

10-1-2008

Carpenter v. Turrell Clerk's Record v. 1 Dckt. 35576

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Vol. 1 of 2

LAW CLERK

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

JAMES C CARPENTER

Plaintiff/Respondent

vs.

TIM TURRELL and PEGGY TURRELL

Defendants/Appellants

TRANSCRIPT ON APPEAL

In the District Court of the First Judicial District of
the State of Idaho, in and for the County of Kootenai

ATTORNEY FOR APPELANTS

Charles R Dean, Jr

ATTORNEY FOR RESPONDENTS

James A Raeon

SUPREME COURT DOCKET #35576

OCT 1 2002

Supreme Court Court of Appeals
Entered on ATS by:

35576

IN THE SUPRMEME COURT OF THE STATE OF IDAHO

JAMES C CARPENTER

Plaintiff/Respondent

VS.

TIM TURRELL and PEGGY TURRELL

Defendants/Appellants

SUPREME COURT NO 35576

CIVIL CASE NO
CV 07-5840

CLERK'S CERTIFICATE ON APPEAL

Appeal from the District Court of the First Judicial district of the State of Idaho, in and for the County of Kootenai.

HONORABLE JOHN T. MITCHELL

District Judge

Attorney for Defendants/Appellants

Charles R Dean Jr
1110 West Park Place Ste 212
Coeur d'Alene, Idaho 83814

Attorney for Plaintiff

James A Raeon
1424 Sherman Ave Ste 300
Coeur d'Alene, Idaho 83814

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PLAINTIFF'S POST TRIAL BRIEF, filed May 23, 2008	28
PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, filed April 30, 2008	14A

Date: 9/3/2008

First Judicial District Court - Kootenai County

User: PARKER

Time: 10:51 AM

ROA Report

Page 1 of 4

Case: CV-2007-0005840 Current Judge: John T. Mitchell

James C Carpenter vs. Tim Turrell, etal.

James C Carpenter vs. Tim Turrell, Peggy Turrell

Date	Code	User	Judge
8/14/2007	NCOC	MCCOY	New Case Filed - Other Claims John T. Mitchell
		MCCOY	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: James Raeon Receipt number: 0757388 Dated: 8/14/2007 Amount: \$88.00 (Cash) For: [NONE] John T. Mitchell
	SUMI	LSMITH	Summons Issued-Tim Turrell John T. Mitchell
	SUMI	LSMITH	Summons Issued-Peggy Turrell John T. Mitchell
8/30/2007		MCCOY	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Charles Dean Receipt number: 0759964 Dated: 8/30/2007 Amount: \$58.00 (Check) For: [NONE] John T. Mitchell
	ANSW	MCCOY	Answer - Charles Dean OBO Tim & Peggy Turrell John T. Mitchell
9/4/2007	HRSC	CLAUSEN	Hearing Scheduled (Scheduling Conference 10/17/2007 04:00 PM) John T. Mitchell
	NOTC	CLAUSEN	Notice of Scheduling Conference John T. Mitchell
9/12/2007	NTSV	HUFFMAN	Notice Of Service John T. Mitchell
10/3/2007	NTSV	HUFFMAN	Notice Of Service John T. Mitchell
10/4/2007	NTSV	HUFFMAN	Notice Of Service John T. Mitchell
10/9/2007	STIP	MCCORD	Stipulation for scheduling - Charles Dean John T. Mitchell
10/15/2007	STIP	MCCORD	Stipulation for scheduling John T. Mitchell
10/17/2007	HRVC	CLAUSEN	Hearing result for Scheduling Conference held on 10/17/2007 04:00 PM: Hearing Vacated John T. Mitchell
10/23/2007	HRSC	CLAUSEN	Hearing Scheduled (Court Trial Scheduled 05/12/2008 09:00 AM) 1 Day John T. Mitchell
	ORDR	CLAUSEN	Scheduling Order, Notice of Trial Setting and Initial Pretrial Order John T. Mitchell
11/15/2007	NOTC	MCCORD	Notice of matters deemed admitted John T. Mitchell
11/27/2007	NTSV	BAXLEY	Plaintiff's Notice Of Service on Defendants Tim and Peggy Turrell through atty Charles Dean, Jr., Defendants' Requests for Admission 11/21/07 John T. Mitchell
	NTSV	BAXLEY	Plaintiff's Notice Of Service on Defendants Tim and Peggy Turrell through atty Charles Dean, Jr., Defendants' Interrogatories and Requests for Production of Documents 11/27/07 John T. Mitchell
4/8/2008	HRSC	CLAUSEN	Hearing Scheduled (Status Conference 04/24/2008 02:00 PM) Status of Trial Week 5/12/08 John T. Mitchell
		CLAUSEN	Notice of Hearing John T. Mitchell
4/11/2008	AFSV	LSMITH	Affidavit Of Service-04/11/2008 G. Don Murrell SR John T. Mitchell
	AFSV	LSMITH	Affidavit Of Service-04/10/2008 Dave Boudier John T. Mitchell
	AFSV	LSMITH	Affidavit Of Service-04/11/2008 Tim Turrell John T. Mitchell
	AFSV	LSMITH	Affidavit Of Service-04/10/2008 Marianne Turrell John T. Mitchell

Date: 9/3/2008

First Judicial District Court - Kootenai County

User: PARKER

Time: 10:51 AM

ROA Report

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Case: CV-2007-0005840 Current Judge: John T. Mitchell

James C Carpenter vs. Tim Turrell, etal.

