

“Complaint and Request for Jury Trial; and Application for Writ of Mandamus,” (“Complaint”) commencing the instant action. The Plaintiffs alleged four causes of action for which they seek monetary “damages.” The Plaintiffs also seek a writ of mandamus ordering the Kootenai County Clerk and Kootenai County Sheriff to “follow the applicable statute, rule and administrative order.” (Complaint, pp.5-6.) Lastly, the Plaintiffs request an order “enjoining (sic) further violations of the aforementioned Criminal Rule and Idaho Code.” (Id.)

The Kootenai County Clerk and Kootenai County Sheriff (“Defendants”) filed a “Notice of Appearance” on March 11, 2011, and to date the Defendants have not filed an answer. During the course of this litigation, the Defendants asked this Court to take judicial notice of the case file in a prior action between similar parties, Allied Bail Bonds v. Kootenai County, et al., Case No. CV-2007-7471. Specific to this matter, the Defendants asked the Court to take judicial notice of “the Second Amended Complaint and Request for Jury Trial dated October 22, 2008 and filed on December 4, 2008, and Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part dated December 12, 2008” (Request for Judicial Notice, July 6, 2010, and August 26, 2010.) Notably, the District Court in that case entered judgment on March 9, 2009, and the Plaintiff appealed to the Idaho Supreme Court.

While the appeal of Case No. CV-2007-7471 was pending, the Defendants in this case filed a “Motion to Dismiss,” on September 15, 2010, moving to dismiss the Complaint pursuant to I.R.C.P. 12(b)(6).¹ The Defendants supported the Motion to

¹ This Court held a hearing in this case on August 26, 2010, and denied the Plaintiffs’ request for a writ of mandate and request for an injunction. (Order Regarding Plaintiff’s Motion for Mandate or Preliminary Injunction, Defendant’s Motion Excepting to Bond, Defendants’ Motion to Strike, Defendant’s Motion to Shorten Time and Defendants’ Request for Judicial Notice, pp.2-3.)

Dismiss with a "Memorandum in Support of Motion to Dismiss" ("Defendants' Memorandum"). The Plaintiffs did not file responsive pleadings. This Court originally set the Motion to Dismiss for hearing on September 29, 2010, but on September 23, 2010, the Plaintiffs substituted counsel. (Notice of Substitution of Counsel, September 23, 2010.) As a result of the substitution, the parties stipulated to continue the hearing on the Defendants' Motion to Dismiss. (Stipulation to Continue Hearing on Defendant's Motion to Dismiss, November 3, 2010).

On March 16, 2010, the Defendants issued a second "Notice of Hearing," and faxed a copy to the Plaintiffs' counsel, notifying the Plaintiffs that the hearing on the Defendants' Motion to Dismiss was set for May 18, 2011. During April 2011, counsel for the respective parties in this case appeared before the Idaho Supreme Court for oral argument on the appeal of Case No. CV-2007-7471.

Later, on May 13, 2011, five days prior to the hearing on the Defendants' Motion to Dismiss in this case, the Plaintiffs filed a "Memorandum in Opposition to Defendant's Motion to Dismiss" ("Plaintiff's Memorandum"). The parties appeared on May 18, 2011, for the hearing on the Defendants' Motion to Dismiss. The parties informed this Court of the pending appeal by the Idaho Supreme Court in Case No. CV-2007-7471 and this Court granted the Defendants' request to take judicial notice of the 2008 Second Amended Complaint and the 2008 Order of Dismissal. (Court Minutes, May 18, 2011.) This Court delayed taking the matter under advisement until the Idaho Supreme issued its decision in Case No. CV-2007-7471 and remittitur issued twenty-one days thereafter. The Idaho Supreme Court issued its opinion on July 8, 2011, affirming the 2008 Order of Dismissal in Case No. CV-2007-7471. Remittitur issued on July 29, 2011.

II. APPLICABLE STANDARDS

The Defendants move pursuant to I.R.C.P. 12(b)(6) to dismiss the Plaintiffs' Complaint for failure to state a claim upon which relief can be granted, as allowed by I.R.C.P. 12(b)(6), which provides:

Every defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses shall be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Defendants have not filed an answer in this case and do not present any affidavits in support of the Defendants' Motion to Dismiss. However, this Court has taken judicial notice the case file in Case No. CV-2007-7471. Therefore the Defendants have presented matters outside the pleading, and this Court will treat the Defendants' Motion to Dismiss as a motion for summary judgment.

