IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 26460

IDAHO DEPARTMENT OF LANDS,	)	**2001 Unpublished Opinion No. 821**
	)	
Plaintiff-Respondent,	)	**Filed: October 1, 2001**
	)	
v.	)	**Frederick C. Lyon, Clerk**
	)	
PHILIP HART,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Gary M. Haman, District Judge; Hon. Robert B. Burton, Magistrate.

Judgment for plaintiff, affirmed.

Philip Hart, Coeur d'Alene, pro se appellant.

Hon. Alan G. Lance, Attorney General; C. Nicholas Krema, Deputy Attorney General, Boise, for respondent. C. Nicholas Krema argued.

LANSING, Judge

Philip Hart appeals from the decision of the district court affirming the magistrate court's entry of summary judgment against Hart. He also appeals from the awards of attorney fees to the Idaho Department of Lands by both lower courts.

I.

FACTS AND PROCEDURAL HISTORY

Philip Hart entered onto state endowment lands and cut nearly 8,000 board feet of timber with which he built a log cabin for his personal use. Hart admitted that he knew that he was on state land. This was done without authorization from the Idaho Department of Lands (IDL) or compensation to the state.

The IDL demanded that Hart pay treble damages for the conversion of timber pursuant to Idaho Code § 6-211. Unable to obtain payment from Hart, the IDL filed suit in the magistrate division of the district court. Hart filed a motion for summary judgment, arguing that the Idaho

Forest Practices Act (FPA), Idaho Code §§ 38-1301, *et seq.*, gave him the right to take the timber. The IDL subsequently filed a cross-motion for partial summary judgment on the issue of liability. The court determined that Hart had willfully taken the timber from state land and ruled that the IDL was entitled to treble damages. The court also determined that Hart's defense was frivolous and without foundation and awarded attorney fees to the IDL. The parties stipulated that the amount of damages, as trebled, was $7,789.83, and a final judgment was entered. Hart appealed to the district court. That court affirmed the magistrate in all respects, including the award of attorney fees. The district court also awarded attorney fees to the IDL on appeal. Hart now appeals to this Court.

II.

DISCUSSION

A. The Idaho Forest Practices Act

Hart lists several issues on appeal. Most of those are actually different arguments regarding his claimed right under the FPA to enter state land and harvest lumber for his personal use. Therefore, they will be consolidated into the single issue of whether under terms of the FPA Hart was entitled to cut and remove timber on state land for his personal use notwithstanding the provisions of I.C. § 6-211 and other law.

When reviewing a decision of the district court rendered in its appellate capacity, we review the record of the trial court independently, but with due regard for the opinion of the district court. *State v. Thompson*, 130 Idaho 819, 821, 948 P.2d 174, 176 (Ct. App. 1997); *State v. Haley*, 129 Idaho 333, 334, 924 P.2d 234, 235 (Ct. App. 1996). On review of an order granting summary judgment, we apply the same legal standard as that used by the trial court. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Washington Fed. Sav. & Loan Ass'n v. Lash*, 121 Idaho 128, 130, 823 P.2d 162, 164 (1992). Summary judgment may be entered only 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 judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). *See also Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995). This Court liberally construes the evidence in favor of the party opposing the motion and draws all reasonable inferences in that party's favor. *Farm Credit Bank of Spokane v. Stevenson*, 125

Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Doe v. Durtschi*, 110 Idaho 466, 469, 716 P.2d 1238, 1241 (1986). However, when parties file cross-motions for summary judgment, "relying on the same facts, issues and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment." *Snyder v. Miniver*, 134 Idaho 585, 587, 6 P.3d 835, 837 (Ct. App. 2000) (quoting *Karterman v. Jameson*, 132 Idaho 910, 913, 980 P.2d 574, 577 (Ct. App. 1999)). Although the parties present different legal theories, the operative facts in this case are undisputed. The only issue presented by the motions for summary judgment is the meaning of statutory provisions, a question of law over which we exercise free review. *Friel, supra*; *Farm Credit Bank of Spokane, supra.*

"We interpret statutes according to the plain, express meaning of a provision in question, and we will resort to judicial construction only if the provision is ambiguous, incomplete, absurd, or arguably in conflict with other laws." *Potlatch Corp. v. United States*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (2000). *See also Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (Ct. App. 1998) ("Judicial interpretation of a statute should 'aim to give it sensible construction' such as will effectuate legislative intent while, if possible, avoiding an absurd conclusion.").

