2-1-2013

# Cumis Ins. Society, Inc v. Massey Appellant's Brief Dckt. 40002

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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| CUMIS INSURANCE SOCIETY, INC.,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>WADE MASSEY and CAPITOL WEST APPRAISALS,<br><br>Defendant-Respondents. | Docket No. 2010-3993 |

# BRIEF OF APPELLANT CUMIS INSURANCE SOCIETY, INC.

Appeal from the District Court for the Third Judicial Circuit for Canyon County
Honorable Juneal C. Kerrick Presiding


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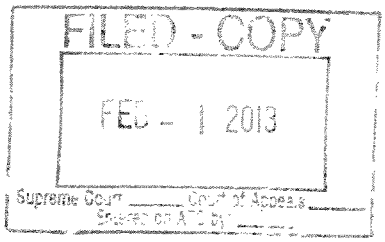

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### A. Introduction

This appeal arises from a grant of summary judgment in favor of Wade Massey and Capitol West Appraisals (hereinafter "Massey" and "Capitol West," collectively as "Defendants") against Plaintiff CUMIS Insurance Society, Inc. (hereinafter "CUMIS" or "Plaintiff").

In its brief, Plaintiff argues that: (1) the District Court misinterpreted federal and Idaho statutory law governing the professional conduct of appraisers; (2) the District Court relied upon evidence that was not in the record, and made inferences from the evidence in order to reach its conclusion that Defendants were entitled to judgment as a matter of law; and (3) genuine issues of material fact exist between Plaintiff's and Defendants' cases in chief and therefore judgment was not entitled as a matter of law. Plaintiff prays that the Supreme Court reverse and remand the case back to District Court.

### B. The Parties

CUMIS is the legal subrogee of Idahy Federal Credit Union, n/k/a Icon Federal Credit Union (hereinafter "Icon"), pursuant to its $247,474.90 fidelity bond insurance payment for losses incurred by the Uniform Residential Appraisal Report prepared by Defendants (hereinafter "Appraisal"). *See*, "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment".

Defendant Massey is a professional appraiser licensed to practice in the State of Idaho and specializing in commercial and residential real estate property appraisals. Massey is the owner of Defendant Capitol West Appraisals, which prepared and finalized the appraisal which was the subject of this lawsuit.

## C. Statement of Facts

### i. *The Appraisal:*

In June 2007, at the request of Jacob Wilson of Clearwater Mortgage (hereinafter "Clearwater"), a loan originator and mortgage broker, Massey appraised a property at 16462 Plum Road in Caldwell, Idaho (hereinafter "Property"). The then-owners of the Property, Steven and Valerie Hruza (hereinafter collectively as the "Hruzas"), were seeking a second mortgage on their home and Clearwater sought the benefit of Massey's professional services in assessing the wisdom of extending a loan to the Hruzas.

Notably, Defendants certified that their Appraisal was a "Summary Report" as defined by the Uniform Standards for Professional Appraisal Practice (USPAP), Rule 2-2(b). Certifying an appraisal as a "Summary Report" requires the appraiser to list intended users of the appraisal by either "name" or "type". Accordingly, Defendants' Appraisal included two certifications that are relevant to the current appeal. First, certification 21 describes the parties to whom Clearwater, as the immediate client, was authorized to release the report without Massey's prior consent:

> 21. The lender/client may disclose or distribute this appraisal report to: ***the borrower; another lender at the request of the borrower***; the mortgagee or its successors and assigns; mortgage insurers; government sponsored enterprises; other secondary market participants; data collection or reporting services; professional appraisal organizations; any department, agency, or Instrumentality of the United States; and any state, the District of Columbia, or other jurisdictions; ***without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent.*** Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party (including, but not limited to, the public through advertising, public relations, news, sales, or other media). (Emphasis added)

*See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 6. Second, certification 23 provides a list of parties who are entitled to rely on the representations and opinions provided in the Appraisal:

> 23. The borrower, ***another lender at the request of the borrower,*** the mortgagee or its successors and assigns, mortgage insurers, government sponsored enterprises, and other secondary market participants ***may rely on this appraisal report*** as part of any mortgage finance transaction that involves any one or more of these parties.

*See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 6. (Emphasis added). When Defendants submitted the Appraisal to Clearwater, they did not indicate that the Appraisal was incomplete, inchoate or tentative, as asserted by Defendant Massey throughout this litigation.

In the Appraisal, Defendants concluded that the Hruza's property was valued at $1,150,000.00. *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 2. Despite Defendants' certifications of the Appraisal's accuracy, the Defendants' overvalued the Appraisal by nearly $500,000.00. Defendants' Appraisal contained several fundamental mistakes that led to the Property's overvaluation. For example, the Appraisal contains a mistake on the first page in which it states that the 16462 Plum Road Property is located in the city of Parma, Idaho, when it fact it is located in Caldwell, Idaho. *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 1.

To support the claimed property valuation of $1,150,000, Defendants' Appraisal purportedly relied on six comparable properties offered for sale in the subject neighborhood. In Defendants' Appraisal, the homes listed as comparative property values (hereinafter "Comps") ranged in price from $997,850 to $1,355,200. Defendants' Appraisal reported that the Comps used appeared to be the most representative closed sales at the time of Defendants' preparation of the Appraisal. *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 2. Defendants certified that they "selected and used comparable sales

that are locationally, physically, and functionally the most similar to the subject property." *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 5, ¶ 7. However, Defendants' Appraisal misrepresented the location of each of the Comps.[1]

The Appraisal listed five properties purportedly from Eagle, Idaho as representing the Comps to the subject property located in Parma. However, the residential values that Defendants used from Eagle did not accurately reflect the residential values in Caldwell, where the property was **actually** located. The selection of "Comps" from Eagle had the effect of overvaluing the Property actually located in Caldwell. The Miscalculations of distance helped hide the fact that the "Comps" in Eagle were not comparable to the Property in Caldwell.

