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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

DERRICK BROWN,)
)
) *Plaintiff/Appellant,*)
vs.)
)
JULIE A. MILLER.)
)
) *Defendant/Respondent.*)
)

Case No. **CV 2000 2831**
(also consolidated case CV 2006 6589)

**MEMORANDUM DECISION ON
APPEAL**

LAUREL BROWN,)
)
) *Intervenor,*)
vs.)
)
**JULIE A. MILLER AND DERRICK A.
BROWN,**)
)
) *Defendants.*)
)
_____)

I. PROCEDURAL HISTORY AND BACKGROUND.

Derrick Brown (Derrick) and Julie Miller (Julie) were divorced in 2000. In June 2000 they stipulated to Derrick being awarded permanent custody of the two children they had together. The final divorce decree and related documents were presented to and signed by the Court on October 2, 2000. Both parents shared legal custody of the two children and Derrick received primary physical custody, with Julie receiving reasonable visitation. Thereafter, as Derrick was being sentenced on a felony charges in Idaho, without telling Julie, Derrick sent the children to California first with his brother

and later with his mother, Laurel Brown (Laurel). At a November 17, 2005, contempt hearing, Kootenai County Magistrate Judge Barry Watson found Derrick in contempt for having thwarted Julie's visitation and Judge Watson's Order to that effect was filed January 3, 2006.

Beginning in 2002, Derrick's mother Laurel (grandmother of the children) sought guardianship of both children and on November 5, 2002, received Letters of Guardianship from a California Court. The California matter is known as *Guardianship of Jacob and Joshua Brown*, Case No. BP074644 (Superior Court of California, County of Los Angeles). Julie testified that she only learned of the guardianship after a guardianship order was entered in California. Julie also testified that she attempted to visit, telephone, and correspond by mail with her children throughout this time, and even moved to Nevada to be closer to them for a period of time in 2004.

On May 4, 2005, after returning to Idaho, Julie filed a Motion to Modify the decree and to change custody of the children to herself. In early 2006, Judge Watson granted Julie sole legal and physical custody of the children, subject to termination of the California guardianship, and entered an Order to this effect on March 21, 2006.

On July 20, 2006, Judge Watson and the Los Angeles Superior court Commissioner who was assigned the guardianship case, held a teleconference to deal with the jurisdictional issue. Judge Watson and the Commissioner agreed Idaho had original jurisdiction. Judge Watson found it appropriate to retain jurisdiction in Idaho, entering an Order retaining jurisdiction on August 2, 2006. Neither Derrick nor Laurel were present during the telephonic jurisdictional review hearing. Julie's attorney was present. Subsequently, Laurel's guardianship was terminated and Fonda Jovick was appointed as Guardian Ad Litem for the children.

In August 2006 Laurel filed her petition to intervene and a petition to modify custody. This matter came before Judge Watson for trial on March 6, 2007. The day before trial on March 5, 2007, Laurel sent a fax to Judge Watson explaining that she suffered vertigo, and providing a supporting note from her doctor, and would not be able to travel to Idaho for the trial. That letter was filed on March 6, 2007. Judge Watson noted receipt of the letter on the record. T. p. 1, L. 21 – p. 3, L. 1 (March 6, 2007 hearing in CV 06 6589). As Judge Watson noted on the record, Laurel’s letter did not ask for a continuance, nor was there any request in the letter or otherwise for her to participate by telephone. *Id.* Neither Laurel nor Derrick appeared at this March 6, 2007, trial. Following the trial Judge Watson granted Julie full custody, ordering transfer of the children to Julie’s home. *Id.*, p. 53, L. 22 – p. 54, L. 4. Judge Watson also awarded Julie her attorney fees upon presentation of a motion and Derrick and Laurel having an opportunity to object. *Id.*, p. 58, LI. 6-20. On March 22, 2007, Julie’s attorney filed a “Memorandum and Affidavit of Kevin J. Waite Itemizing Attorney’s Fees and Costs.” No objections were filed by Laurel or Derrick. After waiting more than the required time for objection, on June 12, 2007, Judge Watson ordered joint and several Judgments against Derrick and Laurel in favor of Julie for Julie’s attorney fees pursuant to I.C. § 12-121 and I.R.C.P. 37(a)(4) and 37(b), consistent with Judge Watson’s March 9, 2007, Order of Modification. Derrick and Laurel timely filed separate *pro se* Notices of Appeal on April 17, 2007, and April 18, 2007, respectively. Subsequently, Derrick and Laurel retained counsel. In spite of an Order entered November 21, 2007 by this Court, requiring the parties “to agree upon an expedited briefing schedule”, this matter was not briefed until January 20, 2009. Oral argument was held on January 22, 2009. The Court took the matter under advisement as it had not had the opportunity to read the