Although neither party in the present case has cited the criminal law, we think it important to recognize that the cutting of timber on state lands is a crime. Idaho Code § 18-7009 provides: "Every person who wilfully and without authority enters upon the public lands of this state and cuts down, destroys or injures any kind of wood or timber, standing or growing upon such lands, or who wilfully and without authority carries away any kind of wood or timber lying on such lands, is guilty of a misdemeanor." Under that statute, Hart's act of removing timber for his personal use was a misdemeanor if he acted "without authority." The statute upon which IDL relied in bringing this lawsuit, I.C. § 6-211, provides a civil remedy for the unlawful removal of state-owned timber. It provides:

> Any person who cuts down or carries off any wood, trees, or timber or removes top soil from, or dumps trash or debris on, any land belonging to the State of Idaho without lawful authority is liable to the State of Idaho for treble the amount of damages, which amount may be recovered in a civil action therefor.

Under the plain language of that statute, Hart is liable for treble damages unless he had "lawful authority" for his actions.

Hart's defense to this action is based upon the FPA and the Rules Pertaining to the Idaho Forest Practices Act (FPA Rules). The purpose of that Act, as set forth in I.C. § 38-1302, is to

regulate forest practices on public and private timber lands in this state. Hart does not contend that he obtained any permit or other actual authorization from IDL or any other public authority to cut and remove timber from state land. He contends, however, that his action was lawful under the FPA rules that deal with notice requirements. IDAPA 20.02.01.020.05 requires that IDL be notified before anyone commences a "forest practice." The rule upon which Hart relies, IDAPA 20.02.01.020.07.b (1997), creates an exemption from that notice requirement for "non-commercial cutting and removal of forest tree species by a person for his own personal use." Hart asserts that because he was harvesting timber for his personal use, he was not required to give the IDL prior notice of his actions. He reasons that since it is impossible to obtain a permit without also giving notice to the IDL, the regulation exempts him from the requirement of obtaining a permit and paying for the timber, or doing anything else that would have the effect of informing the IDL of his planned conversion of State property.

This argument is fallacious. IDAPA 20.02.01.020.07.b (1997) simply creates an exception to the general rule that the IDL be notified in advance of certain forest practices taking place. It does not *authorize any* forest practices or create an exception to the I.C. § 18-7009 prohibition against cutting state timber without authority. Hart has cited nothing in Idaho law that allows a person to freely take trees from land that the person does not own without permission from the landowner. Stated in more frank terms, the fact that the FPA rules did not require Hart to give notice to IDL before stealing state timber does not mean that he was authorized to take it.

Hart argues that the lower courts failed to correctly resolve a conflict between a general and a specific statute. Likewise, he argues that the lower courts failed to give a more recent statute precedence over an older one. These arguments are misplaced because there is no conflict between the FPA and I.C. § 6-211. The FPA does not authorize harvesting trees from state land; it regulates the manner and means of timber cultivation and logging on all lands in Idaho regardless of ownership.

Hart also relies on selected language from the FPA's statement of purpose: "To encourage uniform forest practices implementing the policy of this chapter, and to provide a mechanism for harmonizing and helping it implement and enforce laws and rules relating to federal, state and private forest land . . . ." I.C. § 38-1302(2). Hart draws from this language a "doctrine of harmony," which he contends incorporates otherwise inapplicable law regulating

forestry practices on federal land. Hart argues that his actions would be legal if done on federal land, quoting federal laws.[1] This argument is frivolous. It is the province of the legislature to write the laws of this state. The extent to which "harmony" with federal land management practices is achieved depends upon the extent to which the Idaho legislature enacts statutes or the IDL adopts regulations that mirror or expressly adopt particular federal statutes. The FPA statement of purpose does neither.