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together with any affidavits." Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987). Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). "If the adverse party desires to serve

opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least (14) days prior to the date of the hearing.” I.R.C.P. 56(c). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

This Court notes that the Plaintiffs’ Memorandum was filed five (5) days prior to the hearing, well after the Defendants’ served the notice of hearing on the Plaintiffs’ attorney March 18, 2011, and nearly eight months after the Motion to Dismiss was filed. Thus, the Plaintiffs’ Memorandum is untimely as per I.R.C.P. 56(c) which requires a responsive pleading within fourteen (14) days of filing a motion for summary judgment. Moreover, I.R.C.P. 56(e) controls when a responding party does not file a responding pleading that sets forth specific facts:

...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party’s pleadings but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Attached to the Plaintiffs’ Memorandum is a “Affidavit and Sworn Complaint of Frank Davis” dated March 9, 2011 (“Affidavit of Frank Davis”). This document is really a litany of complaints presented in a stream of consciousness form, instead of a presentation of facts for this Court to consider. Notably, it is not file stamped as a pleading. The form and content, then, does not meet the standards for an affidavit under the Idaho Rules of Civil Procedure and Idaho Rules of Evidence.

As a result of both the untimely filing and the form and content of the Affidavit of Frank Davis, this Court could declare under I.R.C.P. 56(e) that the Plaintiffs have failed to set forth specific facts showing that there is a genuine issue for trial. However, because the Defendants' Motion to Dismiss is dispositive on its merits, this Court declines dispose of the matter as allowed by I.R.C.P. 56(e).

III. ANALYSIS

A. Claims in Case Nos. CV-2007-7471 and CV-2009-9121

Before addressing the Defendants' Motion to Dismiss, a comparison of the 2008 Second Amended Complaint and 2008 Order of Dismissal with the Complaint in this case is warranted.

1. Claims and Findings of Case No. CV-2007-7471

In Case No. CV-2007-7471, the Plaintiff raised at least seven issues in the 2008 Second Amended Complaint. Pertinent to this case are paragraphs 10 and 11:

10) The Kootenai County Sheriff's office is presently and has in the past accepted credit cards from the inmates for purposes of posting bail pursuant to Idaho Code Title 19, Chapter 9, Idaho Rule of Criminal Procedure 46, and Idaho Misdemeanor Rules 12, and 13. Said conduct interferes with Plaintiff's economic opportunity and prospective business advantage by diverting business away from bonding companies and to credit card companies.

11) Accepting credit cards as alleged above is not authorized by Idaho Code or the Idaho Criminal/Misdemeanor Rules and amounts to and Plaintiff is entitled to an order permanently enjoining the Sheriff and his deputies from engaging in said conduct.

(2008 Second Amended Complaint, p.3, ¶¶ 10-11.)²

² The Plaintiff in CV-2007-7471 also alleged that Kootenai County breached a 2001 settlement agreement with the Plaintiff, violated the Idaho Public Records Act, and that Kootenai County Pretrial Services interfered with its "economic opportunity and prospective business advantage by reducing the amounts of bonds, increasing the amounts of releases without bond, and by interfering with the bonding relationship between Allied Bail Bonds and its customers." (2008 Second Amended Complaint, p.4, ¶¶13-17.) The

The Defendants moved to dismiss and the District Court held that the claim of interference with the Plaintiff's economic opportunity and prospective business advantage "sounds in tort," and "must be dismissed as a matter of law pursuant to I.R.C.P. 12(b)(1), because this Court lack subject matter jurisdiction where there was a failure to comply with notice requirements of the [Idaho Tort Claims Act]." (2008 Order of Dismissal, p.6.) Additionally, the District Court held that while "Allied has a contractual right with defendants Kootenai County and its Sheriff Rocky Watson (as per the 2001 settlement agreement), there is no property right to this bail bond business." (2008 Order of Dismissal, p.18.)

The District Court, however, denied the Defendants' motion to dismiss regarding standing, holding that because the Plaintiff has shown that it is a member of "an exclusive group of individuals and entities licensed to provide surety bonds for bail purposes and that the use of credit cards . . . reduces the number of bonds written," the Plaintiff did not merely have a "generalized grievance," but that the Plaintiff "has demonstrated that it bears the incident of the use of credit cards, . . . and therefore has standing to challenge the use of credit cards." (2008 Order of Dismissal, pp.18-19.)

While the Plaintiff did not directly cite to I.C. § 31-1221 in the 2008 Second Amended Complaint, the parties addressed this statute in briefing and in argument and the District Court considered I.C. § 31-1221, Idaho Rule of Criminal Procedure 46,³ and

District Court also analyzed the bonding requirement of I.C. § 6-610. The findings and conclusions of the District Court regarding these claims can be found in the 2008 Order of Dismissal, and the "Order Granting Renewed Motion to Dismiss in Part and Denying Renewed Motion to Dismiss in Part" dated February 26, 2009.

³ The 2008 Order of Dismissal considers the version of I.C.R. 46 that was in effect at the time. This version read: "Provided, bail may be posted by depositing a cashier's check, money order, or a personal check payable to the clerk of the court under such procedures as shall be established by the administrative district judge, or where acceptance of a personal check has been approved by a magistrate or district judge."

