3-26-2013

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

CUMIS INSURANCE SOCIETY, INC., Plaintiff-Appellant, vs. WADE MASSEY and CAPITOL WEST APPRAISALS, Defendant-Respondents.	**SUPREME COURT NO. 40002-2012**

APPELLANT'S REPLY TO RESPONDENTS' BRIEF

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

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I. INTRODUCTION

In its Appeal Brief, Plaintiff asked this Court to find that the district court erred in its decision to grant Summary Judgment for the Defendants, on the basis that the district court made impermissible findings of fact.

Wade Massey's and Capitol West Appraisals' (hereinafter "Massey" and "Capitol West," collectively as "Defendants") position on appeal contends that there were no genuine issues of material fact so as to preclude the district court from its judgment as a matter of law in favor of the Defendants. Defendants also contend that the district court correctly ruled that the Defendants did not owe Plaintiff a duty upon which to predicate its professional negligence cause of action.

Defendants' legal analyses are erroneous because they mischaracterize and ignore the language of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), the Uniform Standards for Professional Appraisal Practice (USPAP), and the Idaho Real Estate Appraisers Act. Defendants' legal arguments are an attempt to diminish the laws that govern the standards of professional conduct for appraisers in the State of Idaho.

- Defendants ask the Court to ignore the undisputed fact that Defendants certified their appraisal as a "Summary Report", as defined by USPAP Rule 2-2(b).
- Defendants ask the Court to ignore USPAP Rule 2-2(b) which clearly provides that Summary Reports are not intended to be confined to the appraiser and their client.
- Defendants misconstrue USPAP. When Defendants certified their Appraisal as a "Summary Report", it did not matter whether Icon was a "Client" of Massey.

- Defendants ask the Court to ignore the undisputed fact that Defendants accepted payment for the Appraisal from Icon, in the form of an $800 check.
- Defendants ask the Court to uphold the district court's extrapolation that the Menchaca Affidavit proves that Defendants prepared the Appraisal exclusively for Clearwater, when the Menchaca Affidavit offers no proof that Menchaca did not give the report to the Hruza's.

Despite the Defendants' contentions to the contrary, genuine issues of material fact exist regarding the Defendant's liability to Plaintiff, all of which are essential issues regarding this case:

1) Whether the "intended user" documented in the Summary Report included Icon as "another lender at the request of the borrower";

2) Whether Defendants' acceptance of payment from Icon for the Appraisal establishes evidence that Massey knew that Icon was in possession of his admittedly defective Appraisal; and

3) How Icon obtained the Summary Report.

II. 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.

III. DISPUTED FACTS

A. "Intended User"

In their Statement of the Facts, Defendants contend that their admittedly defective Appraisal report, (hereinafter "Massey Appraisal") "identified Clearwater Mortgage as the 'intended user,' and Massey initially prepared it exclusively for that company to aid in its decision whether to extend Steven and Valerie Hruza a loan." *See* Respondent's Brief, p.5. Defendants' narrative regarding the "intended user" is both erroneous and misleading because it ignores the essential undisputed fact that Massey certified the Appraisal as a "Summary Report", and in so doing authorized the Hruza's and Icon to rely on their Appraisal.

As extensively discussed in Plaintiff's pleadings[1], the Massey Appraisal contained explicit certifications that authorized Clearwater to release the report to the borrower, or another

[1] Defendants' certifications were discussed in Plaintiff's Memorandum in Support for Summary Judgment, R. Vol. I, p. 133, 142; Plaintiff's Response to Defendant's Memorandum in Support of Motion for Summary Judgment, Judgment R. Vol. I, p. 148-152; Plaintiff's Reply to Defendants Opposition to Plaintiff's Motion for Summary Judgment, Judgment R. Vol. I, p. 186-189; Motion for Reconsideration of the Court's February 16, 2012 Order of Motions for Summary Judgment, R. Vol. II, p. 208-212; Plaintiff's Reply to Defendants Opposition to Plaintiff's Motion to Permit the Taking of Ernie Menchaca Deposition, Judgment R. Vol. II, p. 241-245; and the Brief of Appellant.

lender at the borrower's request, without Massey's prior consent. (See certification 21). Accordingly, once Massey disclosed the Appraisal to Clearwater as "Summary Report", it was foreseeable, even anticipated, that the report could end up in another lenders possession.