Hart next claims that the trial court improperly awarded treble damages to the IDL. He contends that the decision whether to award treble damages is a fact question for the jury that cannot be determined on a motion for summary judgment. More precisely, he argues that the trespass and removal must have been willful and intentional for treble damages to be awarded. Whether a willful and intentional trespass is a prerequisite to treble damages under I.C. § 6-211 is an open question that we need not decide. Even assuming that Hart is correct, the uncontroverted evidence shows that Hart *knew* that he was taking trees from State land. He attempts to justify his actions by claiming a good faith belief that his actions were lawful. Giving Hart the benefit of the doubt on the sincerity of his claim, his mistake of law is no defense to the magistrate's conclusion that the taking was willful and intentional. *See State v. Nesbitt*, 79 Idaho 1, 19, 310 P.2d 787, 799 (1957) (Smith, J., dissenting) ("'And in no case can one enter a court of justice, to which he has been summoned in either a civil or criminal proceeding, with the sole and naked defense that when he did the thing complained of he did not know of the existence of the law which he violated,' nor that he believed the law to be different from what it really was." (quoting *People v. Monk*, 28 P. 1115, 1116 (Utah 1892)); *State v. Camp*, 134 Idaho 662, 667-68, 8 P.3d 657, 662-63 (Ct. App. 2000) (stating that a good faith belief in one's right to enter onto the property of another is no defense to the crime of trespass).

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[1] Hart also relies on the definition of "provision of law" in IDAPA 20.01.01.005.15, which includes the U.S. Constitution and federal statutory law. The mere fact that the regulations refer to federal law does not mean that any federal law that Hart deems somehow beneficial to himself is engrafted into the FPA. Hart's reliance on antiquated federal laws that allow bona fide settlers to remove stone and timber *from federally-owned lands* is wholly misplaced. Those laws do not allow persons to remove building materials *from state-owned lands* anymore than they allow such theft from privately owned lands. They are simply inapplicable, and nothing in the FPA or FPA Rules incorporates them.

Therefore, the decision of the district court affirming the judgment of the magistrate awarding treble damages to the IDL is affirmed.

B. Due Process and Equal Protection

Hart asserts that the district court violated his right to due process and equal protection of the law. The lower courts' interpretation of the law, according to Hart, renders it vague. Therefore, it should be ruled void. Hart did not challenge the constitutionality of any of the statutes or regulations in either of the proceedings below. Challenges to the constitutionality of a statute that were not raised at trial are waived on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Furthermore, the alleged vagueness of the statute Hart relies on to justify his actions, the FPA, would not prevent the IDL from enforcing its rights under I.C. § 6-211.

C. Attorney Fees

IDL was awarded attorney fees by both lower courts pursuant to I.C. § 12-121. Hart contests those awards.

Attorney fees may be awarded under § 12-121 when the action has been "brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1); *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). An award of attorney fees pursuant to I.C. § 12-121 is discretionary and will not be disturbed absent an abuse of that discretion. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 374, 973 P.2d 142, 145 (1999). Review for an abuse of discretion involves the three-part test articulated in *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991):

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Id. at 94, 803 P.2d at 1000.

In the present case, the trial court recognized the discretionary nature of his authority to award attorney fees and articulated the proper legal standards applicable to the decision. The court found that Hart's defense was legally frivolous and on that basis exercised its discretion to award attorney fees to IDL. We agree with the trial court's assessment. Hart's interpretation of the law, however sincerely held, is utterly unreasonable and frivolous.

The district court stated that it agreed with the magistrate's decision and adopted it. In the order formalizing that judgment, the district court stated that the magistrate's opinion was incorporated by reference and that attorney fees on appeal would be awarded to IDL. The district court having adopted the reasoning of the trial court, did not abuse its discretion in awarding attorney fees to IDL for the intermediate appeal.

Lastly, we consider IDL's request for attorney fees on appeal pursuant to I.C. § 12-121. We conclude that such an award is appropriate, for Hart continues to assert on appeal the same distorted, self-serving and irrational version of the law that he unsuccessfully presented to the lower courts. We note that the magistrate took pains to write a decision that carefully explained to Hart the fallacy of his logic and the distinction between *authorization to cut trees* and the need to give *advance notice* of that act. Nevertheless, Hart has taken a second level appeal from that decision, in which he continues to advance unsound arguments. Therefore, attorney fees on appeal are awarded to IDL in an amount to be determined pursuant to Idaho Appellate Rule 41.

III.

CONCLUSION

The decision of the district court affirming the magistrate court's grant of summary judgment to IDL is affirmed, as is the district court's award of attorney fees. Costs and attorney fees on appeal are awarded to respondent.

Chief Judge SCHWARTZMAN and Judge PERRY **CONCUR.**