Administrative Order E-DW1 (June 16, 2000), in the 2008 Order of Dismissal. The District Court held that the Plaintiff failed to state a claim upon which relief can be granted because these rules and statutes, operating together, allow inmates at a county jail to use a credit card to post bail. (2008 Order of Dismissal, pp.19-21.)

2. Claims in Current Case

In this case, the Plaintiffs claim that the Defendant the Kootenai County Sheriff is “presently accepting ‘Comcheck’ which is not a credit or debit card, but is a means to electronically verify funds and eventually transfer the same.” (Complaint, p.2, ¶ 9.)

Also, the Plaintiffs assert that

11) Idaho Criminal Rule 46 [(effective July 1, 2009)] allows for credit cards to be used for posting cash bail provided there is a procedure approved by the administrative judge for doing so.

12) The Administrative Order E-DW-1 dated June 20, 2000, attached hereto as exhibit A, authorizes the acceptance of cash deposits by electronic direct deposit into an account designated by the Clerk of the District Court and can be construed to be the approved procedure for accepting credit or debit cards.

13) Administrative Order E-DW.1 is not being complied with because the Sheriff is not presenting the clerk with a receipt showing the actual deposit of cash into a Clerk’s account within 24 hours after receipt.

14) Administrative Order E-DW.1 dated June 20, 2000, attached hereto as exhibit A, requires the Clerk to designate an account into which this direct deposit is to be made and the Clerk has not designated any such account.

15) Lastly, the account into which the funds are being transferred is not an account approved in accordance with Idaho Code 57-128.

(Complaint, pp.2-3, ¶¶ 11-15.)

The Plaintiffs also claim that the Defendant the Kootenai County Sheriff violated Idaho Code Title 19, Chapter 29, by “releasing prisoners prior to the posting of a cash deposit.” The Plaintiffs last claim that the Defendant the Kootenai County Clerk has

violated Idaho Code Title 19, Chapter 29 and I.C. § 31-3221 by accepting “any other form of electronic funds transfer other than credit or debit cards,” and by failing to “assess an electronic payment convenience fee established by the Supreme Court.”

The Plaintiffs claims he was damaged because of the practice, as “bail bond business has been reduced because Plaintiff has the largest share of total bail bond business and total amount of bonds issued has decreased because of the conduct complained herein.” The Plaintiffs do not specify the exact amount of damages.

B. The Plaintiffs’ Claims are Collaterally Estopped

The Defendant moves to dismiss the Plaintiffs’ claims on the basis of collateral estoppel. “Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel).” Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho, 148 Idaho 47, 50-51, 218 P.3d 391, 394 - 395 (2009), *citing* Stoddard v. Hagadone Corp., 147 Idaho 186, 190, 207 P.3d 162, 166 (2009) (*quoting* Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002)). Issue preclusion protects a party from litigating an identical issue with the same party or his privy. Bach v. Bagley, 148 Idaho 784, 795, 229 P.3d 1146, 1157 (2010), *citing* Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). “As [the Idaho Supreme Court] and the U.S. Supreme Court have held in cases discussing collateral estoppel and res judicata, reducing repetitive or unnecessary litigation is a legitimate goal, as it frees up judicial resources for legitimate disputes.” Hill v. American Family Mut. Ins. Co., 249 P.3d 812, 820 (2011), *citing* Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308, 313 (1980) (stating that both collateral estoppel and res judicata conserve judicial resources) (citations omitted).

Whether *res judicata* bars re-litigation is a question of law. Oregon Mut. Ins. Co., 148 Idaho at 51, 218 P.3d at 295, *citing* Waller v. State, Dep't of Health and Welfare, 146 Idaho 234, 237, 192 P.3d 1058, 1061 (2008). "Res judicata is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence." Id. at 51, 218 P.3d at 395 (*quoting* Ticor Title Co. v. Stanion, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007)).

Five factors are required for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding:

(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Waller, 146 Idaho at 238, 192 P.3d at 1062 (*quoting* Ticor Title Co., 144 Idaho at 124, 157 P.3d at 618). Idaho courts have held that a party had a full and fair opportunity to litigate where an argument could have been made in a prior proceeding. Rodriguez v. Dep't. of Corr., 136 Idaho 90, 92, 29 P.3d 401, 403 (2001).