To further compound this error, Defendants' Appraisal represents two comparable sales properties as being located in Eagle, when in fact they are located in Caldwell and Nampa, Idaho. *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 2. Additionally, Defendants chose four Comps that were between two to six years old, and did not reflect current real estate values in Idaho.

Furthermore, by Massey's own admission, the Appraisal was "defective" and "had errors that ... me and my client were aware of." R. Vol. I, p. 26. Nonetheless, Massey took no action to reissue the appraisal, to issue a written notice of the defects, or to indicate the presence of any errors on the appraisal itself. R. Vol. I, p. 40. To the contrary, Massey indicated on the face of the report that it was a final Summary Report. R. Vol. I, p. 27; R. Vol. I, p. 44.

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[1] The first comp, located at 4458 N. Croft, Eagle, Idaho is listed in the Appraisal as 16.81 miles from the subject proerpty; **28.90** miles is the shortest distance reported on Google Maps. The second comp, located at 187 S. Alder, Eagle, Idaho is listed as 19.7 miles from the subject property; **26.20** miles is the shortest distance reported on Google Maps. The third comp, located at 1081 S. Star Rd, Star, Idaho is listed as 13.62 miles from the subject property; **21.0** miles is the shortest distance reported on Google Maps. The fourth comp, located at 3703 N Highway 16, Eagle, Idaho is listed as 14.43 miles from the subject property; **26.5** miles is the shortest distance reported on Google Maps. The fifth comp, located at 21250 Midland Blvd., Caldwell, Idaho is listed as 8.35 miles from the subject property; **16.7** miles is the shortest distance reported on Google Maps. The sixth comp, located at 8403 Partridge Dr., Nampa, Idaho is listed as 11.53 miles from the subject property, **18.5** miles is the shortest distance reported on Google Maps.

### ii. *Icon's Receipt and Reliance on Defendants' Appraisal:*

Although Clearwater eventually decided not to extend a loan to the Hruzas, the Appraisal did serve as the basis for a loan issued by Icon. In September 2007, the Hruza's submitted a loan application to Icon which included the Appraisal as prepared by Defendants. Icon paid the Defendants a sum of $800 for their Appraisal by check dated September 18, 2007, and Defendants accepted payment. R. Vol. II, p. 174. As a condition of funding the Hruza's loan, Icon reviewed the Appraisal performed by Defendants to verify that there was sufficient equity in the Property in excess of the requested loan amount. Based, in part, on the Defendant's Appraisal, Icon approved the $250,000.00 second mortgage loan to the Hruza's, secured by the Deed of Trust on the Property.

In November 2007, the Hruzas defaulted on the loan they obtained from Icon. At all relevant times hereto, CUMIS was the fidelity bond insurer of Icon and, in that capacity, paid $247,474.90 to the credit union as a result of the Hruza's default.

Icon had the property re-appraised after the Hruzas defaulted on their loan. After having the property reappraised, Icon learned that property was only worth $535,000 as of August 2008. *See,* "Exhibit B" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 2. The property was subsequently re-appraised again by Paul Bull, an appraiser based in Caldwell, Idaho, in order to determine the Property's value at the time of Defendants' Appraisal. After careful analysis, Mr. Bull determined that the Property was worth $652,000 at the date of Defendant's Appraisal, demonstrating that Defendants' Appraisal overvalued the Property by a sum of $498,000.00. *See,* "Exhibit C" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 2.

### iii. *Case Disposition:*

In its Complaint, filed on April 12, 2010, Plaintiff alleges that Massey violated his professional responsibilities under the Uniform Standard for Professional Appraisal Practice (USPAP) that govern the professional responsibilities of appraisers in Idaho, breached its contractual duties, and made negligent misrepresentations with regard to the Property.

Both Defendants and Plaintiff filed Motions for Summary Judgment on November 10, 2011 and November 15, 2011, respectively. On February 17, 2012, the Court issued an Order granting Defendants' motion for summary judgment and dismissing Plaintiff's complaint. R. Vol. II, p. 194-205 (hereinafter "Summary Judgment Order").

In its Order granting Defendants' Motion for Summary Judgment, the District Court heavily relied a undisclosed affidavit of Clearwater CEO Ernie Menchaca (hereinafter, "Menchaca Affidavit") as evidence of undisputed facts negating any duty Defendants may owe to Icon. R. Vol. II, p. 192-93 (hereinafter, "Menchaca Affidavit").

Based on the purported accuracy of the undisclosed Menchaca Affidavit, the Court found the following facts to be undisputed: (1) "Massey prepared the Appraisal at issue 'exclusively for Clearwater' to aid in its decision to extend a loan for Steven and Valerie Hruza"; (2) Icon did not request and was not provided a letter of assignment authorizing it to use or rely on the Massey Appraisal; (3) it is "neither proper nor customary" to assign an appraisal without such a letter of assignment; (4) the custom of the industry is to obtain a new appraisal or to request an assignment from a former underwriter, and not to make lending decisions based on an informally submitted appraisal.