James C Carpenter vs. Tim Turrell, Peggy Turrell

Date	Code	User	Judge
4/24/2008	HRHD	CLAUSEN	Hearing result for Status Conference held on 04/24/2008 02:00 PM: Hearing Held Status for Trial Week of 5/12/08
	AFSV	SHEDLOCK	Affidavit Of Service - Dan B. Selden 4/14/08
	AFSV	SHEDLOCK	Affidavit Of Service - Leonard L. Turpin 4/16/08
4/25/2008	WITP	MCCORD	Witness List - Plaintiff's
	MISC	MCCORD	exhibit list - plaintiff's
4/28/2008	WITD	SHEDLOCK	Witness List - Defendant's
4/30/2008	HRSC	CLAUSEN	Hearing Scheduled (Motion in Limine 05/07/2008 04:00 PM) Raeon
	HRSC	CLAUSEN	Hearing Scheduled (Motion 05/07/2008 04:00 PM) Shorten Time - Raeon
	MISC	MCCOY	Plaintiff's Proposed Findings of Fact and Conclusions of Law
5/1/2008	AFFD	MCCOY	Affidavit of James A. Raeon in Support of Motion in Limine Regarding Defendants' Witness List
	MNLI	MCCOY	Plaintiffs' Motion In Limine Re: Exhibits and in the Alternative Motion to Withdraw "Deemed Admissions"
	MNLI	MCCOY	Plaintiff's Motion In Limine Regarding Defendants' Witnesses
	MOTN	MCCOY	Motion to Shorten Time for Hearing Re: Plaintiff's Motion in Limine Re: Witnesses, Exhibit Lists and Motion to Withdraw "Deemed Admissions"
	NOHG	MCCOY	Notice Of Hearing on Plaintiff's Motion in Limine Re: Defendants Witnesses, Plaintiff's Motion in Limine Re: Exhibits and Motion to Withdraw "Deemed Admissions"
5/6/2008	BRIE	SHEDLOCK	Defendant's Trial Brief
5/7/2008	CONT	CLAUSEN	Hearing result for Motion in Limine held on 05/07/2008 04:00 PM: Continued Raeon
	CONT	CLAUSEN	Hearing result for Motion held on 05/07/2008 04:00 PM: Continued Shorten Time - Raeon
5/8/2008	HRSC	CLAUSEN	Hearing Scheduled (Motion in Limine 05/08/2008 01:00 PM) Raeon
	HRSC	CLAUSEN	Hearing Scheduled (Motion 05/08/2008 01:00 PM) Shorten Time - Raeon
	HELD	CLAUSEN	Hearing result for Motion in Limine held on 05/08/2008 01:00 PM: Motion Held Raeon
5/9/2008	ORDR	CLAUSEN	Order Granting Plaintiff's Motion in Limine Regarding Defendants' Witnesses
	ORDR	CLAUSEN	Order Regarding Plaintiff's Motion in Limine Regarding Defendants' Exhibits
	ORDR	CLAUSEN	Order Granting Plaintiff's Motion to Withdraw Deemed Admissions

Date: 9/3/2008

Time: 10:51 AM

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First Judicial District Court - Kootenai County

User: PARKER

ROA Report

Case: CV-2007-0005840 Current Judge: John T. Mitchell

James C Carpenter vs. Tim Turrell, etal.

