22. I openly, in full view of the Basses, removed the old fence in September 2020 as a part of our property cleanup operation believing that said fence was a fixture on the real estate, the title to which passed to Jennifer and I when we purchased the land and I did not hear about the fence removal from the Basses until the civil trespass lawsuit was served on us by an Idaho County Sheriff's Deputy on November 19, 2020 stating that the Basses claimed I removed their fence on their land.

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[1] As referenced by Judge FitzMaurice

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23. On November 10, 2020, Deputy Cody Killmar declined to review our land purchase paperwork, because he said "that is civil" but, he saw the string line put in place on the boundary by our surveyor when Shawn Bass' requested proof of the location of the surveyed line and Killmar read the stake that stated "Prop Line" and could see that Jennifer and I were removing noxious vegetation required by the State of Idaho and had taken down a fence. Deputy Killmar informed us that this was a "civil" matter and he was only there for the "criminal" and that he was not going to sign a citation.
24. Two days later, on November 12, 2020 Deputy Killmar brought criminal citizen citations to serve on us that had been signed by Shawn Bass, who then, on November 19, 2020 sued Jennifer and I for civil trespass and damage as well.
25. If the citizen criminal trespass citation signed by Shawn Bass against me, threatening me with up to six-months in jail, had not been filed against me, or if it had been timely dismissed, I would have testified to the above information about the Disputed Area and the old fence to be considered at the June 28, 2021 summary judgment hearing before the District Court of Idaho County, Idaho

Dated September 13, 2023.

Don Esslinger.
Don Esslinger, Pro Se

DECLARATION OF JENNIFER ESSLINGER

My name is Jennifer Esslinger. I am over the age of 18 years, I am competent to testify and I have personal knowledge of the matters set forth herein and this declaration is made under the penalty of perjury pursuant to 28U.S.C.§1746.

1. My husband, Don Esslinger and I purchased the 7-Ac. tract of land in 2019 across the road from our home in Slate Creek, Idaho after having leased it for a year in 2018 with an agreement to clean up a former strip-mining operation.
2. Because the 7-Ac. tract existed at the point where three sections of land came together, it was necessary to have an extensive title ownership search in connection with title insurance that we purchased when we closed and paid full market value for the property in May 2019.
3. Contained in the boundaries of said 7-Ac. tract at the south end thereof is a third of an acre that has become known, in this lawsuit as the "Disputed Parcel."
4. At no time prior to the purchase of the 7-Ac. tract and at no time in 2019 did we become aware that Shawn and Laree Bass claimed an interest in any portion of the 7-Ac. tract, including the Disputed Parcel.
5. It was not until late September 2020 that the Basses started asking Don and I about the survey we had obtained, which apparently was

their way of indicating that they had an interest in locating the northern boundary of their property which they knew to be a common line with the southern boundary of the 7-Ac. tract we had just purchased.

6. On October 28, 2020 and November 7, 2020, our surveyor, at the Basses request, came to the property and walked the line that he had marked as the boundary between the Bass and Esslinger properties.
7. On November 7, 2020, Shawn Bass stated that he agreed the survey line was the boundary between the two properties and that the Esslingers were going to build a fence on that line.
8. On Nov. 8, 2020 Shawn Bass confirmed that we agreed the Esslingers were going to build a fence on the property boundary as indicated by the survey line, and further stated that he would be building a fence on the western boundary of our property the next summer.
9. On November 7 and 8, 2020, during the communications with Shawn Bass, he said nothing about the clearing of noxious weeds that Don and I had been doing on the Disputed Parcel.
10. Shawn Bass did not ask about why Don and I were removing the Canadian Thistle in August and September before it went to seed and began the process of spreading for another season.
11. I was certified as a Forestry Technician in 1980 and trained by education and experience and authorized as an agent for the U.S. Forest

Service to identify all species of plants that grow in the northwestern part of the United States.

12. To perform this work, I was required to engage in habitat typing, use aerial survey maps to delineate areas of differential plant growth, conduct timber inventories, participate in orienteering with a compass, drag tapes and topo maps (prior to the advent of GPS) I am a trained arborist who retired from the USFS who knows how to manage property infested by invasive species of plants and how to eradicate the same.
13. The Disputed Parcel has a very step rocky slope, dangerous to herd animals such as cattle and was covered with noxious weeds including Canadian thistle and Hackbrush thorn trees that are invasive, noxious and toxic species identified by the Idaho statute and the Idaho State, Department of Agriculture which ordered us to remove and eradicate these plants from the 7-Ac. tract, including the Disputed Parcel.
14. For instance: Idaho's noxious weeds are a plant species that have been designated "noxious" by law in the Idaho Code (title 22, chapter 24 "Noxious Weeds"). The weed law is implemented using Administrative rules. These rules are contained in IDAPA (Idaho Administrative Procedures Act) 02, title 06, chapter 22, "Noxious Weed Rules." Idaho State Department of Agriculture in conjunction with the Idaho County Weed Superintendent's Office

Puncturevine (Tribulus terrestris) injures to humans and animals and is potentially toxic to livestock.