consolidated transcript of the hearings held in this case by Judge Watson on November 17, 2005, February 6, 2006, August 28, 2006, September 5, 2006, December 4, 2007, and February 1, 2007. This Court has reviewed the transcript of those hearings, as well as the separate transcript of the March 6, 2007, hearing, has read the briefs submitted on appeal and has reviewed the pertinent portions of the file.

The issues on appeal are:

(1) whether Appellants are now raising *all* their issues for the first time on appeal since appellants Derrick and Laurel failed to appear at the trial;

(2) whether Judge Watson properly retained jurisdiction (refused to relinquish jurisdiction) pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA);

(3) whether Judge Watson erred in not considering Laurel's fax as a request for telephonic appearance or motion to continue and proceeding to trial;

(4) whether Judge Watson properly awarded attorney's fees; and

(5) whether Julie is entitled to attorney fees and costs on appeal.

II. ANALYSIS.

A. STANDARD OF REVIEW.

The Idaho Rules of Civil Procedure requires appeals from the magistrate's division be heard by the district court as an appellate proceeding. If the record on appeal is not adequate, the district court may order a trial *de novo* or remand the matter to the magistrate's division. I.R.C.P. 83(b). Thus, as the Idaho Supreme Court has stated, in an appeal from a magistrate court's decision, the district court should proceed in one of two ways: "(1) the district court could act as an appellate court and consider the record from the magistrate court, yet hear new evidence on matters not addressed

below because they occurred after the appeal was filed; or (2) the district court could choose to wipe the slate clean and conduct a ‘full’ trial *de novo*.” *Leavitt v. Leavitt*, 142 Idaho 664, 669, 132 P.3d 421, 426 (2006). No party has requested a *de novo* review. I.R.C.P. 83(u)(1) sets forth the scope of appellate review on appeal to the District Court from the magistrate division:

Upon an appeal from the magistrate’s division of the district court, not involving a trial *de novo*, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.

When the Idaho Supreme Court reviews the decision of a district court acting in its appellate capacity over the magistrate division, the Court reviews the magistrate court’s decision independently of, but with due regard for, the district court’s intermediate appellate decision. *State v. Doe*, 140 Idaho 271, 273, 92 P.3d 521, 523 (2004); *Marchbanks v. Roll*, 142 Idaho 117, 119, 124 P.3d 993, 995 (2005). The Supreme Court will uphold the magistrate court’s findings of fact supported by substantial and competent evidence and exercises free review with regard to conclusions of law. *Doe*, 140 Idaho 271, 273, 92 P.3d 521, 523. Thus, as pertains to the Idaho Court’s exclusive and continuing jurisdiction pursuant to I.C. § 31-11-202, and as to the inconvenient forum subsection, I.C. § 31-11-207, this Court will uphold Judge Watson’s findings if supported by substantial and competent evidence, and this Court will review Judge Watson’s discretionary acts under the abuse of discretion standard.

B. ANALYSIS OF THE ISSUES.

1. Appellants Are Not Raising All Issues for the First Time on Appeal.

Julie raises a legitimate issue as to whether Appellants are now raising *all* their issues for the first time on appeal since appellants Derrick and Laurel failed to appear at

the trial. Appellee's (Respondent's) Revised Brief on Appeal, pp. 10-13.