James C Carpenter vs. Tim Turrell, Peggy Turrell

Date	Code	User		Judge
5/9/2008	WITD	SHEDLOCK	Supplemental Witness List - Defendant's	John T. Mitchell
5/12/2008	CTST	CLAUSEN	Hearing result for Court Trial Scheduled held on 05/12/2008 09:00 AM: Court Trial Started 1 Day 1ST PRIORITY	John T. Mitchell
5/13/2008	HELD	CLAUSEN	Hearing result for Motion held on 05/08/2008 01:00 PM: Motion Held Shorten Time - Raeon	John T. Mitchell
5/19/2008	MEMO	SHEDLOCK	Plaintiff's Memorandum Of Attorney's Fees And Costs	John T. Mitchell
	AFFD	SHEDLOCK	Affidavit Of James A. Raeon In Support Of Plaintiff's Memorandum Of Attorney's Fees And Costs	John T. Mitchell
5/23/2008	BRIE	VICTORIN	Defendant's Post Trial Brief	John T. Mitchell
	BRIE	MCCORD	pet's post trial Brief	John T. Mitchell
6/10/2008	ORDR	CLAUSEN	Order - Judgment for Attorney's Fees & Costs	John T. Mitchell
6/19/2008	MEMO	CLAUSEN	Memorandum Decision, Findings of Fact, Conclusions of Law and Order	John T. Mitchell
6/26/2008	CVDI	PARKER	Civil Disposition entered for: Turrell, Peggy, Defendant; Turrell, Tim, Defendant; Carpenter, James C, Plaintiff. Filing date: 6/26/2008	John T. Mitchell
	FJDE	PARKER	Judgment	John T. Mitchell
	STAT	PARKER	Case status changed: Closed	John T. Mitchell
6/27/2008	MOTN	VICTORIN	Motion for Award of Attorney's Fees	John T. Mitchell
	MEMO	VICTORIN	Plaintiff's Memorandum of Attorney Fees and Costs	John T. Mitchell
	AFFD	VICTORIN	Affidavit of James Raeon in Suppor of Motion to Award of Fees	John T. Mitchell
7/8/2008	HRSC	CLAUSEN	Hearing Scheduled (Motion 08/13/2008 02:00 PM) Fees/Costs - Dean	John T. Mitchell
	STAT	CLAUSEN	Case status changed: Closed pending clerk action	John T. Mitchell
	MEMO	ROBINSON	Memorandum In Support Of Motion To Disallow Fees and Costs and In Opposition To Motion for Award Of Attorney's Fees	John T. Mitchell
	NOTC	ROBINSON	Notice Of Motion To Disallow Fees and Costs	John T. Mitchell
8/4/2008	HRVC	CLAUSEN	Hearing result for Motion held on 08/13/2008 02:00 PM: Hearing Vacated Fees/Costs - Dean	John T. Mitchell
	HRSC	CLAUSEN	Hearing Scheduled (Motion 09/09/2008 02:30 PM) Fees/Costs - Dean	John T. Mitchell
8/5/2008	NOTC	ROBINSON	Amended Notice Of Motion To Disallow Fees and Costs	John T. Mitchell

Date: 9/3/2008

First Judicial District Court - Kootenai County

User: PARKER

Time: 10:51 AM

ROA Report

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Case: CV-2007-0005840 Current Judge: John T. Mitchell

James C Carpenter vs. Tim Turrell, etal.

James C Carpenter vs. Tim Turrell, Peggy Turrell

Date	Code	User	Judge
8/6/2008		LSMITH	Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: Dean & kolts Receipt number: 0807385 Dated: 8/6/2008 Amount: \$15.00 (Check) For: Turrell, Peggy (defendant)
	BNDC	LSMITH	Bond Posted - Cash (Receipt 807386 Dated 8/6/2008 for 100.00)
8/7/2008	APDC	LSMITH	Appeal Filed In District Court
	STAT	LSMITH	Case status changed: Reopened

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone No. 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

SUMMONS ISSUED

AUG 14 2007

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 757388

2007 AUG 14 AM 10: 21

CLERK DISTRICT COURT
DEPUTY

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

JAMES C. CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NUMBER: CV07-

5840

COMPLAINT

FEE CATEGORY: A.1

FEE: \$88.00

COMES NOW, the above-named Plaintiff, JAMES C. CARPENTER, by and through his Attorney of Record, James A. Raeon for cause of action against the Defendants, TIM TURRELL and PEGGY TURRELL, complains and alleges as follows:

I.

At all times relevant hereto, Plaintiff, JAMES C. CARPENTER resided in Post Falls, County of Kootenai, State of Idaho.

II.

At all times relevant hereto, Defendants, TIM TURRELL and PEGGY TURRELL, resided at Hayden, County of Kootenai, State of Idaho and that the actions of the Defendant, TIM TURRELL as alleged herein has benefitted the marital community.

1-COMPLAINT

008

ASSIGNED TO
JUDGE MITCHELL

III.

This Court has jurisdiction because all the parties are Idaho residents and damages in this case exceed \$10,000.00. The venue is appropriate in Kootenai County, because the Defendants reside in Kootenai County, Idaho.

IV.

In May 2005 the Plaintiff purchased two storage buildings and stored them on real property located in Post Falls, Kootenai County, Idaho owned by Marianne Turrell with her permission.

V.

The Defendant, TIM TURRELL, is the son of Marianne Turrell.

VI.

The Defendant, TIM TURRELL, without the Plaintiff's knowledge, authorization or consent sold one storage building to Leonard Turpin on November 29, 2006 and the other storage building to Dan Seldon on December 8, 2006.

VII.

Due to Defendant, TIM TURRELL'S unlawful conversion of the Plaintiff's personal property to his own use and subsequent sale of the storage buildings has caused the Plaintiff economic and non economic damages. That sum is TWENTY SEVEN THOUSAND DOLLARS (\$27,000.00) if this matter is uncontested and further damages as will be proven at the trial in this matter.

VIII.

The Plaintiff has served a demand letter upon the Defendant, TIM TURRELL concerning this cause of action and his damages.

IX.

Plaintiff is entitled to attorney's fees under Idaho Code §12-120 and §12-121 such that if this matter is uncontested the Plaintiff should be awarded attorney's fees in the sum of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) plus costs and an additional amount of attorney's fee and costs if this matter is contested and post judgment attorney's fees incurred by the Plaintiff.