The Massey Appraisal also certified the parties that were entitled to rely on the representations and opinions provided in the Appraisal. (See certification 23). That certification explicitly authorized the borrower and another lender at the request of the borrower to rely on the appraisal report. In this case, Icon relied on the Appraisal, as anticipated by the Defendants when they certified their Appraisal as a "Summary Report".

B. Affidavit of Joe Huffman

In their Response, Defendants' rely on five "undisputed facts" based on the Affidavit of Joe Huffman (hereinafter "Huffman Affidavit") in concluding that Massey did not owe Icon a legal duty. Despite the Huffman Affidavit, the question of whether Icon was an intended user remains a highly disputed fact.

In their Response to Plaintiff's Appeal Brief, Defendants rely strictly on the Huffman Affidavit to support their position that Icon was not a foreseeable user of the Massey Appraisal. However, Defendants' Response confuses the legal issues in this case. Defendants certified the Massey Appraisal as a "Summary Report", after which point, it did not matter whether Icon was defined as a "Client" under USPAP. More importantly, Defendants' certification of the Massey Appraisal as a "Summary Report" created a duty to "the borrower, or another lender at the request of the borrower." The Huffman Affidavit states that an appraiser and his client must communicate regarding whether an appraisal will be certified as a "Summary Report". Defendants attempt to use this statement to suggest that Clearwater and Massey never communicated about whether the Massey Appraisal was to be certified a "Summary Appraisal".

This fact is disputed. Moreover, it is Massey's duty to inform his client what type of appraisal he is certifying. Once the certification has been made and the appraisal has been released to his client, Massey has willingly extended a professional duty to all parties who qualify as an intended user especially, like here, when he accepts payment from the appraisal's user[2]. For this reason, the Huffman Affidavit can hardly be viewed as dispositive on the true issue of this case.

Though Defendants now attempt to assert that the Huffman Affidavit is dispositive, Defendant did not introduce the Huffman Affidavit until the Defendants' Opposition to Plaintiff's Motion for Summary Judgment. Accordingly, the district court did not mention nor rely on the Huffman Affidavit in its Order. Rather, the district court extensively relied on the Affidavit of Clearwater President Ernie Menchaca in making its determination.

IV. ARGUMENT

A. Plaintiff Offered Evidence to Contradict the Menchaca Affidavit

It is undisputed that the Defendants' certified their Appraisal as a "Summary Report". R. Vol. I, p. 27; R. Vol. I, p. 44. By certifying their Appraisal as a "Summary Report", Defendants' permitted the Hruza's and any of their lenders, at the Hruza's request, to rely on the Appraisal, thus establishing a duty owed.

Defendants' have contradicted this fact by belatedly introducing the Affidavit of Ernie Menchaca (hereinafter, "Menchaca Affidavit") R. Vol. II, p. 192-193. In their response, the Defendants state "the only evidence on point, the Affidavit of Ernie Menchaca, establishes that the Client, Clearwater did not "transmit" or assign the appraisal draft. The Plaintiff cannot fail to

[2] Defendants cite *Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234, 1242 (1986), in support of their position that Defendants did not owe a duty to Icon, *Sanchez* is a products liability case based on OSHA and has nothing to do with an appraiser's duties to third parties based on USPAP.

controvert this evidence and expect to survive a motion for summary judgment."[3] *See* Respondent's Brief, p.13.

In fact, the Plaintiff has, at every opportunity, contested the Defendants' alleged "evidence" that Clearwater did not "transmit" the appraisal draft. In its Memorandum in Support of Motion for Summary Judgment, Plaintiff stated that it had retained Paul Bull as an expert in the case. R. Vol. I, p. 136-138. Plaintiff stated that it was the expert opinion of Mr. Bull that "Defendants' Appraisal did not meet the minimum requirements of USPAP and that Massey violated many of the standards in preparing and issuing the Appraisal." R. Vol. I, p. 137. In so doing, Plaintiff offered unrebutted evidence from a qualified expert witness that the Defendants violated the standard of care and the administrative rules that establish the standard of care, even though it should be obvious to a lay-person that Massey's Appraisal was filled with mistakes.[4][5]

Further, in its Response to Defendants Memorandum in Support of Motion for Summary Judgment, Plaintiff directly contradicts the assertions made in Defendants' Motion for Summary Judgment, by putting forth as evidence certifications made in the Appraisal report and payment issued by Icon to Massey, in the form of an $800 check which was later deposited into Defendants' bank account. R. Vol. I, p. 147-149.