15. Also, Hackbrush (Celtis reticulata) A small brush whose branches often have deformed branches called "witches broom" produced by mites and fungi that harbors ticks that spread Lymes Disease and Rocky Mountain Spotted Fever to animals and Humans Not classified as merchantable timber species and on which the respondents collected $107,134.32 from Don and I that was our retirement savings.
16. If the citizen criminal trespass citation signed by Shawn Bass against me, threatening me with up to six-months in jail, had not been filed against me, or if it had been timely dismissed, I would have testified to the above information to be considered at the June 28, 2021 summary judgment hearing before the District Court of Idaho County, Idaho.

Dated September 13, 2023

Jennifer Esslinger

Jennifer Esslinger, Pro Se

03/15/2022 7:46 PM FAX 2088392369

[Transcript of Sheriff's Deputy Body Cam)

Nov. 10, 2020 [Handwritten Date of Investigation]

PO Cody Killmer [Idaho County Sheriff's Deputy]

Jen Jennifer Esslinger

Don Don Esslinger

PO Hi guys.

Don Howdy

Jen Come in - don't let them out. Come on.

PO So the reason why I'm coming is because your neighbors called, the Basses, about some trespassing issues after the survey. I was hoping we could walk down there and just look at it to clear this up.

Jen Can you, wait just a second until I get a coat on? *Jen trying to get dogs back in house*

Don Are you familiar with contracts and boundaries and

PO That's civil. I enforce criminal.

Jen Wait. just a minute.

Don What's their complaint?

PO That you trespassed on their property after they asked you guys not to. Even after the survey.

Don After the survey - and we went on their property.

PO Yep, that's what their saying.

.Don You want to. repeat that, is it loaded?. - Come on in I don't want to leave the door open.

PO Okay. You guys have a nice house. It's huge.

Don Did you hear - she's hard of hearing, If she's not looking at you, she don't hear you.

Jen What'd you say Don?

Don Alright, the complaint is Basses said that we went on their property after the survey.

PO After they asked you not to come onto it.

Don I don't remember them even telling me not to come onto it.

Jen They never said anything like that.

PO Okay.

Jen That I remember.

PO Uh, no, I trust you with your lines down there.

Jen Okay.

PO Is it okay if I leave my pickup there Don or do you need to get out?

Don No, you are alright.

Jen Alright. Okay so I'm not 100% sure where this is at, what they are talking about, but I think it's right by their house, is that right?

Jen You need your coat?

PO What?

Jen Do you need your coat?

PO Oh no, I got three layers on. Did your brother leave already?

Jen Yeah.

PO Yeah.

Jen There it is.

PO Okay that's the new one, right?

Jen No, its not a.new one. This has been here since 19 - I have the record of it from 1968 where this property lines goes up here. This was recorded I think in June. It was surveyed over the last 17 months. Hunter Edwards in Grangeville is the surveyor. He came down there last Saturday, in person, with his son and he brought his gps. He has a survey. I already gave Basses a certified copy of it?

PO They did or

Jen I did.

PO Oh; Okay.

Jen On the 23 td of, um, October. And I told them at that time that I was putting this back on the property line and the thing of it is everybody knew the fence wasn't on the property line. And when I told we were putting it back, straight back on the property line, they did not like it. So I told them two weeks to research it or whatever and in the mean time they called the police said there was a dispute over the property boundary. I still didn't do anything. Hunter came down here last Saturday. He set his stuff up- Showed them where the stakes were, He even drove some more stakes in between here and the-other point.

PO Okay.

Jen And that's what these red flags these wooden ones are.

PO Are the other stakes.

Jen He drove them

PO So where was the old fence line?.

.Jen Over here.

PO Oh and it across this cedar (seeder).

Jen It went right here.

PO Oh, okay.

Jen And we didn't do anything to that and I told them they don't have any problem.. I never touched it, I'm not gonna, but we told them w:e'd help them move it out of here.

PO Okay.

Jen Because if you don't pick it up and cut that it out you are going to destroy all this was rotten. You .know what I mean.

PO So the fence line was above this slope?

Jen Yes.

PO Okay.

Jen It was up here.

:PO Okay.

Jen And Hunter asked them repeatedly if they had any questions and everything they asked him about, he answered it. And then he said when he left, he say I'm glad they don't have a problem with it. And because that string, the string; I got to tie it back we were still- _the string goes in a straight line from here to the other tall flag down there is the next survey point.

PO Okay.

Jen And we never went on that side of it except we had cut some great big hackbrush and we drove there with the backhoe to yard it out of there.

PO Okay. .I don't see any other trees or limbs cµt on their side.

Jen I never cut anything on their side. Except for back to where my string goes. And they didn't like it.

PO They didn't like it.

Jen No.

PO What did they say to you?

Jen They got – okay, they were okay when Hunter was here, right. And then as we proceeded to clear this out, they got madder and madder and ruder and ruder and ruder. Until was it Sunday night, um, it was about evening and we had been out here working and stuff. Shawn and his son come, must have come this way because their pickup was pointing that way, it's getting dark and I have this on Go Pro, getting dark, they stop in the middle of the road, open both doors get out and start yelling at me about putting the fence on the right-of-way. Well, what it was, I had talked to his wife and I said – she was concerned about their old dogs getting up on the road cause the fence *was* down and I said I had put a fence, up every night so that couldn't happen. I had a temporary fence up there and I put it up every night so the dogs couldn't wander.

PO Get out.

Jen And it was their dogs. And so I said, Shawn, this is a fence to keep the dogs from getting on the road until we can get down here and finish clearing this out. And I intend to put it back down there. And all this we used straps to pull all that brush up out of here.