Julie argues that because Derrick and Laurel failed to appear at trial, they did not raise any issues at trial, thus, their now raising for the first time on appeal the issue of Judge Watson's alleged error in refusing to relinquish jurisdiction, it not properly before the Court. *Id.*, p. 10. Julie also argues the "inconvenient forum" argument and the issue of attorney's fees were not raised below and should not be heard for the first time on appeal. *Id.*, p. 11. Julie claims the exception to the rule allowing jurisdictional arguments to be raised at any time, should not apply here because the UCCJEA deals with neither subject matter nor personal jurisdiction, but rather with *discretionary* exercises of jurisdiction. *Id.*, p. 12. Derrick and Laurel argue the issue of jurisdiction cannot be waived for failure to raise the issue earlier, citing *Fix v. Fix*, 125 Idaho 372, 376-377, 870 P.2d 1331, 1335-36 (1993). They go on to state that the question of whether the modification should have been heard by California courts was raised via Laurel's pleadings and addressed and litigated below. Appellant's Revised Reply brief, p. 5. They further argue the discretionary exercise of jurisdiction necessarily presupposes proper subject matter and personal jurisdiction and therefore, the question of jurisdiction can be raised at any time. *Id.*, pp. 4-6. Finally, they argue the inconvenient forum argument was discussed by Judge Watson and the Commissioner during the July 20, 2006, telephonic conference, Laurel's illness was implicitly dealt with by Judge Watson at the March 6, 2007, hearing because the Court proceeded with trial despite the claimed illness, and reconsideration of a fee award may be appealed or dealt with through a reconsideration request. *Id.*, p. 6.

A litigant may not remain silent as to a claimed error during a trial and later raise objections for the first time on appeal. *Bradford v. Simpson*, 97 Idaho 188, 191, 541

P.2d 612, 615 (1975). To do so would allow a party to secretly nurture an error, speculate on a favorable outcome, then, in the event of an adverse outcome, "...bring forth the error as a life preserver on a motion for new trial." *Id.* Two exceptions exist to the rule that objections not made at trial will not be considered on appeal: (1) where the objection raises a question of jurisdiction and (2) an objection regarding a pleading failing to state a cause of action. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). Here, Julie urges the Court to consider the Idaho Supreme Court's decision in *Ladurini v. Hazzard*, 130 Idaho 192, 196, 938 P.2d 1230, 1234 (1997), where, in dealing with the UCCJA, Idaho Supreme Court upheld the decision of the magistrate that Idaho had continuing jurisdiction over the divorce decree. The Idaho Supreme Court reasoned the foreign (Florida) court acted improperly in not inquiring whether Idaho was going to decline to exercise jurisdiction and then deferring to the decision of the Idaho magistrate. *Id.* Therefore, although Idaho Supreme Court would not hear the issue as to when the respondent ceased to live in Idaho on appeal because that finding was not challenged below, the Idaho Supreme Court focused on the actions of the Idaho and Florida courts. The facts in the instant matter are distinguishable because while *Ladurini* dealt with the UCCJA, here, Judge Watson and the California Court Commissioner communicated and the Commissioner deferred to Judge Watson's decision regarding continuing and exclusive jurisdiction remaining with the Idaho courts pursuant to I.C. § 32-11-202.

It follows that, absent case law specifically excluding child custody action from the exception allowing jurisdictional questions to be presented for the first time on appeal, such a matter can properly be raised by Derrick and Laurel. Further, although Derrick and Laurel have not done so explicitly, the Commissioner did raise the issue of

inconvenient forum with Judge Watson. The applicable statute, I.C. § 32-11-207, states, “[t]he issue of inconvenient forum may be raised upon the motion of a party the court’s own motion or request of another court.” Here, it was another court which raised the issue. While no Idaho case law exists discussing this precise issue, it appears proper for this Court to hear an appeal of a matter initially raised by a California Court Commissioner before Judge Watson at the June 20, 2006, hearing. Regarding the issue of Laurel’s fax on March 5, 2006, it similarly appears that at least in some minor form, the issue of the presence or non-presence of a party was before Judge Watson. Since Judge Watson did not issue an Order concerning her absence or the purported motion to continue, there was nothing, interlocutory or otherwise, for Laurel to move to reconsider...the trial had already taken place. See *Telford v. Neibaur*, 130 Idaho 932, 950 P.2d 1271 (1998) (holding I.R.C.P. 11(a)(2)(B) provides the authority for a district court to reconsider and vacate interlocutory orders where final judgment has not been ordered.)

This Court finds that it is proper to reach the merits of the issue on appeal, even though appellants Derrick and Laurel failed to appear at the trial on March 6, 2007, or the June 20, 2006, hearing. The remaining issue on appeal were at least peripherally raised before Judge Watson, although not by Derrick and Laurel.