In its Order, the District Court noted that:

> [I]n preparing for the hearing on the instant motions, it became clear to the court that [Defendants were] relying on the Menchaca

> Affidavit in support of their Motion. However, the court could not locate that Affidavit in the file and there was no record of the Affidavit in the Register of Actions. At the hearing, the court confirmed that [Plaintiff] had timely received service of a copy of the Menchaca Affidavit with the original motion papers and granted [Massey] leave to file a copy after the hearing. [Massey] filed a copy of the Menchaca Affidavit on February 9, 2012.

Summary Judgment Order at n. 1.

**iv. *The Menchaca Affidavit:***

Defendants' attorneys purportedly prepared the Menchaca Affidavit on September 2, 2011. R. Vol. II, p. 192 - 193. While Defendants extensively rely on the Menchaca Affidavit in their November 10, 2011 Motion for Summary Judgment, the Menchaca Affidavit was not filed with the Court until February 9, 2012, and only then because the Court requested it. In fact, Defendants have *never* produced the Menchaca Affidavit to Plaintiff, who saw it for the first time when it obtained the trial court transcript in order to prepare for this appeal.[2]

Defendants' failure to produce the Menchaca Affidavit became the subject of Plaintiff's two post-Order Motions for Reconsideration. Plaintiff's lawyers submitted two Affidavits affirming under oath that the in Court stipulation that Plaintiff had received the Menchaca Affidavit was erroneous, and that, in fact, the Menchaca Affidavit had only been made available to them as the opposing party when it was filed with the Court following oral argument. R. Vol. II, p. 276-280; R. Vol. II, p. 281-285. Instead, Defendants relied on the *undisclosed* Menchaca Affidavit until their failure to produce the Menchaca Affidavit was identified by the District Court on February 9, 2012. To this date, Plaintiff has never been served the Menchaca Affidavit.

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[2] Plaintiffs also note that a subpoena *duces tecum* was issued by Defendants for Clearwater c/o Ernie Menchaca on August 18, 2010. R. Vol II, p R. 247-48. Subsequently, Defendants sent a Notice of Vacating Records Deposition on August 25, 2010, indicating that Defendants would "reschedule the deposition for a later date and time." R. Vol. II, p. 251. However, no deposition was ever scheduled by Defendant.

The findings of fact based on the Menchaca Affidavit form the basis for the District Court's decision to grant Defendant's Motion for Summary Judgment regarding the Plaintiff's professional negligence, breach of contract, and negligent misrepresentation claims. Despite Plaintiff's objections, the District Court upheld its Order granting summary judgment to Defendants. Plaintiff's appeal follows.

## II. ISSUES PRESENTED ON APPEAL

1) Whether the District Court misconstrued federal and Idaho law governing the standards of professional conduct for appraisers in reaching its decision to grant summary judgment in favor of Massey?

*[Suggested answer in the affirmative]*

2) Whether the District Court erred by relying on evidence not in the record in reaching its decision to grant summary judgment in favor of Massey?

*[Suggested answer in the affirmative]*

3) Whether the District Court erred by making impermissible findings of fact in reaching its decision to grant summary judgment in favor of Massey?

*[Suggested answer in the affirmative]*

## III. ARGUMENT

### A. Standard of Review

"When reviewing a grant of summary judgment, this Court applies the same standard of review used by the district court in ruling on the motion." Mortensen v. Stewart Title Guar. Co., 149 Idaho 437, 441, 235 P.3d 387, 391 (2010). A grant of summary judgment is warranted where "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." I.R.C.P. 56(c). The facts are to be liberally construed in favor of the non-moving party. Renzo v. Idaho State Dep't of Agric., 149 Idaho 777, 779, 241 P.3d 950, 952 (2010). The moving party bears the burden of proving the absence of any issue as to any material fact. Blickenstaff v. Clegg, 140 Idaho 572, 97 P.3d 439 (2004). The moving party may satisfy its initial burden by establishing, either through its own evidence or that of the non-moving party, that non-moving party will be unable to prove an element of a claim or defense at trial. McCorkle v. Northwestern Mutual Life Ins. Co., 141 Idaho 550, 554, 112 P.3d 838, 842 (2005). The nonmoving party must then adduce sufficient admissible evidence to support a finding in its favor by the trier of fact or offer a valid justification under I.R.C.P. 56(f). Id.

**B. The District Court Misconstrued the Law Governing Appraisal Standards**

Despite starting with the premise that negligence requires "a duty, recognized by law," nowhere in its Summary Judgment Order does the District Court consider the affirmative duties imposed on appraisers by the applicable federal statutes and related national professional standards. Summary Judgment Order at 6; R. Vol. II, p. 199.

**i. FIRREA and USPAP Define the Duties Owed by Appraisers**

In response to mortgage abuses that contributed to the Savings and Loan scandal of the 1980s, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Title XI, 12 U.S.C. § 3331, *et seq*. The stated purpose of FIRREA is to ensure that real estate appraisals are conducted in accordance with uniform national standards. These standards require that all appraisals be performed and supervised by individuals whose competency has been established. FIRREA also established an Appraisal Standards Board to provide these guidelines, which were subsequently promulgated as the Uniform Standards of

Professional Appraisal Practice (USPAP). These standards are updated annually to account for changes in the real estate market. The core principle of USPAP is embodied in Standards Rule 1.1:

> In developing a real estate appraisal, an appraiser must:
>
> a) Be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;
>
> ***
>
> b) Not commit a substantial error of omission or commission that significantly affects the appraisal; and
>
> ***
>
> c) Not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affect the credibility of those results.