PO You guys are doing a lot of work because you plan to subdivide this?

Jen It already is.

PO Oh, cool. Did you guys do that or was it already done when you bought it?

Jen We didn't have to subdivide it, it was because its in three different sections of land.

PO Oh, already.

Jen The property is already, was in three lots, but because when they condemned this ground down here to build this new highway, um they didn't take it off the county maps, they didn't correct it and they condemned like four acres or something along here.

PO And did you get that fixed?

Jen And so, yeah, when we had it surveyed, we got it corrected.

PO Okay.

Jen And that's when we said we are putting it back on the property line and I could show you the old survey is this line right here and see that yellow flag.

PO Yeah.

Jen Okay, that goes down to the highway.

PO That yellow one does.

Jen And you know what that is, that is a section line.

PO A section between the three lots.

Jen It's also a property line. And this line right here, uh, it goes over there and it's • these lines since, my survey goes back to.1895. This lot right here is never been moved. Ever. And what it was is 50 years ago or something, and grandpa and dad, and the crooks, Mareks, he wanted to put bulls in here - rodeo bulls or something. And so if you put a fence down there what's happened.is they are going to get stuck down there. And he probably didn't want them in his back yard or something so they put their heads together and put the fence to come up here. And curved around.

PO Instead of going down the hill.

Jen . And, uh,

PO So Basses are claiming that their grandpa built the fence in like 1910.

Jen It doesn't matter.

PO I'm just telling you what they said.

Jen I don.'t

PO This is ciyil - this is a civil problem this is not criminal.

Jen And, but . .

PO I'm here for the trespassing complaint. The rest of it I told them was civil and they needed to get a lawyer.

Jen There we never, it was no trespass, there is our property line. The surveyor himself, if they want sue somebody, sue the surveyor.

PO So Jennifer he was saying that this part, this road part that you guys mowed out when did you know what was on his property?

Jen Where it's what?

PO Where it's mowed so it looks like a little road here that recently was mowed down. It looks like that is on the other side. of the line. Let's walk down there.

Jen . Here's the other comer of it. The old pipe.

PO The old pipe. So did you guys build that?

Jen And actually the truth of it is, okay, it goes from here - see this white line.

PO Yeah.

Jen 323.52 feet. See that -barely see that yellow flag.

PO · Yep

Jen · Okay from here; straight that way, and then it doglegs over to the dike. Shawn Bass don't own that.

·PO Who owns on this side of the white line that we are standing on?

Jen We don't,

PO Do you know who does?

Jen · I'll finding out,

PO .Okay, but it's pow Shawn's?

Jen No, it's not.

PO How do you know its not Shawn's?

Jen Because I have a real estate attorney helping me through this.

PO Okay. So is this on Shawn's property – this

Jen Shawn's property goes from right here straight over there and then it makes a dog ..

PO So this right here is Shawn's property,

Jen · Yeah.

PO. Okay. How much you guys put that on his property?

Jen Um, because at that time I wasn't- I didn't have my line delineated correctly.

PO Okay.

Jen But, um, if he wants me to move it, I will.

PO Okay, I'll ask him. So this part you don't think Shawn owns where you drove down into here?

Jen Nobody. And if he'-s trying to claim this, he's incorrect,

PO . He's trying to say that this right here, where you guys drove down here where these tracks are, is on his property,

Jen What's that? *Inaudible* from right here that was trespass.

PO Okay.

Jen But he never told us don't come on there,

PO Has he ever told you not to come on there?

Jen Never. And, in fact his campfire going and stuff and I said We got the fire going, you guys are more than welcome to come over here and talk to us, but like I said from October 23rd they've gotten madder and madder and madder and madder. At first, they were like Yeah, well,

we'll just dogleg the fence back over there. And, but what it revealed, what my survey revealed is that neither one of us own this land. Because the same reason what happened what I told you about the condemnation.

PO The Highway, yeah.

Jen And the.State of Idaho never cleaned it up, you know what I mean. They just left it. And it wasn't until 2018 when I hired the surveyor that it came to light.

PO That neither one owns it. Okay. Well, I'm not going to issue a trespassing citation. I have to write it up though because of his complaint and send it to the prosecutor to review all of his complaints. So I'll let him decide: what we are going to do.

Jen Alright

PO What's this over here?

Jen What's what?

PO That fence right there. What do you call these?

Jen Just rock bucks.

PO Yeah, rock bucks. So this is you think like on the State property where neither one of you guys own this?

Jen Um, well because before the fence, okay, it went there and come over here and then went around. So I don't know. If I wanted to put my stock back in here, I wanted to put this fence back up as soon as possible. And uh, we agreed we'd go put it there and back to that and then down. And he Was - he didn't say nothing about it. Other than Okay.

PO Okay, Your neighbors get mad at you.

Jen Oh man. All I've ever tried to do is – IO mean look at this, look how nice this land – don't families and people and grandkids and don't people deserve to come buy this and live here.

PO This looks great.

Jen I mean, and go up there how gorgeous that river view is.

PO What happened to that lady that was thinking about buying it,

Jen . Um, well you know what, through all this legal stuff I had to - When you sell something; you've got to clearly show people where your property boundary is. Its actually illegal if you don't .And I .could have just said Oh, well you can disclose the.fact that fence isn't the property boundary, but really who wants to pay premium – I'm trying to get a lot of money for this. And who – look at all that land that was underneath hackbrush.