2. It Was not Error for Judge Watson to Refuse to Relinquish Jurisdiction.

Appellants Derrick and Laurel and respondent Julie all agree that the Idaho Court had original jurisdiction over this matter. Appellant’s Revised Opening Brief on Appeal, p. 8; Appellee’s Revised Brief on Appeal, p. 14. But Derrick and Laurel argue that California was the children’s home state pursuant to I.C. §§ 32-11-102(g), 31-11-201 and 32-11-202, and the Idaho Court could only assert continuing jurisdiction, foreclosing

any exercise of jurisdiction by California, *only if* the Idaho Court determined (1) neither the children, nor one parent and the child, nor a person acting as parent had a significant relationship with Idaho and substantial evidence regarding the children was no longer available in Idaho; (2) either it or a Court of California determined that the children, the parents, and any person acting as parent no longer presently resided in Idaho; *and* (3) the Idaho Court had jurisdiction to make an initial child custody determination under § 32-11-201. Appellant’s Revised Brief on Appeal, p. 8. Derrick and Laurel argue there was no contact with Idaho by the children for five-and-a-half years and all school records, teacher, counselors, daycare providers, etc. were in California. *Id.*, p. 10. Therefore, according to Derrick and Laurel, the original state, Idaho, was no longer the home state of the children and Julie “acceded to their continued residence in California and California acquired ‘home state’ status for the children.” *Id.*, p. 11. Assuming California is the “home state,” Derrick and Laurel claim Judge Watson erred in failing to inquire whether Idaho had lost significant contacts with the children. *Id.*, pp. 11-12

As to the inconvenient forum issue arguably raised by the Commissioner, Derrick and Laurel argue an Idaho Court must consider whether it is appropriate for another state’s court to exercise jurisdiction, and must allow the parties to submit information relevant to the factors enumerated in I.C. § 32-11-207(b) in order to do so. *Id.*, pp. 13-14. Derrick and Laurel claim all possible evidence regarding the children from 2000 on was located in California and “no evidence regarding the children remained in Idaho.” *Id.*, p. 14.

Julie argues Idaho courts should not lose or relinquish jurisdiction based on the wrongful acts of Derrick and Laurel. Appellee’s Revised Brief on Appeal, p. 14. Julie

goes on to clarify that Judge Watson's continuing jurisdiction over his own decree for the purposes of the contempt motion has not been questioned; and that the hearing on the contempt motion along with the February, 2006, hearing on the Temporary Order granting Julie custody and a home visit all provided substantial evidence regarding the children's care, protection, training, and relationships. *Id.*, p. 16.

Julie argues that an Idaho Court with proper § 32-11-201 initial child custody jurisdiction (which is not disputed here) has continuing jurisdiction under the UCCJEA requirements in I.C. § 32-11-202(1), until there is a determination by the Idaho Court that: (1) neither the children nor the children together with one parent have any significant connection with Idaho and (2) substantial evidence is no longer available in Idaho regarding the children's care protection, training, and relationships. *Id.*, at 15.

The statute reads:

32-11-202.EXCLUSIVE, CONTINUING JURISDICTION.

(a) Except as otherwise provided in section 32-11-204, Idaho Code, a court of this state which has made a child custody determination consistent with section 32-11-201 or 32-11-203, Idaho Code, has exclusive, continuing jurisdiction over the determination until:

- (1) A court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or
- (2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

(b) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 32-11-201, Idaho Code.

Idaho Code § 32-11-202. Julie's interpretation is correct as the statute contains the word "or" between the requirements of § 32-11-202(a)(1) and (a)(2). The interpretation urged by Derrick and Laurel that subpart (a) (1) and (2) and (b), all need to be proven,