USPAP also provides definitions and minimum requirements for various types of appraisal reports. Standards Rule 2-2 provides that every appraisal "must be prepared under one of the following three options and prominently state which option is used: Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report." The Comment to Rule 2-2 clarifies that the essential difference between the three options is the content and level of information provided, and cautions appraisers that *"[w]hen the intended users include parties other than the client, either a Self-Contained Appraisal Report or a Summary Appraisal Report must be provided.* When the intended users do not include parties other than the client, a Restricted Use Appraisal Report may be provided." (Emphasis added). All reports require the appraiser to identify both the client and any intended users, by name or by type.

For Self-Contained and Summary Reports, "[i]ntended users of the report might include parties such as lenders, employees of government agencies, partners of a client, and a clients

attorney and accountant." Comments to Rule 2-2(a)(i); 2-2(b)(i). In contrast, a Restricted Use Appraisal is required to "state a prominent use restriction that limits use of the report to the client and warns that the appraisers opinions and conclusions set forth in the report may not be understood properly without additional information in the appraisers workfile." Rule 2-2(c)(i). All appraisal reports, regardless of their type, must "be consistent with the intended use of the appraisal" and include a certification that "analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*." Rule 2-2(a); Rule 2-2(b); Rule 2-2(c); Rule 2-3. Accordingly, no appraiser can be a stranger to USPAP.

In Idaho, the Real Estate Appraisers Act (§54-4101) governs the administrative regulation of all appraisers licensed in accordance with FIRREA. The Act defines the term "appraisal assignment" as:

> (2) "Appraisal assignment" means an engagement for which an appraiser is employed or retained to act, ***or would be perceived by third parties or the public as acting***, as a disinterested third party in rendering an unbiased opinion or conclusion relating to the value, nature, quality or utility of specified interest in, or aspect of, identified real estate.

Idaho Code Ann. §54-4104 (2011) (emphasis added). Thus, Idaho law clearly contemplates the detrimental effect that a negligent appraisal could have on third parties.

While USPAP does not require an appraisal to be perfect, it does require that appraisers use diligence and due care when valuing a piece of real estate, and supports the sanction of appraisers who render services in a negligent or careless manner. *See* Private Mortgage Investment Services, Inc., v. Hotel & Club Associates, Inc., 296 F.3d 308, 315 (4th Cir. 2002) (finding that failure to exercise due care allows for claims against a real estate appraiser).

Thus, FIRREA and USPAP, and their incorporation in Idaho law by way of the Real Estate Appraisers Act, define the contours of the general principle that every person in the conduct of his or her business has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others. Sharp v. W.H. Moore, Inc., 796 P.2d 506 (1990). In assessing whether a duty has arisen in a particular case, Idaho courts consider:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Turpen v. Granieri, 985 P.2d 669, 672 (Idaho 1999) (*citing* Rife v. Long, 908 P.2d 143, 148 (1995); Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658 (Cal. 1985)).

The "flexible concept" of forseeability is one:

> [w]hich varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required. Thus, foreseeability is not to be measured by just what is more probable than not, but also includes whatever result is likely enough in the setting of modern life that a reasonable prudent person would take such into account in guiding reasonable conduct.

Sharp v. W.H. Moore, Inc., 796 P.2d at 509-10. The Court will only conduct this balancing of harms "in those rare situations when we are called upon to extend a duty beyond the scope previously imposed, or when a duty has not previously been recognized." *Id.* at 673 (*citing* Rife at 148). In the instant case, the District Court erred by failing to consider the duties imposed by USPAP and FIRREA, and by failing to balance the harms as directed by this Court.

### ii. The District Court Did Not Consider the duties prescribed by FIRREA and USPAP.

The provisions of Idaho and Federal law, discussed above, limit the scope of duties owed by an appraiser in accordance with the type of report the appraiser certifies. In this case, Defendants certified the Appraisal as a "Summary Report", voluntarily expanding the scope of person who Defendants owes a duty to include borrowers and other lenders. Though Icon is the Hruza's mortgage lender and the evidence shows that Icon was given the Appraisal by either Clearwater or the Hruzas, the District Court treated Icon as a third-party and found that Defendants owed it no professional duties.

In particular, the District Court found that this case does not present "unusual circumstances which justify imposing" an affirmative duty to "act to assist or protect another," as with common carriers under Restatement (Second) of Torts §314A. Summary Judgment Order at 6; R. Vol. II, p. 199. The District Court further noted that a "person may create a duty to another to perform an act in a non-negligent manner by voluntarily undertaking to perform that act," but nonetheless found that Defendants' provision of a Summary Appraisal acknowledging reliance by "another lender at the request of the borrower" was not a voluntary undertaking. Id. Despite beginning with the correct statement that negligence requires "a duty, recognized by law," nowhere in its Summary Judgment Order does the District Court consider the affirmative duties imposed on appraisers by the applicable federal and Idaho statutes and related national professional standards.

Instead, the District Court accepted Defendants' argument that "Massey prepared the Appraisal Report for Clearwater, as his client and **intended user**" without analyzing the USPAP standards which define the term "intended user". Had it done so, the District Court would have

noted that Defendants prominently and conspicuously described the Appraisal as "Summary Report" and, in so doing, makes specific reference to the requirements of USPAP Rule 2-2(b). Rule 2-2(b), clearly provides that Summary Reports are **not** intended to be confined to the appraiser and their client.