Charles R. Dean, Jr.
1110 West Park Place, Suite 212
Coeur d'Alene, Idaho 83814
(208) 664-7794 / Fax (208) 664-9844
ISB #5763

Attorney for Defendants

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 759964

2007 AUG 30 PM 4:34

CLERK DISTRICT COURT

DEPUTY

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF KOOTENAI

JAMES C. CARPENTER,)	Case No.: CV 07-5840
)	
Plaintiff,)	ANSWER
)	
vs.)	
)	
TIM TURRELL and PEGGY TURRELL,)	
husband and wife,)	
)	
Defendant)	
)	
)	

Comes now defendants Tim Turrell and Peggy Turrell, husband and wife, and in response to plaintiff's complaint, admits, alleges and denies as follows:

1. Answering the allegations contained in paragraph I of said Complaint, defendants allege that they have no information or belief upon the subject contained therein sufficient to enable them to answer the allegation and, basing their denial on that ground, deny each and every, all and singular, generally and specifically, said allegations and the whole thereof.

2. Answering the allegations contained in paragraph II of said Complaint, defendants admit that at all times relevant hereto, defendants resided at Hayden, County of Kootenai, State of Idaho. Except as so admitted, defendants deny the balance of said paragraph.

3. In answer to paragraph III, defendants deny the first sentence of said paragraph. Except as so denied, defendants admit the balance of said paragraph.

4. Defendants deny the allegations contained in paragraphs IV, VII & IX of said Answer.

5. Defendants admit to the subject of the allegations contained in paragraphs V, VI and VIII of said Complaint.

AFFIRMATIVE DEFENSES

As and for a first affirmative defense, defendants allege that plaintiff's complaint fails to state facts sufficient to constitute a cause of action.

As and for a second affirmative defense, defendants allege that plaintiff has waived and/or is estopped to make the claims herein presented.

As and for a third affirmative defense, defendants allege that plaintiff's claims are barred by the doctrines of laches and unclean hands.

As and for a fourth affirmative defense, defendants allege that plaintiff's claims are barred by Idaho Code § 9-202(3).

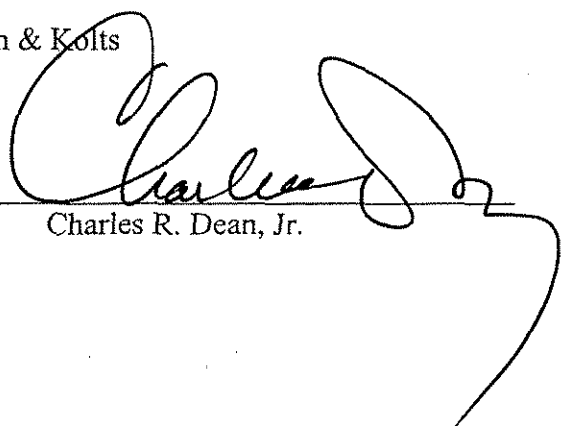
As and for a fifth affirmative defense, defendants allege that plaintiff's claims are malicious and frivolous, entitling defendants to IRCP 11(a) sanctions as governed by Idaho Code § 12-121.

Wherefore, defendants pray that plaintiff take nothing by his complaint and that they be awarded sanctions against the appropriate persons under IRCP 11(a) and Idaho Code § 12-121.

Dated: 8-28-07

Dean & Kolts

By


Charles R. Dean, Jr.

VERIFICATION

STATE OF IDAHO

County of Kootenai

Tim Turrell and Peggy Turell, being first duly sworn, depose and say,

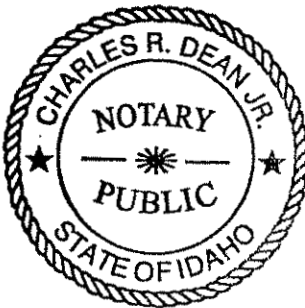
Affiants are defendants in the above entitled action, they have read the foregoing answer to complaint, know the contents thereof, and believe the facts stated therein to be true.

Dated this 28th day of August, 2007.

Tim R Turrell

Peggy Turell

SUBSCRIBED and SWORN to before me this 28th day of August 2007.



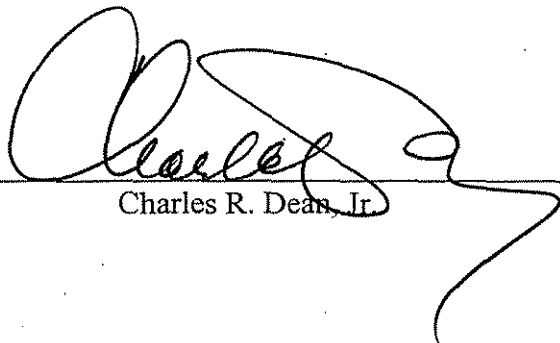
Charles R. Dean Jr.
Notary Public in and for the State of Idaho
Residing at: Oliverd's Lane
My commission expires: 10/19/10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th ay of August 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James A. Raeon
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814

- ☒ U.S. MAIL
- ☐ FEDEX GROUND
- ☐ HAND DELIVERED
- ☐ OVERNIGHT MAIL
- ☐ FACSIMILE



Charles R. Dean, Jr.