finds no support in a simple, plain reading of the statute. Julie's argument continues that Judge Watson never had to make such a determination because the children were wrongfully removed from the state. Appellee's Revised Brief on Appeal, p. 15. Julie cites two Idaho cases for the proposition that wrongful conduct on the part of Derrick cannot gain him an advantage. *Id.*, pp. 17-18, citing *Ziegler v. Ziegler*, 107 Idaho 527, 537, 691 P.2d 773, 783 (Ct.App. 1985) (Where the court did not maintain jurisdiction in Idaho when aggrieved husband purposefully sought and obtained relief in another state before seeking to maintain jurisdiction in Idaho; the Court also noted that the husband no longer resided in Idaho, but had moved to Spokane, Washington.), and *Hopper v. Hopper*, 144 Idaho 624, 167 P.3d 761 (2007). Julie urges this Court on appeal to recognize that contacts between the state of Idaho and the children remained; that Judge Watson heard "substantial testimony" on these contacts during the November 15, 2005 hearing on contempt and the February 6, 2006 hearing on Julie's motion for temporary order; that the Guardian ad Litem requested by Laurel was in Idaho; and Judge Watson's continued to monitor the case via a status hearing. Appellee's Revised Brief on Appeal, p. 16. Julie concedes the Guardian ad Litem's involvement and Judge Watson's oversight have occurred since the children have been ordered back to Idaho via the March 9, 2007 Order. Julie makes two final arguments in this regard. First, California was not the children's "home state" when Julie filed the Petition to Modify in May, 2005, because Derrick was either incarcerated or in Idaho from 2000 until May, 2005, and Laurel was not a "person acting as parent." *Id.*, pp. 18-19. Second, Idaho places a high evidentiary burden on parents who wish to relocate their children; they must show that the benefits of the move outweigh any harm to the relationship between the other parent and the children. *Id.*, p. 19.

Here, the interpretation of the UCCJEA proffered by Julie is correct. The language of the statute provides that once an Idaho court has initial child custody jurisdiction (which has not been disputed here), that Idaho court has exclusive, continuing jurisdiction until *either*:

(1) the *Idaho* court *determines* that (1) neither the child, (2) nor the child and one parent, (3) nor the child and a person acting as parent have a significant relationship with Idaho *and* that substantial evidence regarding the child's care, protection, training and personal relationships is no longer available in Idaho

or

(2) An *Idaho* court *or* court of another state *determines* that (1) the child, (2) the child's parents, and (3) any person acting as parent do not presently reside in the state.

Due to the italicized word "*determines*", obviously the statute requires the *status quo* in the Idaho courts always remains with the Idaho courts, unless and until someone brings the issue up to a court...a court must *determine* something different happen. Julie argues: "Obviously, there never was any such determination by a court of this state." Appellee's Revised Brief on Appeal, p. 15. This Court tends to agree that at least no party to this case, and certainly Derrick and Laurel have not asked Judge Watson to *determine* that he no longer has continuous, exclusive jurisdiction. This Court on appeal will give Derrick and Laurel the benefit of every doubt, that they can raise the issue because the "determination" was implicit in the conversation between the California Court Commissioner and Judge Watson in the June 20, 2006, hearing. In that hearing the California Court Commissioner concedes that California never asked for permission [from the Idaho court given Idaho's continuing, exclusive jurisdiction] to make custody

orders concerning the children, and that Idaho is the home state for the children. Tr, p. 5, Ll. 11-15 (July 20, 2006 Telephone Conference Hearing, CV 00 2831). The Court Commissioner then asked if Judge Watson was in a position to release jurisdiction to California...or whether Judge Watson intended to retain jurisdiction. *Id.*, Ll. 16-23.

Judge Watson's response was clear:

THE COMMISSIONER: All right. Then I just want to make sure, Judge Watson, that I understand your position, and that is that Idaho um, will not release its jurisdiction to California to make child custody orders; is that correct?

THE COURT [JUDGE WATSON]: Correct.

Tr. p. 9, L. 22 – p. 10, L. 2.

Idaho Code § 32-11-202(a)(2) is inapplicable here for a host of reasons. No party has ever asked Idaho or any other court to determine that the child, the child's parents and any person acting as a parent do not presently reside in the state of Idaho.

Subsection 2 requires all of those things to be determined, and no one has asked any court to make such determination. Factually, that subsection could not have been satisfied as there is was no showing to this Court that Julie did not at any hearing before Judge Watson, not live in the State of Idaho.