PO Yeah; that' a lot.

Jen And it's my property: I bought and paid for that survey to delineate that line right there and they are barking up the wrong tree civil or criminal if they think they can put a stop to it because for one thing, okay whatever cinches this, Highway 95 as State of Idaho surveys and these monuments are in here and that's Old Hjghway 95 and those monuments, I think were put in in the 30s or something like that. And those - between that yellow flag up there and that one down over there by the Highway, that is on the section line.

PO So this is broke into three sections.

Jen Uh-huh,

PO This is nice nice work. Okay well I will write all this up and turn in his stuff and we'll see what happens. So when did you realize when you drove down there that, that wasn't on your property. Did you know that wasn't on your property?

Jen It was when the surveyor.

PO And you thought your property was further than that. Or where did you originally think your property-where this line is.

Jen Yeah.

PO So you knew that your line - your property line was right here.

Jen I thought it went straight down there like it showed on the county map.

PO Okay. Alright well I'll write this up. Don't go down there again okay.

Jen I won't.

PO Then we'll have a real issue further than me just not writing a citation.

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Jen What's that.

. PO If you go down there again, we'll have a different interaction, different conversation between you and me than w hat we are having today where I'm just writing this up and giving it to the prosecutor.

Jen Okay I

PO . You go down there again, we'll have issues.

Jen Fully understand.

PO Yea, don't go down there,

Jen Great.

PO So I'll get this turned in and we'll see what the prosecutor says. You'll get papers - if you don't hear anything, if you don't hear anything, then that's good news.

Jen He's already got a desk a whole drawer with my name in it..

PO Oh the prosecutor.

Jen Yeah, it's been an interesting-ye , I don't know, people just got used to it and then they think they own it and they don't.

PO So he;s been looking up some civil property lines based off offence lines. Well some court cases.

Jen You can't do that in the State of Idaho, I'm sorry.

PO I'm just giving you a warning that they are doing that and they are going to be talking to an attorney. So, I'm just giving you a heads up about that.

Jen Wasting money. Does these – um rural legends, you know, like, if the fence has been there for 7 years, its yours. No it isn't. The only person that can do that is a judge.

PO I didn't know that.

Jen I'll guaranty it. And it's not like they had buildings or something, you know what I mean.

PO I'm just going to look at this old fence line one more time like I said, the fence line and what they are getting an attorney for has nothing to do with me.

Jen You know the thing.

PO I'm just trying to picture what there complaint is.

Jen When Laree came up here, she was all – everybody knew the fence wasn't and she was all justifying .her dad, or whoever, you know moving it. And I'm like that's reckless because this is a property boundary we are talking about here and to let your neighbor to convince for you ease of construction to move it off of your property boundary -.what's that doing? What's that doing? For what it is like is for now; You are creating a problem for future generations because people get used to -- Oh that's my field, you know what.I mean, but No, it isn't.

PO · So what about, what are you going to do with this old cedar [seeder]. They are really really concerned about that.

Jen Well they shouldn't because we've told them from the.very get go; I love that thing. I think it's cool. Before it was buried in brush- nobody could even see it. I don't know year it is, but they had records of all that stuff you know what.I mean. I could .be in a museum. And we've taken extra pains to be careful and we even said we'll help you get it out of there because. it looks kind of heavy to me, but whatever. And Don has a piece equipment and is totally skilled about leverage and · everything so he could pick it up or make a draw bar or something, you know, where it would balance, pick it up, he could even put it on a trailer. I said Where do you want it? Oh, I don't know. I was like Okay, we're not going to do nothing to it and I don't care how long it sits there.

PO It looks cool.

Jen I think it's totally cool myself, it's made out of real iron. I don't.know what year it is, but there.is some big tree growing out of it and if they don't watch it, you know, trying to jerk it out of there or something

PO It's going to break it.

Jen You are just going to destroy it, bend the wheels and everything and I think it's cool. Then the other thing, he comes over here when I was taking that out and the only thing holding the fence up was these big tall fence posts and he evidently, Marek, made him buy it or he had to buy it because he was sick of the cows getting in there. Cause 75% of those railroad ties, that stack down there, that was a fence

and they were rotten. And, but.then he comes over there and I had all the posts and, uh, I said these are - Don said you guys apparently bought these posts, you want them? And he said no he didn't want them, he couldn't see no need :for them, Then about three day I.was working down there, he comes back, he's like what'd you do with them posts and I said I thought you said you didn't want them, I took them up to the post pile. And then he ordered me to bring them back. He didn't say I've changed my mind, can I please have them back or nothing. I was like, Fine. I go up and get them; there's 13 of them. I took them back down there. And put them down because he said was going to maybe put them on that fence line down there so I couldn't really see taking them up to his house.

PO Yeah.

Jen Then the same thing. He comes back to my house the next morning, *knock knock knock;* what'd you do with them posts. I said I put them back down there where you said you wanted them,

PO Alright, well I'll tum you want me to lock this?

Jen Yeah.

PO See if I fall.

Jen I don't know, I thought that looked pretty good..

PO Yeah, you guys are doing a lot of work,

Jen It's been kind of fun *inaudible.*

PO Yeah. Hey guys.

OV A side-by-side killed a mule deer ,doe.

PO . Where at?