Indeed, Rule 2-2 acknowledges this feature of a Summary Report in two ways. First, Summary and Self-Contained Reports, as defined by Rules 2-2(a) and 2-2(b), are distinguished from the Restricted Use Reports defined by Rule 2-2(c), which limit the appraisal to the appraiser and the client. Second, USPAP distinguishes between "clients" and "intended users" with the express purpose of establishing a professional duty of the appraiser outside of his relationship with the named client. *See generally* Statement on Appraisal Standards No. 9, Appraisal Standards Board (1996). That is, if the appraiser-client relationship is the end-all be-all of an appraiser's duty, there is simply no need for the term "intended user." Therefore, the District Court was incorrect in finding that the Appraisal terms "client" and "intended user" were synonymous in this case.

Further, the District Court improperly interpreted that Certifications 21 and 23 of the Appraisal must be read in conjunction with one another. The District Court determined that Certification 21 identified a list of people to whom Clearwater could disclose the Appraisal. It then determined that Certification 23 defines the Defendants' duties owed to parties to whom Clearwater discloses the Appraisal. Summary Judgment Order at 8; R. Vol. II, p. 201. This reading of Certification 21 and 23 is incorrect and not supported by the plain language of the certifications.

Though Certification 21 and 23 contain similar language, they act independently of one another. Certification 21 provides that "[Clearwater] may disclose or distribute this appraisal

report to: *the borrower* [or] *another lender at the request of the borrower* ... without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent." *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 6.

Without any reference to Certification 21, Certification 23 provides that "*[t]he borrower, [or] another lender at the request of the borrower, ... may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties.*" *See,* "Exhibit A" to "Memorandum in Support of Plaintiff's Motion for Summary Judgment", p. 6. (Emphasis added). That Certification 21 and 23 operate independently of one another is underscored, not only by the fact that they do not reference one another, but also by the fact that Certification 22 separates them. Certification 22 states that "[The appraiser is] aware that any disclosure or distribution of this appraisal . . . may be subject to certain laws and regulations. Further I am also subject to the provisions of the Uniform Standards for Professional Appraisal that pertains to disclosure or distribution by me."

When read properly, it becomes apparent that Certification 21 and 23 are two independent stand alone clauses. This point is fundamental. The fact that the borrower or another lender may rely on an appraisal report is independent from the disclosure limitations placed on the client in Certification 21[3]. By conflating these two concepts, the District Court erroneously determined that only the client can rightfully obtain and rely on an appraisal report. This is not the intent of USPAP Rule 2-2, which clearly contemplates the client 's distribution of the appraisal report to the borrower or another lender, who can then rely on the report.

[3] Plaintiff notes that the evidence demonstrates that either Clearwater or Hruzas (having obtained the Appraisal from Clearwater) gave the Appraisal to Icon. Defendants' assertion that this is not the case, is at best a dispute of fact.

For these reasons, it is appropriate for this Court to reverse the District Court's grant of summary judgment with the direction that it consider the applicable federal law and industry standards that clearly define the duties owed by licensed appraisers.

### iii. The District Court Did Not Balance the Harms as Directed by the Supreme Court.

Additionally, the District Court erred by not conducting the balancing test required by this Court when considering whether to extend a duty in unfamiliar circumstances. Instead, the District Court rested its decision on the finding that Massey, as a licensed appraiser, and Icon, as "another lender" as contemplated by the Appraisal's certifications, were total strangers under the law. Had it conducted the required balancing inquiry, the District Court would have found that imposition of duty in this case is not onerous.

First, Icon is a foreseeable third party. Indeed, Defendants' Appraisal recognizes that it may be used by persons other than Clearwater, and the USPAP rules governing that report clearly contemplate the same. The harm suffered by Icon, as "another lender," is the type of injury one would reasonable expect to result from promulgation of the Appraisal that was "full of errors." Thus, the forseeability of harm to Plaintiff is evident. Second, Defendants' conduct is inextricably linked to the Plaintiff's losses, as Defendants' admittedly defective Appraisal unquestionably informed Icon's decision to extend a loan. Third, the moral blame and policy of preventing future harm are both clearly encapsulated in the provisions of FIRREA and USPAP. That is, Idaho and federal legislatures have collectively acknowledged that providing a negligent and defective appraisal is behavior that may subject an appraiser to legal sanctions. Fourth, the extent of the burden on Defendants, and future similarly situated defendants, is not great. The only "burden" on them is to adhere to their written word, certifications, oaths and promises. Fifth, there is no "cost" to the community of imposing this duty. To the contrary, the extension

of professional liability to duly licensed professionals is recognized in other contexts as a benefit to the community at large, and is implicit in the grant of licensure.

For these reasons, Plaintiff respectfully requests that this Court reverse the District Court's grant of summary judgment with the instruction that it consider the appropriate balancing test in assessing whether a legal duty exists between the parties.

### C. The District Court Considered Evidence Not Found in the Record

In its Order granting Defendants' Motion for Summary Judgment, the District Court relied on the *undisclosed* Menchaca Affidavit as evidence of undisputed facts negating any duty owed by Defendants to Plaintiff. First, based on the Menchaca Affidavit, the Court found that "Massey prepared the Appraisal at issue "exclusively for Clearwater ... to aid in its decision to extend a loan for Steven and Valerie Hruza." R. Vol. II, p. 200. Second, the Court found that Icon did not request and was not provided a letter of assignment authorizing it to use or rely on the Appraisal. R. Vol. II, p. 200. Third, the Court found that it is "neither proper nor customary" to assign an appraisal without such a letter of assignment. R. Vol. II, p. 201. Fourth, the Court found that the custom of the industry is to obtain a new appraisal or to request an assignment from a former underwriter, and not to make lending decisions based on an informally submitted appraisal. R. Vol. II, p. 201. The Menchaca Affidavit was not provided to the Court until after oral argument on the competing motions for summary judgment. It has never been provided to the Plaintiff. Accordingly, the Court erred in granting summary judgment based on evidence that was not in the record.[4]