The Defendants have met all five factors of collateral estoppel in this case. First, the record in Case No. CV-2007-7471 shows that the Plaintiff had a full and fair opportunity to litigate any and all claims against the opposing parties Kootenai County and the Kootenai County Sheriff. Next, the Plaintiff had the opportunity to litigate any and all claims in regards to the use by inmates of means other than cash and bond to post bail, the processes used by the Defendants in accepting the payment, and the resulting effect on the Plaintiffs' business. Notably, in Case No. CV-2007-7471 the

Plaintiff filed not one complaint, but also two amended complaints, and specifically raised challenges to the applicability and compliance with Idaho Criminal Rule 46, Idaho Code Title 19, Chapter 29, Administrative Order E-DW.1 and Idaho Code § 31-3221. While the arguments in this case may be slightly more nuanced than in Case No. CV-2007-7471, this Court sees no reason that the arguments could not have been made in the prior litigation given the citation the same statutes and rules at issue in this case.

Further, the ultimate issue decided in Case No. CV-2007-7471 is nearly identical to the issue raised in this case: the use of means other than cash or bonding agents for posting bail besides and the process used by the Defendants in accepting the payment. While the Plaintiffs argue that the 2009 amendment to Idaho Criminal Rule 46 affects the District Court's determination in Case No. CV-2007-7471, the amendment merely allows for acceptance of a cash deposit for bail via an electronic transfer from a debit card, as well as a credit card. Moreover, the amendment in the rule does not limit posting of bail to credit or debit cards, and therefore the prior case law interpreting this rule to allow for other means of posting bail remains unchanged.

The Defendants have also met the third and fourth required factors. As noted above, the District Court in Case No. CV-2007-7471 entered legal conclusions, and the March 8, 2009 Judgment issued after the 2008 Order of Dismissal clearly states that it dismissed with prejudice "all claims arising out of Plaintiff's challenge to the acceptance of a credit card to post bail." (2009 Judgment, p.2.) Moreover, the Plaintiff advocated his claims through to the Idaho Supreme Court and received full adjudication of those claims.

Lastly, while Kootenai County and the Kootenai County Sheriff were specifically named as the defendants in Case No. CV-2007-7471, and the Defendants in this case are the Kootenai County Clerk and Kootenai County Sheriff, the county clerk is a privy of Kootenai County and therefore bound by the decision in Case No. CV-2007-7471. The Plaintiffs are collaterally estopped from bringing the claims in this case against the Kootenai County Clerk as a result.

Because the Defendants have met all five factors, the Plaintiffs are collaterally estopped from bringing the claims made in Case No. CV-2007-7471 in this action against the Defendants. The Defendants' Motion to Dismiss, then, is granted and all of the Plaintiffs' claims are dismissed.

C. The Plaintiffs Have Standing

As discussed above, in Case No. CV-2007-7471 the Defendants argued that the Plaintiffs "failed to establish a particularized injury not suffered by all taxpayers and lacks standing to challenge the acceptance of credit cards." (2008 Order of Dismissal, pp.18-19.) The District Court concluded that the Plaintiff had standing to assert its claims because "it bears the incident of the use of credit cards." (Id. at p.19.) On appeal to the Idaho Supreme Court, the Defendants did not cross-appeal this finding of the District Court and the Idaho Supreme Court neither affirmed nor reversed the District Court's conclusions that the Plaintiff had standing.

In this case, the Defendants again raise the issue of standing, arguing "that Allied does not have a property right or contract right to any particular bail business." (Motion to Dismiss, pp.5-6.) The Plaintiffs argue that because the District Court in Case No. CV-2007-7471 concluded that the Plaintiffs have standing, and because this Court has

taken judicial notice of that decision, this Court must also find that the Plaintiffs have standing in this case.

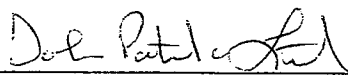
This Court notes that the issue of standing is jurisdictional, and is not an adjudicative fact of which it may take judicial notice. Martin v. Camus County ex rel Board of County Commissioners, 150 Idaho 508, 248 P.3d 1243 (2011)(holding that "jurisdictional issues such as standing are questions of law.") Thus, this Court cannot merely take notice of the conclusion of the District Court in Case No. CV-2007-7471.

However, as described above the claims in this case are the same as those raised in Case No. CV-2007-7471. Therefore, this Court finds no reason to revisit the issue of standing in a manner different than that of the District Court in Case No. CV-2007-7471. This Court, then, concurs that the Plaintiffs have standing because it has demonstrated a particularized injury that is not born by all taxpayers and that the Plaintiffs bear the incident of the use means other than cash or bonding agents to post bail such that it has standing to challenge other means of posting bail. The Defendants' Motion to Dismiss for lack of standing is denied.

IV. CONCLUSION

The Defendants' Motion to Dismiss is hereby GRANTED on the basis of collateral estoppel. The Defendants Motion to Dismiss for lack of standing is DENIED. This Court reserves ruling on any issues of attorney fees and costs.

DATED this 16th day of August, 2011.



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: DEFENDANTS' MOTION TO DISMISS was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 16th day of August, 2011 to the following:

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CLIFFORD T. HAYES
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By: 

Deputy Clerk

#593