0 V They are coming up SIate Creek They are encamped at Slat Creek campground

Some guys continue to talk about this other incident.

Jen Okay

PO Alright. I'm going to tum all this in and. the video.of our conversations today and see what he decides okay.

Jen., :What's. that?

PO I'm. this video, everything in to the prosecutor, and we'll see what he has to say....

Jen Right

PO So if you don't get any papers or don't hear anything, then just consider it over with, but don't go on their property again.

Jen. I'll guaranty you neither one of us

PO It would be worse that what i:tappeµed today so don't, not worth it.

Jen I have said all along, look you guys, I don't want no trouble with you. I am not trying to take anything from you. What I'm trying to do is get to the truth of this property and I intend to put and even the surveyor said you know how maybe if you had a piece of ground and you thought you were going to be a nice

guy and put the fence over here 5' or something he said No. Listen people, put it on the line.

PO That's what the surveyor said.

Jen Yes.

PO Okay. Alright well I mean I'm not here for the property lines or the fence lines, I'm just here for the trespass issue.

Jen Okay.

PO So the rest of it is all civil and if they want to proceed with that, then they'll need to get a lawyer,

Jen Okay. Great.

PO But the only thing I am here for is the trespass stuff.

Jen . Alright.

PO Can I go talk to Don and he understands not to go on their property.

Jen Don, can you come out here. Officer Killmer wanted to explain to you

PO So, um, what I'm here for is just the complaint about the trespassing where you guys drove your machine down there on the road. So I wanted to let you know I'm not writing anybody a trespassing citation. All I'm going to do is tum in their complaint to the prosecutor and let him decide what what needs to. happen, But I want to make sure you understand, don't go on their property. Don't step across that line for anything. Even to remove something that you guys

might have built like that rock pile that you have don't remove that yet. Just leave it the way it is. Don't go on their property.

Jen . Okay, but - right, but I'm telling you that if they want it moved, I will.

PO Okay I'll let them know that and they can contact you if they want to do that.

Jen Okay. Great.

PO But don't- don't touch it.

Jen I won't.

Don How are we going to 1:luild the fence?

PO · Stay on your side.

Jen We can do that.

PO When are you wanting to build the fence?

Jen We'll just build a road down to it instead of driving down the end.

Don That end isn't theirs is it?

Jen. Huh?

Don That end isn't there is it?

·Jen. Yeah, welt he's saying where that • where the found pipe was, don't go beyond that.

PO She explained to me where - it's kind of a grey

Recording ends

Duration: 5:22 Nov. 12, 2020 [Handwritten Date]

PO Hi.Don: How's it going? So yesterday when I was here I talked to Jennifer about the trespassing issue and told her that I was not going to write any citations or anything like that, but Shawn wanted to sign a citation against you guys for trespassing down there, On that part. Is Jennifer home. Okay here's your copy and if you want to go get her, I'll give her her copy and explain it to you guys. Perfect.

Don What did - did you show the prosecutor your- what you guys walked through down there?

PO No, he hasn't seen anything. It's still on my camera, I haven't unloaded anything.

Don. I don't know how she's going to react

PO Okay.

Don - Jennifer; Jennifer! She can't hear me. Jennifer!

PO Hi Jennifer. So you know yesterday when I told you that I wasn't going to write a citation or anything for trespassing.

Jen Yeah.

PO So Shawn wants to sign the citation against you guys for trespassing so. I just have this paperwork for you.

Jen When was the trespass?

PO_ He's got pictures and a statement. I haven't' read it yet all the way, but he got pictures of you guys

down there. So, this both of you have to show up for Court on the 26th at 9 a.m. is what this citation says and then you can explain all of your stuff where.you had it re-surveyed and stuff like that. So, I mean, there's not much I can do when he says he wants to sign the citation. So-sorry this is happening.

Don . Well this is good for what we are going to do. You ever heard of the Rekow.

PO Well, you will.

PO What's a Rekow?

Don It's organized- what do they call it- Jennifer.

Jen I don't remember.

PO So; um, just make su.re you guys show up to that Court date and just explain everything what's going on okay. Alright, bye guys, I'll get out of here.

Don. Bye. Tak to you later.

PO Have a good night. Sorry to ruin it.

Don No, this is kind of what I want. You see Bradley, Mareks, and them are trying to keep us from selling that and there's laws against that. It's criminal enterprises. The penalty for that is three times the value of the land that being disputed.

End

Electronically Filed
4/13/2021 4:30 PM
Second Judicial District, Idaho County
Kathy Ackerman, Clerk of the Court
By: Sherie Clark, Deputy Clerk

Samuel T. Creason, ISB# 8183
Ruvim V. Kuznetsov, ISB #10085
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Facsimile: (208) 746-2231
Email: samc@cmd-law.com
Attorneys for Plaintiffs/Counterdefendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

Shaun Bass & Laree Bass, husband & wife, Plaintiffs, vs. DonEsslinger & Jennifer Esslinger, husband & wife, Defendants.	)	CASE No. CV25-20-0513 MEMORANDUM IN SUPPORT RE: PLAINTIFFS' MOTION FOR SANCTIONS

I. INTRODUCTION

The issue before the Court is whether it should enter sanctions against Defendants Donald Esslinger and Jennifer

Esslinger for failure to participate in the duly noticed depositions in this matter on April 8, 2021.