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2009 APR 30 PM 4:41

CLERK DISTRICT COURT
DEPUTY

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone No. 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

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

JAMES C. CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NUMBER: CV07-5840

PLAINTIFF'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

COMES NOW, the above-named Plaintiff, JAMES C. CARPENTER, by and through his Attorney of Record, James A. Raeon and pursuant to this Court's Scheduling Order entered on the 23rd day of October 2007 hereby submits the Plaintiff's Proposed Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1. That on or about the 23rd day of May 2003 the Plaintiff purchased from G. Don Murrell, Sr., a lunchroom modular building Serial #601-102A and an office modular

1-PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

building, Serial #400-101A. Subsequent to the purchase of the lunchroom and office buildings, the Plaintiff delivered and stored the same at real property owned by Herbert F. and Marianne Turrell, husband and wife, located at 2855 W. Yukon Avenue, Post Falls, Idaho with the Turrell's verbal permission.

2. Herbert F. Turrell passed away sometime in the year 2004.

3. Approximately in June 2006 the Defendant telephoned the Plaintiff of a potential buyer for one of the buildings and gave the Plaintiff the potential buyer's telephone number. Plaintiff contacted the potential buyer, but a sale was never consummated.

4. At no time during the period of time that the Plaintiff's buildings were stored on the Turrell property was the Plaintiff ever advised verbally or in writing by either Herbert Turrell or Marianne Turrell to remove the same, nor was he ever requested to pay rent or any form of compensation as for the storage of said buildings on the Turrell property.

5. On or about the 15th day of March 2007 the Plaintiff took a potential customer to the Turrell property to look at the buildings hoping to sell either one of them and discovered that the buildings were no longer there. The Plaintiff being aware that Herbert F. Turrell had passed away contacted the Defendant, Tim Turrell, to determine the status of the buildings. The Defendant advised the Plaintiff that he had given and/or gifted both of the buildings but would not reveal to the Plaintiff to whom or who transported the buildings from the Turrell property.

6. Upon investigation, the Plaintiff determined that the Defendant sold the office building to Leonard Turpin on or about the 29th day of November 2006 for \$1,750.00 and the lunchroom building to Dan Selden on or about the 8th day of December 2006 for \$1,750.00.

7. The sale of the lunchroom and office buildings by the Defendant, Tim Turrell,

2-PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

was without prior knowledge, consent or authority by the Plaintiff.

8. The Plaintiff received no proceeds from the same of the lunchroom building and/or office building from the Defendant, Tim Turrell.

9. The range of the fair market value of the lunchroom building is \$9,250.00 to \$10,400.00.

10. The range of the fair market value of the office building is \$9700.00 to \$11,000.00.

CONCLUSION OF LAW

1. The Plaintiff was the owner of the lunchroom and office buildings hereinafter referred to as buildings.

2. Marriane Turrell was rightfully in possession of the buildings as bailee. The relationship between the Plaintiff and Herbert F. Turrell and Marianne Turrell was that of a gratuitous bailment, *Quinto vs. Millwood Forest Products, Inc.*, 130 Idaho 162 (Id. App. 1997).

3. The Defendant without authority of the bailee assumed dominion and control of the Plaintiff's buildings.

4. The Defendant exercised dominion and control of the buildings thereby permanently depriving the Plaintiff of possession of said personal property by the sale of the buildings to Selden and Turpin. *Wiseman vs. Schaffer*, 115 Idaho 537 (Id. App. 1989).

5. Any allegation by the Defendant that he was unaware of the Plaintiff's rights over the buildings with which the Defendant converted to his own use is irrelevant and the Defendant is still liable. *Restatement of Torts* (2nd) Section 222, 223, 224.

6. Defendant is liable to the Plaintiff for damages resulting from his wrongful

3-PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

conversion of the Plaintiff's buildings the measure of damages is the full value of the buildings at the time and place of the sale to third-parties. *Restatement of Torts* (2nd) Section 222(A), Comment C, *Wiseman* (*Supra*).

7. Idaho Code §9-202(3) is not relevant to the instant case because the Estate of Turrell is not a party or named Defendant in this matter, there is no claim by the Plaintiff against Marianne Turrell or the Estate of Turrell and any proffered testimony as to any agreement or communication between the Plaintiff and Herbert F. Turrell concerning a state of affairs or matter of fact prior to Mr. Turrell's death is not barred by said statute. *Argyle vs. Slemaker* (Id. 1978) at 547.

8. It is not necessary to prove a demand and refusal and the intent of the parties is immaterial when a conversion occurs by wrongful taking. *Klan vs. Koppel*, 63 Idaho 171 (1941).

9. The Defendant is indebted to the Plaintiff in estimated sum of \$20,000.00 to \$23,000.00 representing the range of the fair market value of the buildings for which judgment for the Plaintiff and as against the Defendant will be entered.

DATED this 30 day of April, 2008.