Therefore, Derrick and Laurel only have available to them I.C. § 32-11-202(a)(1) for their argument that Idaho's exclusive, continuing jurisdiction was no longer in effect. As to the first phrase of that subsection, Derrick and Laurel have arguably demonstrated that the children, the children and Derrick, and the children and Laurel did not at times have a significant connection with Idaho. However, there is a plethora of substantial evidence in Idaho regarding the children's care, protection, training and personal relationships. At all pertinent times, Idaho is where Julie lived. As Julie has argued, the reason for any purported lack of substantial relationship with Idaho or evidence in Idaho

is in large part due to Derrick's wrongful action in taking the children first to his brother in California and then to his mother Laurel. Had Derrick not wrongfully spirited the children to California, we would not have this dispute. Derrick is an Idaho registered sex offender due to a guilty plea to the felony charge of sexual battery of a minor child, Kootenai County Case No. CR 2000-1944. Just prior to his being sentenced in Idaho for that crime, Derrick sent the children to California to be with Derrick's brother. Tr. p. 11, L. 10 – p. 15, L. 5 (November 17, 2005, hearing); Exhibit D. Judge Watson, before the July 20, 2006 hearing, had already found Derrick in contempt for willfully thwarting Julie's visitation rights and hence also his children's rights to a relationship with their mother. Further, it is questionable as to how much Derrick was in California, given the fact that on June 8, 2005, he was personally served with the modification pleadings at his then residence of 1913 Strand, Post Falls, Idaho. Appellee's Revised Brief on Appeal. Although Laurel could likely be considered a "person acting as parent" under I.C. § 32-11-102(m) and I.C. § 32-11-202(a)(1), this determination would not change whether this Court would find substantial evidence supported Judge Watson's decision that substantial evidence regarding the children's care, protection, training and personal relationships remained available in Idaho. A home study was ordered to be filed in this case. Temporary Order, filed March 21, 2006. The conclusion of that home study dated April 3, 2006:

Based on the available information, Idaho Youth Ranch finds that Julie and Justin Booth have a stable home that is suitable for children. The undersigned social worker acknowledges that the children under guardianship were not seen or interviewed for this home evaluation, and little information was made available about their specific special needs if any. However it does appear that the Booth home is an appropriate family setting for the care and raising of children at this time.

Tr. Exhibit F; Notice of Filing of Home Evaluation, filed June 13, 2006. There is

substantial competent evidence to support Judge Watson's determination that the continuing, exclusive jurisdiction of the Idaho courts should not be changed.

Idaho Code § 32-11-207 allows an Idaho court, even if it has jurisdiction, to decline to exercise that jurisdiction if it determines that it is an inconvenient forum under the circumstances. Due to the word "may", the language of that statute is discretionary:

(a) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

Idaho Code § 32-11-207(a). Judge Watson's determination of whether Idaho had become an inconvenient forum, pursuant to I.C. § 32-11-207, was an exercise of his discretion and would only be overturned by this Court upon a finding of abuse of that discretion. Derrick and Laurel argue Judge Watson failed to perform the statutorily required inquiry and that this court should review the decision under the substantial evidence standard. Appellant's Brief, p. 13. What is clear on appeal is that *at no time have Derrick or Laurel asked Judge Watson to consider the "inconvenient forum" issue!* At this juncture on appeal, this Court can no longer give Derrick and Laurel the benefit of doubt because the California Court Commissioner simply did not raise the issue of "inconvenient forum" with Judge Watson...that entire hearing was focused on the court retaining jurisdiction. No party, no other court has raised the issue of "inconvenient forum." Certainly under the statute, Judge Watson could have raised the issue *sua sponte*, however, subsection (b) of that statute puts the proof back on *the parties*.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this state;
- (3) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

Idaho Code § 32-11-207(a). Derrick and Laurel have asked this Court to travel great lengths for them on appeal, considering the fact that neither of them attended the July 20, 2006, hearing or the March 6, 2007, hearing, and thus, they have put on no proof and have no evidence on appeal. Essentially on this issue, Derrick and Laurel are asking this Court on appeal to do the impossible, to go out and find the evidence that the Derrick and Laurel should have submitted to Judge Watson, and then make a determination about “inconvenient forum” that Judge Watson was never asked to make. Julie appeared at the telephonically through counsel, but neither Derrick, nor Laurel, nor their counsel appeared. No argument has been made that notice of the hearing was improper. Derrick and Laurel’s argument that Judge Watson erred in not hearing the evidence flies in the face of the fact that Derrick and Laurel failed to appear at the hearing and failed to present any such evidence.

.Judge Watson did not in any way abuse his discretion. Substantial competent evidence shows it was not error for Judge Watson to refuse to relinquish jurisdiction.