II. PROCEDURE & FACTS

The Basses commenced this action on November 12, 2020 through the filing of a *Verified Complaint with Jury Demand*, setting forth claims for (A) declaratory judgment, including quiet title; (B) trespass, including timber trespass; (C) unjust enrichment; and (D) negligent infliction of emotional distress. The Esslingers responded on December 15, 2020, with a *Verified Answer & Counterclaim*. Through their counterclaim, the Esslingers alleged that the Basses engaged in (A) criminal racketeering; (B) breach of contract; (C) receipt of unjust enrichment; and (D) intentional interference with a prospective business opportunity. That same date, the Esslingers also filed a *Verified Response to Application for Ex-Parte Temporary Restraining Order, Order to Show Cause and Preliminary Injunction.*

The Court held an Order to Show Cause Hearing in this matter on December 17, 2020, at which time Ms. Jennifer Esslinger offered sworn testimony regarding several matters in dispute. The hearing concluded when the parties entered into a stipulation (which was formalized and filed with the Court on January 13, 2021).

On or about January 12, 2021, the Esslingers provided verified discovery responses to the Basses' first set of discovery requests.

Initially, the Basses intended to take the Esslingers' depositions during the week of February 8, 2021. However, in late January, the Basses understood that the Esslingers had agreed to terms of settlement. Ultimately, the written settlement agreement was never executed, and litigation continued.

On March 5, 2021, the Basses issued notices for taking the Esslingers' depositions on April 8, 2021 at the Super 8 Hotel in Grangeville, Idaho. Between March 5 and April 8, the attorneys for each side exchanged emails regarding the case. That email exchange included a March 29, 2021 email from the Esslingers' attorney, in which he represented that "[m]y clients are prepared to proceed with their depositions on April 8, 2021 at 8:30 a.m. and 1:30 p.m. in Grangeville at the super 8, pursuant to your notices."

On the morning set for depositions, Counsel began by deposing Ms. Jennifer Esslinger. As set forth in the transcript filed herewith, the deposition began with fairly standard background questioning for Ms. Esslinger. *See* pp.1-9. Counsel then began inquiring about the existing of yet unknown and undisclosed video recordings that Ms. Esslinger admitted she had in her possession. At that point, the Esslingers' attorney objected on the grounds that the inquiry required the witness to waive her Fifth Amendment

privilege against self-incrimination, and instructed the witness not to answer. *See* 10:4-11:12. Counsel then covered some additional background information for Ms. Esslinger. *See* pp.11-21. Beginning approximately 30 minutes after the deposition commenced, and for the next approximately two hours thereafter, the Esslingers' attorney objected to nearly every single question on the grounds that the inquiry required the witness to waive her Fifth Amendment privilege against self-incrimination, and instructed the witness not to answer. *See* 22-73. The extent of objection and refusal to answer is so replete, that the Basses include the entirety of the transcript for the Court's consideration. The objections and refusals to answer went far beyond particular aspects regarding the trespass and included, by way of example:

1) Whether the witness could identify objects in a picture. (23:1-22, 28:15-25, 38:13-43:14, 44:1-5).

2) Whether the witness ever owned or leased the Esslinger Parcel. (26:22-27:20).

3) Whether the witness ever performed any boundary Inspections or surveys on the property. (27:21-28:8).

4) Whether the witness had spoken with the Basses and/or third-party witnesses. (32:14-18; 37:19-23; 66:24-68:3).

5) Whether the witness has an understanding about the nature of the civil suit. (33:1-7).

6) Whether the witness had ever heard someone use the term "Jerusalem tree". (37:13-18)

7) Whether the witness could recognize her own signature. (45:20-24).

8) Any questions about the basis of her verified *Counterclaims* (45:12-66:6)

Mr. Esslinger adopted Ms. Esslinger's position with respect to all matters. *See* 4:8-22.

III. ANALYSIS

Plaintiffs do not dispute that the Defendants have a right to assert their Fifth Amendment privilege. *See McPherson v. McPherson*, 112 Idaho 402, 404, 732 P.2d 371, 373 (Ct. App. 1987). However, "the law does not require postponement of civil discovery until fear of criminal prosecution is gone." *Mid–America's Process Service v. Ellison,* 767 F.2d 684, 687 (10th Cir.1985)). Defendants have the right to assert the privilege; they do not have the right to engage in bad faith litigation tactics or to avoid the consequences for asserting that privilege in a civil case.

The United States Supreme Court has squarely addressed the question of whether a person asserting their Fifth Amendment

right in a civil action may be adversely impacted by that assertion. "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.'" *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (quoting 8 J. Wigmore, Evidence 439). The Idaho Supreme Court and the Idaho Court of Appeals have adopted this rule in *Baxter* to Idaho civil cases. *See Idaho Dep't of Health & Welfare v. Doe*, 151 Idaho 300, 309-310, 256 P.3d 708, 717-718 (2011) ("We note that it is generally permissible in civil cases to make inferences against someone who invokes her Fifth Amendment rights."); *and Alderson v. Bonner*, 142 Idaho 733, 744, 132 P.3d 1261, 1272 (Ct. App. 2006).