JAMES A. RAEON
ATTORNEY FOR PLAINTIFF

I hereby certify that a true
and correct copy of the foregoing was
mailed, postage prepaid, on the
30 day of APRIL, 2008, to:

Charles R. Dean, Jr.
Attorney at Law
1110 West Park Place, Suite 212
Coeur d'Alene, ID 83814

Am 11 / COE
James A. Raeon
Attorney for Plaintiff

Charles R. Dean, Jr.
 1110 West Park Place, Suite 212
 Coeur d'Alene, Idaho 83814
 (208) 664-7794 / Fax (208) 664-9844
 ISB #5763

Attorney for Defendants

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED

2008 MAY -5 PM 4:58

CLERK DISTRICT COURT

DEPUTY

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 STATE OF IDAHO, COUNTY OF KOOTENAI

JAMES C. CARPENTER,

Plaintiff,

vs.

TIM TURRELL and PEGGY TURRELL,
 husband and wife,

Defendant

) Case No.: CV 07-5840
)
) DEFENDANT'S TRIAL BRIEF
)
)
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INTRODUCTION

This is an action for conversion that should result in an award of attorneys' fees under Idaho Code 12-121 as sanctions for filing and pursuing a frivolous action. As the Court will see, plaintiff is making up a story to avoid the fact that any claim he had to the property at issue died with defendant, Tim Turrell's father.

STATEMENT OF FACTS

A. In General. Herbert Turrell and his wife, Marian, lived on a 5-acre parcel just outside of the city limits of Post Falls. Herbert was a "trader" in addition to being a truck driver. He bought, sold and bartered cars, trucks, equipment, lumber and whatever else he thought might worth his while. His "inventory" was kept on his property, littering the site with what anyone else would consider junk. As Herbert grew older and developed

Parkinson's, his ability to judge what should be acquired and kept rapidly deteriorated as rapidly as did his ability to work deals to rid his property of the mess he was hording.

Herbert suffered a debilitating stroke in December of 2003 and was thereafter generally incompetent to handle his affairs. He died in June of 2005, leaving his wife and sons to deal with his many accumulations.

At the time of Herbert's death, the assets he and his wife owned were held and subject to a living trust. His wife's health was also deteriorating and she was legally blind. Their sons, principally Tim Turrell since he lived locally, accordingly took over as successor trustee to wind up his father's affairs. Since it appeared their mother's health issues would force the trust to sell the family home to help pay for her continuing care, Tim and his brothers decided that it was necessary to clear the property of junk to make it presentable for sale. Doing so would require them to dispose of almost 70 vehicles, piles of lumber and other equipment, and several temporary buildings that littered the property. Two of those buildings are the ones plaintiff now contends were his.

B. The Alleged Conversion. The evidence will show that plaintiff's allegation that he had some arrangement with Marian Turrell to store the buildings on her property and that he had had conversations with Tim Turrell about the buildings are absolute fabrications. What the evidence will show is that the buildings were placed on the Turrell property in 2003. Neither Marian nor Tim Turrell had any contact with plaintiff or any reason to believe he had any ownership interest in them. All they knew is that Herbert had acquired them from someone for some unknown consideration. The buildings appeared to be of little value and contained no markings or other indications

that plaintiff or anyone other than Herbert owned them. The buildings were simply part of the mountain of junk Tim and his brothers had to sell or discard.

Sometime in late 2005, one of Marian's nephews confronted two men on Marian's property who claimed they were there to look at the buildings at the suggestion of plaintiff. (Plaintiff was a former neighbor who had moved away years before, but who had done occasional deals with Herbert.) When he heard of the incident, Tim found an old cell phone number for plaintiff and called him. When plaintiff did not answer, Tim left a voicemail message indicating that plaintiff should call him if he had any interest in the building. Tim will testify that he hoped to receive a favorable response from plaintiff. He was looking at having to spend several thousands of dollars to have the buildings moved to a dump site and would have naturally preferred for plaintiff to remove them from his mother's property if he wanted them.

Plaintiff did not return the call, so Tim Turrell assumed plaintiff had no interest in the buildings. Six months later, two individuals who were looking at other items Tim was selling for the trust offered to purchase the buildings for \$1,700. They wanted the buildings for use as chicken coops and were willing to bear the cost to move them. Tim jumped at the offer. The buildings were then moved and the money received in payment deposited in Marian's bank account. Tim received no part of the sales proceeds.

C. Plaintiff's Deception. In April of 2007, months after the buildings were sold, plaintiff complained to the Kootenai County Sheriff's Department that Tim Turrell had stolen his buildings. Plaintiff did not claim at that time that he had any arrangement with Marian Turrell to store the buildings, nor did he tell the Sheriff's office that he had had any contact with Tim Turrell about his supposed ownership of the buildings before

they were sold. Instead, plaintiff simply reported that he had a deal with Herbert, without mentioning his wife or son.

In response to a demand letter from plaintiff's counsel, the undersigned pointed out to plaintiff that any claim he had based on an alleged oral agreement with Herbert was unenforceable under Idaho's "dead man's statute" (IC 9-202(3)). To avoid that bar to his claim (and in complete derogation of what he related to the Sheriff's office), plaintiff then filed this action claiming that his arrangement with respect the buildings was also with Marian, Herbert's surviving widow. As the Court will see, that claim is an absolute lie as is plaintiff's later assertion that he discussed his ownership of the buildings with Tim Turrell.