3. Judge Watson did not Err in not Continuing the Trial.

Derrick and Laurel appear to argue Laurel’s fax to the Court received the morning before the March 6, 2007, trial, stating she had vertigo and could not travel,

somehow imposed an obligation on Judge Watson to inquire further as to whether she needed a continuance or would appear by telephone. Appellant's Revised Opening Brief, p. 15. Julie argues that the faxed letter was not a motion to continue or appear telephonically, and that Derrick and Laurel's *pro se* status does not excuse their failure to attend or properly move to continue, and in any event, Derrick's failure to attend is certainly not excused by Laurel's letter. Appellee's Revised Brief on Appeal, p. 21.

It is important to note that as of March 5, 2007, when she wrote and faxed this letter to Judge Watson, *knew* she could participate by phone. Laurel had in fact done just that on previous occasions. Tr. p. 317, L. 23 – p. 318, L. 7 (Transcript of August 28, 2006, hearing). It is also important to note that while Laurel state in her fax that she could not "travel", the doctor's note attached merely stated she could not drive or operate machinery. Nothing in the letter or note from the doctor said she could not fly up for the hearing, and certainly nothing stated she could not place a phone call to participate in the hearing.

Clearly, the decision to grant or deny a continuance is vested in the sound discretion of the trial court. *State v. Ward*, 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). "Trial Judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *State v. Carman*, 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct.App. 1988), quoting *Morris v. Slappy* 461 U.S. 1, 11, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983). Thus, Derrick and Laurel must prove Judge Watson, upon reading Laurel's letter, abused his discretion in not *sua sponte* continuing the hearing or in tracking down Laurel to force her to participate by phone, when Laurel's letter requested

neither a continuance nor telephone participation.

It makes no difference that Laurel was not represented by an attorney at this time. *Pro se* litigants are “held to the same standards and rules as those represented by an attorney.” *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990); *Schneider v. Curry*, 106 Idaho 264, 678 P.2d 56 (Ct.App. 1984) (review denied). Laurel’s only argument is one of fundamental fairness. Appellant’s Revised Opening Brief, p. 16. However, this “fundamental fairness” argument does not even address whether Laurel’s substantial rights were prejudiced. “In order to show that the trial court abused its discretion, the *appellant* from denial of a motion to continue trial must show that his or her substantial rights were prejudiced by denial of the motion.” *Everhart v, Washington County Road and Bridge Dept.*, 130 Idaho 273, 275, 939 P.2d 849, 851 (1997); *State v. Laws*, 94 Idaho 200, 202, 485 P.2d 144, 146 (1971). Here, neither Derrick nor Laurel even made a motion to continue or to appear telephonically, yet they now argue that Judge Watson should have somehow intuited that they intended or desired to, and it was an abuse of discretion Judge Watson not to inquire as to their intentions or desires.

Judge Watson did not abuse his discretion in proceeding with trial despite having received a fax stating that Laurel had vertigo.

4. Judge Watson did not Err in Granting Julie Attorney Fees.

Derrick and Laurel argue their case was not brought, defended, or pursued frivolously or without foundation and that an award of fees to Julie under I.C. § 12-121 was improper. Appellant’s Reply Brief, pp. 16-17. Derrick and Laurel claim I.C. § 12-123 set forth the requirement of a “hearing” before an award of fees for frivolous conduct can be entered. *Id.*, pp. 17-19. Julie replies fees are appropriate pursuant to a

prevailing party analysis under I.C. § 12-121 and the “hearing” required under § 12-123 was the trial itself. Appellee’s Revised Brief on Appeal, p. 22. That argument misses the point as well.

The argument of Derrick and Laurel lacks any merit. An award of attorney fees under I.C. § 12-121 is separate and distinct from an award under I.C. § 12-123. See *Roe Family Services v. Doe*, 139 Idaho 930, 938, 88 P.3d 749, 757 (2004). Idaho Code § 12-121 provides for fees in a *civil action* to the *prevailing party* while I.C. § 12-123 provides a basis for an award of fees for frivolous *conduct* within in a civil case. *Id.* When dealing with a specific instance of conduct under Idaho Code § 12-123, a motion is required by a party and notice must be given and a hearing must be held. *Id.* But, an award of attorney fees under Idaho Code § 12-121 may only be granted by the Court when it finds that the case was brought, pursued or defended frivolously, unreasonably, or without foundation. *Hossner v. Idaho Forest Indus., Inc.*, 122 Idaho 413, 835 P.2d 648 (1992). Although Derrick and Laurel are appeared *pro se* at times in this matter (they are represented by counsel on this appeal), as mentioned above, *pro se* litigants are “held to the same standards and rules as those represented by an attorney.” *Golay v. Loomis*, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990); *Schneider v. Curry*, 106 Idaho 264, 678 P.2d 56 (Ct.App. 1984) (review denied). A prevailing party analysis under I.C. § 12-121 takes into account whether a case is brought, defended, or pursued frivolously, and, because I.C. § 12-123 is a separate statute covering different circumstances, no I.C. § 12-123 need be held in order for fees to be awarded pursuant to I.C. § 12-121.