If Defendants intended to wholly frustrate the deposition process by refusing to answer nearly all substantive questions, then the proper procedure was to oppose the depositions by giving notice to opposing counsel and, if necessary, filing a motion for protective order with the court. Rule 26(c) gives the trial court—not the litigants—discretion to restrict the scope and timing of discovery. *See Walborn v. Walborn,* 120 Idaho 494, 501, 817 P.2d 160, 167 (1991). Where litigants seek relief from discovery, they must present the Court with "specific facts to show good cause." *Westby v. Schaefer*, 157 Idaho 616, 623, 338 P.3d 1220, 1227 (2014). The *Westby* Opinion supports that rule of law on principles of "candor

and fairness in the pre-trial discovery process" and the purpose of the discovery rules "to facilitate fair and expedient pretrial fact gathering." *Id.*

Here, the Esslingers permitted the Basses to dedicate significant resources into scheduling, arranging, preparing for, and taking the Esslingers' depositions. The Esslingers knew that the Basses counsel would be traveling to the deposition and had arranged for the deposition to be taken at a local hotel. The Esslingers never mentioned the Fifth Amendment considerations or concerns, until after the deposition started. At that point, the Esslingers refused to answer questions based upon an assertion of the Fifth Amendment. Esslingers made this assertion despite their earlier discovery productions and despite the fact that a significant portion of the questioning was wholly unrelated to any criminal proceeding against them (for example, the Esslingers refused to answer any questions regarding their counterclaims in this action).

The Court has power to sanction the Esslingers and their attorney pursuant to Rule 30(d)(1), 30(d)(3), and 37 of the Idaho Rules of Civil Procedure. Sanctions may include:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(iii) striking pleadings in whole or in part;
(iv) staying further proceedings until the order is obeyed;
(v) dismissing the action or proceeding in whole or in part;
(vi) rendering a default judgment against the disobedient party; or
(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination and initiating contempt proceedings.

In addition to the foregoing, the Court "may impose sanctions or conditions, or assess attorney fees, costs or expenses against a party or the attorney advising that party for failure to comply with an order made pursuant to these rules."

The Basses request the Court enter the following relief:

(1) An award of all costs, fees, and expenses incurred related to the taking of the depositions of the Defendants;

(2) An award of all costs, fees, and expenses incurred related to the preparation, filing, and prosecution of this request for relief; and

(3) An order prohibiting Esslingers from supporting or opposing their defenses and their counterclaims in this matter.

IV. CONCLUSION

Plaintiffs have made a full showing that they are entitled to relief under Rule 37. The Plaintiffs request that the Court grant their *Motion for Sanctions*.

DATED this 13th day of April, 2021.

CREASON, MOORE, DOKKEN & GEIDL PLLC

/s/ Samuel T. Creason
Samuel T. Creason, ISB# 8183
Attorneys for Plaintiffs/
Counterdefendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2021, a copy of the foregoing **MEMORANDUM IN SUPPORT RE: PLAINTIFFS' MOTION FOR SANCTIONS** was served by the method indicated below, and addressed to the following:

Wesley W. Hoyt _X_ iCourt File & Serve
hoytlaw@hotmail.com

/s/ Samuel T. Creason

ICCS7100000083
IDAHO COUNTY SHERIFF
IDAHO UNIFORM CITATION

In the court designated below the undersigned certifies that he/she has just and reasonable grounds to believe that on: 11/12/2020 04:02 PM
DR#: 2020-2011142
IN THE DISTRICT COURT OF THE 2nd JUDICIAL DISTRICT OFTHE STATE OF ID, IN AND FOR THE COUNTY OF IDAHO

STATE OF ID
vs.

Violator

Last Name: ESSLINGER MI: E
First Name: DON DOB: 11/13/1945
Hm. Address: 237 SLATE CREED ROAD
Phone: ( ) -
City/State/Zip: WHITE BIRD, ID 83554
Height: 5'11" Weight: 185 lbs. Sex: M
Eyes: BLUE Hair: GRAY – Class D
DL: WA109156J DL ID Li. Expires: 11/13/2020

REGISTRATION

Yr. Veh: Plate#: State ID
Make: Model:
Color: Style:
VIN:
IPUC: USDOT TK
Census:
Hasmat: □ GVWR 26001+: □ 16+ Persons□

LOCATION

Upon a Public Street or Highway or Other Location Namely:

VIOLATIONS

224. SLATE CREEK RD; WHITE BIRD, ID 83554

.....

Did unlawfully commit the following offense(s)
In violation of STATE OR Local Statute:
Infraction Citation □ Misdemeanor Citation ◆
Accident: □
Date/Time: 11/12/2020 04:02 PM
Violation #1: 187008(3)(a)(1)(2) – TRESPASS WITH PROPERTY DAMAGE OF ($0 to $1000)

Comment: CITATION SIGNED BY SHAUN BASS

COURT INFORMATION

THE STATE OF ID TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the District Court of IDAHO County,
Located at

320 WEST MAIN
Grangeville, ID
208-983-2776 on
November, 26th 2020, at 9:00 AM

CITATION SERVICE

I hereby certify service upon the defendant personally on 11/12/20 .

Signature of Officer
s/Cody Kilmar

Officer Name: **C. KILLMAR Officer ID: 710**
Agency Name: IDAHO COUNTY SHERIFF

READ CAREFULLY

This is an MISDEMEANOR charge in which:

Note: If you fail to appear within the time allowed for your appearance, another charge of failure to appear may be filed and a warrant may be issued for your arrest.