[4] To be clear, the District Court itself noticed the absence of the Menchaca Affidavit in the record in preparing for the summary judgment hearing. Summary Judgment Order at n.1; R. Vol. II, p. 196. The Court duly inquired as to whether CUMIS had nonetheless received a copy of the affidavit despite its absence from the Court's records. At the time, CUMIS' counsel indicated that a copy of the affidavit had indeed been received. Satisfied that the parties were on equal footing, the Court granted Massey leave to file a copy of the affidavit with the Court to correct its

Defendants had an affirmative obligation to serve Plaintiff with a copy of the Menchaca Affidavit and to file a copy with the Court when it became apparent that it would form the basis for their summary judgment argument. I.R.C.P. 7(b)(3)(B) provides that "[w]hen a motion is supported by affidavit(s), the affidavit(s) shall be served with the motion[.]" Additionally, I.R.C.P. 5(d) requires "[a]ll papers after the complaint required to be served upon a party" to be filed with the Court either before or reasonably soon after service. These mandatory procedures are expressly meant to ensure that the parties have equal and just access to the facts to be relied upon by the other party. The District Court did not receive the Menchaca Affidavit until the oral arguments on summary judgment. Plaintiffs have never received the Menchaca Affidavit. Accordingly, Plaintiff has been denied equal and just access to statements made in the Menchaca Affidavit and the ability to file its own Affidavit contradicting the assertions of the Menchaca Affidavit.

Further, I.R.C.P. 56 contemplates that motions for summary judgment may be accompanied by supporting affidavits, and provides a form and a schedule for such affidavits. I.R.C.P. 56(b), 56(c), 56(e). The party opposing the motion may then file affidavits of its own responding to the moving party's factual assertions along with its response to the motion. I.R.C.P. 56(c), 56(e). Where this type of factual support is unavailable, the court may order a continuance to allow for additional discovery, depositions, or affidavits to be procured to justify the non-moving party's opposition. I.R.C.P. 56(f). Read together, the elements of I.R.C.P. 56 allow the parties equal opportunity to present responsive factual evidence to the court prior to any decision on summary judgment.

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records. Subsequently, CUMIS inspected its files and determined that it had not, in fact, received a copy of the Menchaca Affidavit. The absence of the Menchaca Affidavit was attested to in two affidavits given under oath by CUMIS' counsel. CUMIS twice requested that the court reconsider its decision because, *inter alia*, CUMIS had not been provided a copy of the evidence upon which the District Court relied in reaching its decision. Both of these requests were denied.

At oral argument on Plaintiff's Second Motion for Reconsideration, Defendants admitted that it had repeatedly failed to comply with its duties under I.R.C.P. 7(b)(3) and 5(d). Defendants noted that the Menchaca Affidavit was referenced 14 times in Defendants' Memorandum of Law in Support of Summary Judgment and three times in its Brief in Opposition to Plaintiff's Motion for Summary Judgment. Tr. Vol. I., p. 11, L. 13-24. Accordingly, it was Defendant's responsibility to file and serve the Menchaca Deposition when serving both of those pleadings.

In light of the foregoing, it is clear that Plaintiff was severely prejudiced by the inability to consider and respond to the Menchaca Affidavit while preparing for summary judgment proceedings.

First, the District Court gave considerable weight to the evidence advanced by Defendants in the Menchaca Affidavit. Menchaca's blanket denials of responsibility and his erroneous description of normal business practice form the crux of the District Court's finding that Defendants owed no duty to Icon despite the fact that Massey accepted payment from Icon for the Appraisal. *See*, Summary Judgment Order at 8; R. Vol. II, p. 201. Second, it is equally clear that the duty to provide this material to the court and to the opposing party rests with Defendants, and that Defendants failed to honor this duty. Lastly, it is contrary to Rule 56 for one party to control the factual record without the other party having even *the opportunity* to respond.

As a result of this failure, Plaintiff was served with an adverse order that relied significantly on evidence that had not been made available to it prior to the issuance of the order. Further, Plaintiff had previously identified witnesses who were capable of rebutting the claims

found in the undisclosed the Menchaca Affidavit and would have been fully capable of providing opposing affidavits under Rule 56(e) if it had been given the opportunity to do so.

Ultimately, the District Court relied on evidence never provided to Plaintiff, when rendering its decision on the competing motions for summary judgment. Although Plaintiff's Motion for Summary Judgment contained detailed evidence that establishes genuine issues of material facts, **the Court admits that it did not read Plaintiff's Motion**. Accordingly, Plaintiff respectfully requests that this Court overturn the District Court's grant of summary judgment as against the clear requirements of I.R.C.P. 56(c).

### D. The District Court Relied on Impermissible Findings of Fact and Improper Inferences to Reach its Decision

"[W]hen considering a motion for summary judgment, this Court **liberally construes the record in the light most favorable to the party opposing the motion**, drawing all reasonable inferences and conclusions in that party's favor." Tolley v. THI Co., 140 Idaho 253, 259, 92 P.3d 503, 509 (2004) (*citing* Construction Management Systems, Inc. v. Assurance Co. of America, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001))(emphasis added). By disregarding evidence and arguments contained in Plaintiff's Motion for Summary Judgment - by not reading it - the Court failed to construe the facts in the light most favorable to the non-moving party.