B. Icon Paid for the Massey Appraisal and Defendants' Accepted Payment Knowing That the Massey Appraisal Contained False and Inaccurate Information

In its Order, the district court failed to consider the undisputed fact that Icon issued a check for $800 to Defendant, Capitol West Appraisals, as payment for the Appraisal. R. Vol. II,

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[3] In its Appeal Brief, Plaintiff discusses the fact that the Menchaca Affidavit was never produced to the Plaintiff.

[4] In its Motion, Plaintiff cites case law which demonstrates that expert testimony is unnecessary if the relevant standard of care does not require specialized or technical knowledge. *See, Am. Family Mut. Ins. Co. v. Allen*, 102 P.3d 333, 343 (Colo. 2004), nor is expert testimony required if a legislative enactment or administrative rule establishes the specific standard of care *See, Allen*, 102 P.3d at 343; *see also Giampapa v. Am. Family Mut. Ins. Co.*, 919 P.2d 838, 841 (Colo.App.1995).

[5] Further, Plaintiff also cited the Affidavit of Paul Bull in its Response to Defendants Memorandum in Support of Motion for Summary Judgment. R. Vol. I, p. 147.

p. 194-205. Defendant Massey admitted in his deposition that he prepared a "defective appraisal." R. Vol. I, p. 26. He said that his Appraisal "had ...errors that we were aware of, that me and my client were aware of." R. Vol. I, p. 26. He recalled receiving payment of $800 from Icon even though he did not correct the "errors" or inform the credit union about the errors in his "defective" Appraisal. R. Vol. I, p. 40. In fact, Icon paid the Defendants a sum of $800 for their Appraisal by check dated September 18, 2007, and the Defendants accepted payment. R. Vol. II, p. 174. The $800 check, made payable to Capitol West Appraisals and A. Wade Massey and deposited into the Defendants' bank account, conclusively demonstrates that Icon properly paid for the Appraisal and that the Defendants accepted payment for the Appraisal. The Court's conclusion that there is no evidence to show how Icon came into possession of the Appraisal is erroneous. Icon paid for the Appraisal and the Defendants accepted payment knowing that the Appraisal contained false and inaccurate information.

While the fact that the credit union sent Defendants' a check in payment of services may not, in and of itself, be consider bargained for exchange, the Defendants' acceptance and negotiation of the $800 payment from Icon established the requisite consideration. Defendants' acceptance of payment for its Appraisal is direct evidence of the Defendants' consent to the credit union's use of and reliance upon the Appraisal report.

C. The Menchaca Affidavit Does not Establish That Clearwater did not "Transmit" or Assign the Appraisal

In their Response, Defendants attempt to mislead the Court by alleging that the Menchaca Affidavit provides conclusive proof that Clearwater did not transmit the appraisal. It does not.

Ernie Menchaca is not the Defendants' Expert Witness. In his role as Clearwater president, Mr. Menchaca was a witness to the events. In his Affidavit, Menchaca stated:

1. That it is neither proper nor customary to assign an appraisal to another underwriter without a written letter of assignment to authorize use and reliance upon the appraisal so assigned; and
2. That it is the custom of the industry for those in the position of Idahy to use their own appraiser, obtain a new appraisal, or request a letter or 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. R. Vol. II, p. 192-193.

In essence, Menchaca's opinion testimony stated that it is not normal business practice to disclose an appraisal without a letter of assignment. Tellingly, at no point did Menchaca state that Clearwater **did not transmit** Massey's Appraisal to either the Hruza's or Icon, and he does not even purport to address the question of whether the Defendants disclosed the report to the same.[6]

Accordingly, Defendants' contention that the Menchaca Affidavit establishes that Clearwater did not "transmit" or assign the Appraisal is false.

D. The District Court Made Impermissible Findings of Fact When Reaching its Decision

The undisclosed Menchaca Affidavit offers very little in determinate evidence. While the Menchaca Affidavit contains the assertion that it is not normal business practice to disclose an appraisal without a letter of assignment, it takes no position on whether Clearwater actually transmitted the Massey Appraisal to the Hruzas or Icon. Therefore, the proper scope of the Menchaca Affidavit, to the degree that the district court was entitled to consider it, is limited.

[6] These questions would have been asked of Menchaca during his scheduled deposition had that deposition not been cancelled by the Defendants.

The Menchaca Affidavit does not prove that either the Hruzas or Icon did not receive the Appraisal from Clearwater. Further, the Plaintiff has introduced evidence that Massey accepted payment from Icon for the Massey Appraisal. As such, there is a genuine issue of material fact as to whether Clearwater transmitted the Appraisal to either the Hruzas or Icon.