LEGAL AUTHORITY

A. Conversion. Plaintiff's complaint seeks to recover the alleged value of the buildings on a theory of conversion. A conversion is a tort and is defined as an act of dominion wrongfully asserted over the personal property of another in denial of or inconsistent with the owner's right to immediate possession thereof (*Luzar v. Western Surety Co.*, 107 Idaho 693, 696 (1984)). The operative word in that definition is wrongful.

Being a tortious act, the party claiming conversion must establish that his property was either wrongfully taken from his possession or, where no appropriation is shown, that he made demand for possession on the party charged and that that person wrongfully refused delivery (*Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 743 (1998)). In other words, where possession is obtained rightfully, an unlawful taking does not occur until the rightful owner makes demand for the return of his

property and that demand is wrongfully refused (*Gissel v. State*, 111 Idaho 725, 730-31 (1986)).

Here, if plaintiff's claim to ownership is believed (which it probably will not based on what he related to others about ownership of the buildings), Tim Turrell's sale of the property was not wrongful and thus not a conversion. The buildings were by plaintiff's own account lawfully and rightfully in Marian Turrell's possession. Plaintiff had no right to possession of those building since any oral agreement plaintiff may have had with Herbert was unenforceable as a matter of law. Additionally, the evidence will show that Tim Turrell had no knowledge of plaintiff's alleged ownership and that plaintiff had never made a demand for possession. Plaintiff thus cannot prove any of the essential elements of his conversion claim – ownership, an unlawful taking, a right to immediate possession, or a demand for possession.

B. Plaintiff's Rights Lay Elsewhere. If plaintiff is the true owner of the buildings, he has sued the wrong party. A seller of personal property has no ability to convey a greater title than he had, regardless of whether the purchaser had notice or any reason to believe of the real owner's interest in the property (*Massey-Ferguson, Inc. v. Talkington*, 88 Idaho 501, 502 (1965)). Even the intervention of bona fide purchaser for value of such property does not defeat the true owner's ability to regain the property. A bona fide purchaser who refuses the demand of an owner entitled to immediate possession of stolen personal property is guilty of conversion (*Nora v. Safeco Insurance Co.*, 99 Idaho 60, 68 (1978)).

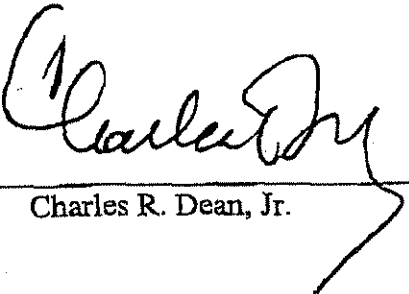
If the buildings belonged to plaintiff, Tim Turrell did not have the authority to convey title thereto to the individuals who bought them. Plaintiff accordingly had, and

still has, the ability to retrieve possession from those buyers after making proper demand on them. If they fail to return the buildings after such demand, they, not Tim Turrell, are guilty of conversion (*Id.*)

Dated: May 5, 2008

Dean & Kolts

By




Charles R. Dean, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James A. Raeon
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814

- ☒ U.S. MAIL
- ☐ FEDEX GROUND
- ☐ HAND DELIVERED
- ☐ OVERNIGHT MAIL
- ☐ FACSIMILE



Charles R. Dean, Jr.

STATE OF IDAHO
COUNTY OF KOOTENAI) ss
FILED:

2008 MAY -9 PM 2:12

CLERK DISTRICT COURT

DEPUTY

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone No. 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

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

JAMES C. CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NUMBER: CV07-5840

ORDER REGARDING PLAINTIFF'S
MOTION IN LIMINE REGARDING
DEFENDANTS' WITNESSES

Plaintiff's Motion referenced above came on for hearing on the 8th day of May 2008 wherein the Plaintiff appearing by and through his Attorney of Record, James A. Raeon and the Defendants appearing by and through their Attorney of Record, Charles R. Dean, Jr., based upon the review of the records and files herein and arguments of counsel,

NOW, THEREFORE, the Court finds that a one day late disclosure of Defendants' Witness List is of no concern to the Court and it is not prejudicial to Plaintiff but that the Defendants incomplete disclosure of their Witness List as contemplated by this Court's Scheduling Order does concern the Court and the Court notes that pursuant to I.R.C.P. Rule 26(e)(1) wherein the Plaintiff did request of the Defendants to

1- ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE REGARDING
DEFENDANTS' WITNESSES

disclose witnesses through discovery and such requests for disclosure required the Defendants to supplement their responses to this request which was not done;

NOW, THEREFORE,

IT IS HEREBY ORDERED THAT:

1. That the Plaintiff's Motion In Limine regarding Defendants Witnesses is granted in its entirety unless the Defendant discloses to the Plaintiff's Counsel on or before 5:00 p.m. on May 8, 2008 the names, addresses, telephone numbers and the substance of each and every witness the Defendants intend to call to testify at trial and for any witness not disclosed that witness will not be permitted to testify at trial.