Rule 56(c) states that summary judgment is only appropriate where "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." I.R.C.P 56(c). Thus, there are essentially two prongs to the summary judgment standard. First, the parties must agree on the material facts, such that there are no genuine

distinctions between their competing versions of material facts. Second, these undisputed facts must support one party's legal position without further inquiry.

**i. Failure to Consider Massey's Acceptance of Payment**

As noted by the District Court, the moving party can meet its initial burden by establishing through evidence that the non-moving party will be unable to establish an element of its claim at trial, in this case duty. Summary Judgment Order at 4; R. Vol. II, p. 198 (*citing* McCorkle at 842). When making its analysis regarding whether Defendants met this burden, the District Court did not consider the undisputed fact that Massey accepted payment for his admittedly "defective appraisal". When viewed in a light most favorable to Plaintiff, Massey's acceptance of payment clearly establishes a duty owed by Defendants to Icon to inform it that the Appraisal it just paid for was "garbage" (Defendants' counsel's description) or, at a minimum, it establishes an issue for the jury to decide. It is clear that District Court erred when it found that Massey owed no legal duty to Icon despite having accepted payment from Icon for his admittedly defective appraisal. *See*, Hoffman v. Simplot Aviation, Inc., 539 P. 2d 584, 588 (Idaho 1975) (cited in Melichar v. State Farm Fire and Cas. Co., 152 P.3d 587 (Idaho 2007)). (stating that an implied warranty is imposed upon the provider of a good or a service that the good will not be defective and the service will be completed in a workmanlike manner).

**ii. Impermissible Findings of Fact**

To the extent that the District Court was entitled to rely on the Menchaca Affidavit notwithstanding its absence from the record, the Court impermissibly made findings of fact on disputed matters based on the Menchaca Affidavit that materially affected its decision. Accordingly, the Court's decision is contrary to the clear requirement of I.R.C.P. 56(c) that summary judgment is only appropriate where there are no disputes as to material facts. Further,

the District Court's reading of the Menchaca Affidavit fails to construe the facts in the light most favorable to the non-moving party.

The undisclosed Menchaca Affidavit contains three assertions on which the District Court relied to arrive at its conclusion that Defendants owed no duty to Icon. First, "[Icon] did not request and was not 'provided a letter of assignment authorizing it to use or rely upon the subject Appraisal in its decision to extend a loan to the Hruzas[.]'" Summary Judgment Order at 7; R. Vol. II, p. 200. Second, "[i]t is 'neither proper nor customary to assign an appraisal to another underwriter without a written letter of assignment to authorize use and reliance on the appraisal so assigned[.]'" Summary Judgment Order at 8; R. Vol. II, p. 201. Third, "[i]t is 'the custom of the industry for those in the position of [Icon] to use their own appraiser, obtain a new appraisal, or request a letter of assignment to use an appraisal initiated by a former underwriter and to not make lending decisions on the basis of an appraisal, even if the same be complete, that is informally submitted by another underwriter.'" Id.

Accordingly, the proper scope of the Menchaca Affidavit, to the degree that the District Court was entitled to consider it, is relatively limited. Menchaca simply gives opinion testimony as to the proper custom in the industry for exchanging appraisal information between underwriters. He alleges that it is customary for a second underwriter to request an assignment before using an appraisal, and for the first underwriter to release an appraisal only after receipt of such a request. At no point, however, does he state that Clearwater never assigns appraisals absent a request for assignment. Most significantly, Menchaca **did not** testify that Clearwater never gave the appraisal to either the Hruzas or Icon, and he does not even purport to address the question of whether Defendants disclosed the report.[5]

[5] These questions and many others would doubtless have been asked of Menchaca during his scheduled deposition had that deposition not been cancelled by Defendants.

The District Court also considered the deposition testimony of Icon CEO Connie Miller in which she stated that she was not personally aware that Plaintiffs had identified how Icon came into possession of the Massey Appraisal. When asked by Massey, "Does the company know how it obtained the appraisal?" Ms. Miller responded:

> A. No. We never identified – I'm not aware that we ever identified how we got the appraisal.
>
> Q. Do you know whether there's been any sort of investigation to determine how [Icon] obtained the appraisal?
>
> A. I think [CUMIS], potentially, may have found that out through interviewing the employees, but I don't know. I'm not aware of that.
>
> Q. When you say that [CUMIS] may have learned, do you have any specific reason to think that?
>
> A. Only if it came out in a conversation when they were interviewing employees. Because I know they interviewed Dan and Ethan, but I don't know what came out of that.

R. Vol. I, p. 62-63. Miller did not testify that Plaintiff was unaware of how the appraisal came to Icon. Rather, Miller is making a statement only about her personal knowledge.

What is clear from the record is that Icon came into possession of the Appraisal. Defendants do not argue that Icon did not possess the report, and Icon does not dispute the fact that the report was, at its inception, controlled by Massey and Clearwater. The record also reflects the fact that that the paperwork brought by the Hruzas to Icon included a credit report that had been generated for Clearwater during their consideration of the loan application. R. Vol. I, p. 88. When asked about this credit report, Icon CEO Connie Miller testified that its presence in the loan file indicated that the Appraisal was also brought to Icon by the Hruzas

> A. Okay. I'm just going to make a professional comment here, and that's: Based on the fact that we have this credit report it would be likely that we got the appraisal from Valarie, but I don't have any idea.