However, the district court extrapolated the statements made in the Menchaca Affidavit to find that Clearwater did not disclose the Appraisal. In so doing, the district court failed to construe the facts in the light most favorable to the non-moving party.

E. Defendants Incorrectly Maintain that Plaintiff is Bound to its Stipulation

In their response, Defendants claim that Plaintiff is bound to counsel Wilson's admittedly incorrect statement that he "believed" he had received the Menchaca Affidavit, when in fact he had not. *See*, Respondent's Brief, p. 17. Defendants cite one case[7], *Workman Family Partnership v. City of Twin Falls,* in support of their contention that "a stipulation such as this, which is made in open court, is final." 104 Idaho 32, 35, 655 P.2d 926, 929 (1982), *See* Respondent's Brief p. 17-18.

Workman involved a case in which a developer sought to have property rezoned. After the Twin Falls City Council denied the application for a zoning change, the developer filed a complaint against the City of Twin Falls seeking declaratory relief. The plaintiff developer and defendant city agreed to a Stipulation that contained information about the City Council's prior approval of other rezoning applications. The district court entered a Memorandum Decision holding that the acts of the Twin Falls City Council were arbitrary and capricious.

Upon appeal, the City objected on the grounds that the trial court's review of the matter should have been confined to evidence that was originally before the Twin Falls City Council,

[7] Defendant cites *Taylor v. McNichols* to support its claim that Plaintiff "invited error". *See* Respondent's Brief, p. 18. *Taylor v. McNichols* discusses a failure to state a claim upon which relief may be granted. 243 P.3d 642 (2010). The case at hand should be governed by the precedent set in *Workman.*

and since evidence in the stipulation was not before the Council, the district court erred in considering such evidence.

The Idaho Supreme Court denied Twin Falls appeal for reconsideration on the basis that "at no point in the proceedings before the district court did the city object to the courts consideration of the evidence contained in the stipulation." 655 P.2d at 929.

Interestingly, nowhere in the Workman opinion does the Supreme Court state that a stipulation made in open court is "final". The Court states that as a "general rule", the parties who enter into a stipulation are bound thereby. *Id.* However, in the very next sentence, the Court states that "the trial court under certain circumstances may relieve a party from stipulations entered into [during] judicial proceedings." *Id.* The Workman court denied the City's appeal because they failed to object to the stipulation in district court, and because the stipulation was information of public record at the time before the hearing.

Workman is distinguished from the case at hand because in this case, Plaintiff objected to the stipulation on multiple occasions. After a review of its records, Plaintiff determined that it had not ever received the Menchaca Affidavit. Accordingly, Plaintiff filed its Motion for Reconsideration, and later its Motion to Permit the Taking of Ernie Menchaca Deposition Pursuant to Rule 56(f) and Renewed Motion to Reconsider the Court's Order Granting Summary Judgment[8].

Further, the information contained in Menchaca Affidavit was not public record before it was referenced in the Defendants' Memorandum of Law in Support of Summary Judgment. In fact, the Menchaca Affidavit was never filed and served with Defendants' pleadings as required by I.R.C.P. 7(b)(3) and 5(d).

[8] Plaintiff's Counsel submitted Affidavits with the Renewed Motion stating that they had never received the Menchaca Affidavit.

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. Despite Defendants' assertions to the contrary, Plaintiff should have been allowed relief of the Stipulation mistakenly entered into at the February 9, 2012 hearing.

F. Defendants' Assertion of Their Right to Attorney Fees is Specious and Should be Denied

The Defendants have asked this Court to grant them attorney fees under Idaho Code Section 12-121 and Idaho Rule of Civil Procedure 54(e). Idaho Code Section 12-121 states, in pertinent part:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees...

On January 2, 1979, the Idaho Supreme Court adopted Idaho Rule of Civil Procedure 54(e) in order to limit the application of Section 12-121 to those situations in which the court finds that the action was "brought, pursued or defended frivolously, unreasonably or without foundation." The Idaho Supreme Court has held that attorney fees sought for an appeal under Section 12-121 will be awarded only when the Court is "left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Rudd v. Merritt,* 138 Idaho 526, 533, 66 P.3d 230, 237 (2003). Accordingly, "On appeal, the Supreme Court will take the 'entire course of litigation' into account to see if any legitimate issues were presented; one frivolous argument does not lead to fees under I.C. § 12-121 if at least one legitimate issue was raised." *Peterson v. Private Wilderness, LLC,* 152 Idaho 691, 273 P.3d 1284, 1292 (2012) quoting, *Michalk v. Michalk,* 148 Idaho 224, 235, 220 P.3d 580, 591 (2009).