1. **You may be represented by a lawyer, which will be at your expense unless the judge finds you are indigent.**
2. **You are entitled to a trial by jury if requested by you.**
3. **PLEA OF NOT GUILTY: You may plead guilty to the charge by appearing before the Clerk of the Magistrate's Court or the judge, within the time allowed for your appearance, at which time you will be given a trial date.**
4. **PLEA OF GUILTY: You may plead guilty to the charge by going to the Clerk of the Magistrate's Court within the time allowed for your appearance, at which time you will be told if you can pay a fixed fine or whether it will be necessary for you to appear before the judge; OR you may have the fine determined by a judge at a time arranged with the Clerk of the Magistrate's Court, within the time allowed for your appearance.**
5. **You may call the clerk of the court to determine if you can sign a plea of guilty and pay the fine and costs by mail.**

I plead guilty to the charges._____

Defendant (if authorized by the Clerk of the Magistrates Court)

ICCS7100000082

IDAHO COUNTY SHERIFF
IDAHO UNIFORM CITATION

In the court designated below the undersigned certifies that he/she has just and reasonable grounds to believe that on: 11/12/2020 04:02 PM
DR#: 2020-2011142
IN THE DISTRICT COURT OF THE 2nd JUDICIAL DISTRICT OF THE STATE OF ID, IN AND FOR THE COUNTY OF **IDAHO**

STATE OF ID
vs.

Violator

Last Name: ESSLINGER MI: A
First Name: JENNIFER DOB: 02/09/1959
Hm. Address: 237 SLATE CREED ROAD Ph:
(City/State/Zip: WHITE BIRD, ID 83554
Height: 5'7" Weight: 145 lbs. Sex: F
Eyes: BROWN Hair: BROWN
DL:XW304600 1+244H DL Li. Exp: 02/09/2027

REGISTRATION

Yr. Veh: Plate#: State ID
Make: Model:
Color: Style:
VIN:
IPUC: USDOT TK
Census:
Hasmat: □ GVWR 260011+: □ 16+ Persons□

LOCATION

Upon a Public Street or Highway or Other Location Namely:

VIOLATIONS

224. SLATE CREEK RD; WHITE BIRD, ID 83554

.....

Violations

Did unlawfully commit the following offense(s) In violation of STATE OR Local Statute:

Infraction Citation □ Misdemeanor Citation ◆

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Date/Time: 11/12/2020 04:02 PM

Violation #1: 187008(3)(a)(1)(2) – TRESPASS WITH PROPERTY DAMAGE OF ($0 to $1000)

Comment: CITATION SIGNED BY SHAUN BASS

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2. **You are entitled to a trial by jury if requested by you.**
3. **PLLEASE OF NOT GUILTY: You may plead guilty to the charge by going to the Clerk of the**

Magistrate's Court, within the time allowed for your appearance, at which time you will be told if you can pay a fixed fine or whether it will be necessary for you to appear before the judge; OR you may have the fine determined by a judge at a time arranged with the Clerk of the Magistrate's Court, within the time allowed for your appearance.
You may call the clerk of the court to determine if you can sign a plea of guilty and pay the fine and costs by mail.

I plead guilty to the charges._____
Defendant (if authorized by the Clerk of the Magistrates Court)

In the District Court of the Second Judicial District
of the State of Idaho
In and for the County of Idaho
330 W. Main St.
Grangeville, I 83530

State of Idaho Plaintiff, vs. Don Esslinger Defendant	))))))	CASE No. CR 25-20-1680 ORDER OF DISMISSAL

DEFENDANT having been charged with the following:
Count I: Trespass w/ Property Damage of ($0 to $1000)
Id. Code 18-7008(3) (a) (1) (2)
The Defendant was advised of his Constitution and Statutory rights and the Statutory penalties in compliance with the provisions of I.M.C.R.6(C):
Case DISMISSED on Motion of Prosecutor
THE COURT FINDS that the Defendant was represented by Counsel Tom Clark
Dated: 2/22/2022

/s/ Jeff P. Payne
Judge Jeff P. Payne

I hereby certify that a copy of the foregoing was delivered to the following on February 22, 2022:
Prosecutor A. Green, Defense Attorney T. Clark, Sheriff and D. Esslinger
KATHY M. ACKERMAN, CLERK

/s/ Cammy Greig
By Cammy Greig, Deputy Clerk

In the District Court of the Second Judicial District of the State of Idaho
In and for the County of Idaho
330 W. Main St.
Grangeville, I 83530

State of Idaho Plaintiff, vs. Jennifer Esslinger Defendant	))))))	CASE No. CR 25-20-1679 ORDER OF DISMISSAL

DEFENDANT having been charged with the following:
Count I: Trespass w/ Property Damage of ($0 to $1000)
Id. Code 18-7008(3) (a) (1) (2)
The Defendant was advised of his Constitution and Statutory rights and the Statutory penalties in compliance with the provisions of I.M.C.R.6(C):
Case DISMISSED on Motion of Prosecutor
THE COURT FINDS that the Defendant was represented by Counsel Tom Clark
Dated: 2/22/2022

/s/ Jeff P. Payne
Judge Jeff P. Payne

I hereby certify that a copy of the foregoing was delivered to the following on February 22, 2022:
Prosecutor A. Green, Defense Attorney T. Clark, Sheriff and J. Esslinger

KATHY M. ACKERMAN, CLERK

/s/ Cammy Greig
By Cammy Greig, Deputy Clerk