Q. Let me make sure I understand you, and I understand that you do not know for sure. Because you have this credit report that was obtained by another broker or lender –

A. Yeah, It would be --

Q. -- it would suggest or imply that she gave it to you --

A. Yeah, yeah.

Q. -- along with the appraisal?

A. Lenders do not share credit reports. That's very nonstandard. Clearwater would not -- they would not have given us this credit report. They would have no reason, whatsoever, to give us this credit report.

Credit reports cost, you know, $7 to pull. Appraisals are, you know, $400. So that's why appraisals sometimes are shared, is the borrower doesn't want to pay for another appraisal.

R. Vol. I, p. 88.

The loan officers who reviewed and eventually approved the Hruza's loan application, and thus would have received any documents brought to Icon by the borrowers, were identified in Plaintiff's Response to Defendants' First Set of Interrogatories. Ms. Miller outlined the role played by these loan officers throughout her deposition.

Notwithstanding this testimony, the District Court ultimately found that there is "no evidence in the record to support the conclusion that Clearwater disclosed the Report to the Hruzas or that the Hruzas requested that Clearwater disclose the Report to [Icon]." Summary Judgment Order at 8; R. Vol. II, p. 201. As noted above, however, the transfer of the Clearwater credit report to Icon supports the conclusion that Clearwater disclosed the report to, at least, the Hruzas, as stated in Plaintiffs' pleadings.

Further, the mere fact that Icon was in possession of the Massey Appraisal indicates that the report was made available either to the Hruzas as the "borrowers" or Icon as "another

lender". The undisclosed Menchaca Affidavit does not dispute this inference. Rather, the Menchaca Affidavit showed only that, in the opinion of one defense witness, it would be improper and against custom for Clearwater to disclose the Appraisal without a letter of assignment. Menchaca simply does not address whether Clearwater disclosed the report, specifically to the borrower as it was entitled to do under Certification 21. Icon's possession of the Appraisal indicates that the Appraisal left the exclusive control of Clearwater and Defendant, and thus that one of those parties disclosed the Appraisal.

The District Court's ruling relies heavily on the Menchaca Affidavit, which is simply silent on the material facts of how Icon received the defective Appraisal. To arrive at its conclusion granting summary judgment in favor of Defendants on Plaintiff's negligence claim, the District Court had to make a finding of fact by, at best; drawing inferences from the undisclosed Menchaca Affidavit regarding the manner in which Icon came into possession of the report, or both. In any case, the District Court exceeded its proper role during summary judgment proceedings.

The Court usurped the jury's role as finder of fact and exceeded its role of determining whether the *undisputed* facts supported only one legal conclusion. As the District Court correctly noted, determining whether a duty exists is a question of law. Summary Judgment Order at 6; R. Vol. II, p. 199. However, that finding of law is necessarily based on the facts of the case before the Court. As there is a dispute as to the material fact of how Icon came into possession of the Appraisal, there is simply no relevant undisputed factual record from which the District Court could exercise its function as arbiter of the law. It is undisputed that Icon did, in fact, possess and rely upon the Appraisal and that Massey accepted payment from Icon for the work he expended to create the Appraisal. It is further undisputed that, at its inception, the

Appraisal was controlled by Clearwater and Massey. What is clearly disputed is the manner in which the Appraisal made its way from the exclusive control of Clearwater and Massey to the Hruzas and Icon.[6]

Menchaca has provided an affidavit stating that it would be abnormal for Clearwater to transmit the report to Icon absent a letter of assignment. It carefully does not address whether they *did* transmit the report to Icon or any other party. Thus, the District Court's conclusion that Defendants owed no duty to Plaintiffs required it to make the finding of fact that neither Defendants nor Clearwater provided the Appraisal to Icon or to the Hruzas. This finding is not supported by the evidence before the District Court, and is outside the District Court's competence during summary judgment proceedings.

The District Court's ruling is also contrary to this Court's repeated holding that "all reasonable inferences and conclusions" are to be drawn in favor of Plaintiff as the non-moving party. Tolley at 509. The Menchaca Affidavit *implies* that Clearwater did not provide the Appraisal to either the Hruzas or Icon because such an action would be against industry custom. It does not, nor could it, establish as an undisputed fact that neither Clearwater nor Defendants transmitted the report. Thus, to arrive at its conclusion of law, the District Court would have had to draw the inference that Clearwater **never** acts outside of normal business custom (in conjunction with the *sui generis* finding of fact that Defendants did not transmit the report). That inference is clearly to the benefit of Defendants as the moving party, and thus violates this Court's direction regarding the benefit to be given to the non-moving party.

[6] To the degree that Defendants and Clearwater wish to deny that they provided the report to either Icon as "another lender at the request of the borrower" or to the Hruzas as "the borrower" under Certification 21, of course, they are free to do so. However, this blanket denial against the clear weight of the evidence is not undisputed or binding upon the District Court.

For these reasons, Plaintiff respectfully requests that this Court reverse the District Court's grant of summary judgment in favor of Massey as it contains findings or inferences of fact beyond the District Court's competency during summary judgment.

## IV. CONCLUSION

For the foregoing reasons, the Plaintiff-Appellant CUMIS Insurance Society, Inc., respectfully requests that this honorable Court reverse the grant of summary judgment ordered by the District Court of Canyon County in favor of Respondents Wade Massey and Capitol West Appraisals.

DATED this 1st day of February, 2013.

Respectfully submitted,

WILSON & MCCOLL

By: _____
Jeffrey M. Wilson

COLLINS & COLDWELL

By: _____
Patrick J. Collins

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing have been served this _____ day of February, 2013, on the following:

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