In an attempt to seek attorney fees, Defendants' now claim that Plaintiff has not raised a single legitimate issue in its appeal brief. First, Defendants attempt to diminish the import of

Plaintiff's argument that the district court misconstrued the law governing appraisal standards by claiming that Plaintiff has not supported its argument that Massey owed a professional duty to Icon. Defendants' assertion, however, purposefully ignores Plaintiff's extensive discussions throughout its pleadings of FIRREA, USPAP and Massey's acceptance and deposit of check from Icon for payment.[9] Instead, Defendants points to the Huffman Affidavit, declaring that this single affidavit somehow diminishes all of Plaintiff's extensive briefing regarding the plain language of USPAP, which states that an appraiser a owes a duty to third parties when he certifies that he has prepared a "Summary Report". What Defendants fail to mention is that they did not submit the Huffman Affidavit in the Memorandum in Support of their Motion for Summary Judgment. R. Vol I, p.113-128. Rather, Defendants only submitted the Affidavit as an attachment to their Opposition to Plaintiff's Motion for Summary Judgment in order to create a purported issue of disputed fact. R. Vol I, p. 161. Moreover, in its Order granting Defendants' motion for summary judgment, the district court does not rely on the Huffman Affidavit. In fact, the district court never mentions the Huffman Affidavit, but renders its decision based explicitly on the Menchaca Affidavit.

Defendants next attempt to convince this Court that Plaintiff's argument that the district court relied on the evidence not in the record, is frivolous. As with all of Defendants' briefing and oral arguments regarding this issue, Defendants patently refuse to acknowledge that, to date, they have failed to provide the Menchaca Affidavit to Plaintiff, as required by the Idaho Rules. As discussed above, Defendants cite a single case, *Workman*, for their proposition that a lawyer

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[9] *See* Plaintiff's Memorandum in Support for Summary Judgment, R. Vol. I, p. 131-145; Plaintiff's Response to Defendant's Memorandum in Support of Motion for Summary Judgment, Judgment R. Vol. I, p. 146-160; Plaintiff's Reply to Defendants Opposition to Plaintiff's Motion for Summary Judgment, Judgment R. Vol. I, p. 185-191; Motion for Reconsideration of the Court's February 16, 2012 Order of Motions for Summary Judgment, R. Vol. II, p. 206-216; Plaintiff's Reply to Defendants Opposition to Plaintiff's Motion to Permit the Taking of Ernie Menchaca Deposition, Judgment R. Vol. II, p. 238-254; and the Brief of Appellant.

must bound to any mistaken stipulation ever made. While the *Workman* case holds that the city cannot object on appeal to stipulated evidence because no objections were raised at the trial court level, the case is not applicable to our fact pattern. In the case at hand, Plaintiff has made several objections to the district court's reliance on the Menchaca Affidavit and asks this Court to reconsider the district court's reliance on evidence that was has still never been produced to Plaintiff. Accordingly, Defendants' claim that Plaintiff's argument regarding evidence not in the record is frivolous has not been supported by any relevant citations to Idaho law.

Defendants finally claim that, like every argument that does not suit Defendants' version of the facts, Plaintiff's argument that the district court based its Order on disputed facts is frivolous. Defendants do not, however, address Plaintiff's argument that the Menchaca Affidavit does not state that Clearwater never gave the Massey Appraisal the Hruzas or Icon but only that it would have been outside of the ordinary course of business to do so. Defendants also do not address Plaintiff's argument that the district court made findings of fact that were not viewed in the light most favorable to the non-moving party, when it extrapolated from the language of the Menchaca Affidavit in order to conclude that Clearwater did not provide the Massey Affidavit to either the Hruzas or Icon. Rather, Defendants continue to assert that the Menchaca Affidavit unequivocally states that Clearwater did not distribute the Massey Affidavit. This, however, is patently untrue.

Defendants cannot claim Plaintiff's have mounted frivolous arguments when Defendants have been unable to assert any evidence to directly defeat Plaintiff's discussions of FIRREA, USPAP and the district court's reliance on, and extrapolations from, the Menchaca Affidavit.

V. 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 or Respondents Wade Massey and Capitol West Appraisals.

DATED this 26 day of March, 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 26 day of March, 2013, on the following:

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