Attorney fees were awarded by Judge Watson on the alternative ground that Derrick and Laurel failed to comply with discovery, under I.R.C.P. 37. The argument of

Derrick and Laurel that an award of attorney fees as a sanction for non-compliance with discovery orders is improper because there was no evidence to substantiate the noncompliance at the time of trial, fails as well. See Appellant's Reply Brief, p. 18. Because Derrick and Laurel essentially defaulted, Judge Watson only had Julie's testimony and her counsel's argument to consider. On appeal, Julie argues Derrick and Laurel at best, were only partially responsive to discovery and that they never provided answers to interrogatories or document requests. Tr. p. 3, L. 13, - p. 4, L. 7. (Transcript of March 6, 2007 hearing). The imposition of sanctions for discovery violations is committed to the discretion of the trial court and will not be overturned on appeal absent a manifest abuse of that discretion. *Ashby v. W. Council, Lumber Production and Industrial Workers*, 117 Idaho 684, 686, 791 P.2d 434, 436 (1990); *Storm v. Spaulding*, 137 Idaho 145, 149, 44 P.3d 1200, 1204 (Ct. App. 2002) (trial court's supervision of discovery is wholly discretionary). Derrick and Laurel have completely failed to demonstrate how the Court abused its discretion in this regard.

5. Attorney's Fees on Appeal.

An award for attorney's fees under I.A.R. 41 is only proper where the Court "is left with an abiding belief that the appeal was brought, pursued or defended unreasonably or without foundation." *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). A party seeking fees on appeal must assert the claim in the first appellate brief filed by the party. I.A.R. 41(a). Julie has complied with that rule by requesting fees in her reply brief. The Supreme Court has held that, where plaintiffs employ clearly dilatory tactics throughout pretrial stages of litigation, and then appealed to the Supreme Court for relief from sanction brought on by their own actions, an award of attorney fees was justified. *Ashby v. Western Council*, 117 Idaho 648, 791

P.2d 434 (1990). In *Ashby*, the Court found the action of the appellants “reminiscent of the story of the man who murdered both of his parents, then threw himself on the mercy of the court because he was an orphan.” 117 Idaho 684, 688, 791 P.2d 434, 438.

Derrick and Laurel have no evidence due to their own inaction. Derrick and Laurel have no evidence to support their appeal in large part because they chose not to attend telephonically or in person, crucial hearings of which they had notice. They have misinterpreted applicable (attempting to graft the hearing requirement of I.C. § 12-123 upon I.C. § 12-121; construing I.C. § 32-11-202 in the conjunctive rather than the disjunctive); they have asked this Court to find that Judge Watson should have somehow intuited that Laurel intended or desired to request a continuance or to attend a hearing telephonically when nothing in the record would support such (Derrick does not even have the “benefit” of this contorted claim as he simply failed to show up in any way). In this case, Derrick and Laurel simply seek relief from the result of their failure to appear at the trial on March 6, 2007, at the earlier hearing on June 20, 2006, and from their dilatory tactics throughout the litigation.

Attorney’s fees on appeal in favor of respondent Julie and against appellants Derrick and Laurel are appropriate.

III. ORDER.

IT IS HEREBY ORDERED that the decision of Magistrate Judge Barry Watson appealed from in this case are **AFFIRMED** in all aspects.

IT IS FURTHER ORDERED that Respondent is entitled to attorney fees against Appellants, jointly and severally, under I.A.R. 41 as this Court is left with an abiding belief that the appeal was brought and pursued unreasonably and without foundation.

Entered this 23rd day of January, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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