IT IS FURTHER HEREBY ORDERED that if upon the Defendants' compliance with this Order, the Plaintiff feels that more time is needed to prepare for trial and decides that a continuance of the trial scheduled for 9:00 a.m. on May 12, 2008 is necessary Plaintiff's counsel must notify this Court by telephone on or before 9:00 a.m. on May 9, 2008 and supplement said telephone call by written Motion To Continue which Motion will be granted without hearing or argument.

IT IS FURTHER HEREBY ORDERED that the Plaintiff is awarded attorney's fees and costs incurred regarding this particular Motion upon submission of an appropriate Memorandum of Costs and Attorney's Fees.

ENTERED this 9th day of May, 2008.


JOHN MITCHELL
DISTRICT COURT JUDGE

2- ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE REGARDING
DEFENDANTS' WITNESSES

I hereby certify that on the 9
day of May, 2008, I caused to be
served a true and correct copy of the foregoing
by the method indicated below, and addressed to the
following:


Charles R. Dean, Jr.
Attorney at Law
1110 West Park Place, Suite 212
Coeur d'Alene, ID 83814
(208) 664-9844

☐ U.S. Mail
☒ Facsimile

James A. Raeon
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene, ID 83814
(208) 668-9211

☐ U.S. Mail
☒ Facsimile

DANIEL J. ENGLISH
CLERK OF THE COURT


DEPUTY

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 MAY -9 PM 2:12

CLERK DISTRICT COURT
DEPUTY *Charles R. Dean, Jr.*

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone No. 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

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

JAMES C. CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NUMBER: CV07-5840

ORDER REGARDING PLAINTIFF'S
MOTION IN LIMINE REGARDING
DEFENDANTS' EXHIBITS

Plaintiff's Motion referenced above came on for hearing on the 8th day of May 2008 wherein the Plaintiff appearing by and through his Attorney of Record, James A. Raeon and the Defendants appearing by and through their Attorney of Record, Charles R. Dean, Jr., based upon the review of the records and files herein and arguments of counsel,

NOW, THEREFORE, the Court finds that a one day late disclosure of Defendants' Exhibit List is of no concern to the Court and it is not prejudicial to the Plaintiff but that I.R.C.P. Rule 26(e)(2) requires that upon receiving a discovery request regarding identification of exhibits and disclosure of the same, the Defendants are under a duty to supplement their response to said request upon determination of the

1- ORDER REGARDING PLAINTIFF'S MOTION IN LIMINE REGARDING
DEFENDANTS' EXHIBITS

same which was not done,

NOW, THEREFORE,

IT IS HEREBY ORDERED THAT the Plaintiff's Motion In Limine regarding Defendants' Exhibits is granted in its entirety unless the Defendants provide Plaintiff's counsel a list of exhibits and copies of all exhibits noted on said list on or before 5:00 p.m. on May 8, 2008 and the failure of the Defendants to comply with this Order will result in the admissibility of any exhibit not listed and provided to Plaintiff's counsel at the trial in this matter scheduled for 9:00 a.m. on May 12, 2008.

IT IS FURTHER HEREBY ORDERED that if upon the Defendants' compliance with this Order, the Plaintiff feels that more time is necessary to prepare for trial and needs a continuance of said trial, Plaintiff's counsel must notify this Court by telephone on or before 9:00 a.m. on May 9, 2008 and file a written Motion to Continue which Motion To Continue will be granted without further notice or hearing.

IT IS FURTHER HEREBY ORDERED that no attorney's fees and costs will be awarded to the Plaintiff.

ENTERED this 9th day of May, 2008.


JOHN MITCHELL
DISTRICT COURT JUDGE

I hereby certify that on the 9
day of May, 2008, I caused to be
served a true and correct copy of the foregoing
by the method indicated below, and addressed to the
following:

Charles R. Dean, Jr.
Attorney at Law
1110 West Park Place, Suite 212
Coeur d'Alene, ID 83814

☐ U.S. Mail
☒ Facsimile

James A. Raeon
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene, ID 83814
(208) 666-9211

☐ U.S. Mail
☒ Facsimile

DANIEL J. ENGLISH
CLERK OF THE COURT

Joanne Clausen
DEPUTY

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2008 MAY 23 PM 1:44

CLERK DISTRICT COURT


DEPUTY

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone No. 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

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

JAMES C. CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NUMBER: CV07-5840

PLAINTIFF'S POST TRIAL
BRIEF

NATURE OF CASE

Plaintiff has filed the instant action to recover the fair market value of a lunchroom modular building and an office modular building (hereinafter referred to as "Buildings") from Tim Turrell who without any knowledge, authority or consent of the Plaintiff sold the Plaintiff's buildings to Leonard L. Turpin and Dan B. Selden. The Plaintiff's filing of this lawsuit was prefaced by a demand letter to the Defendants requesting the sum of \$27,000.00 as and for the Defendants' unlawful conversion of the Plaintiff's buildings to his own use and subsequent sale thereby depriving the Plaintiff of

1-PLAINTIFF'S POST TRIAL BRIEF

his rightful ownership and possessory interest in the same.

TRIAL FACTS

The Plaintiff is the sole owner of Quality Modular Homes, a business involved in the buying and selling of modular homes. In May 2003 the Plaintiff purchased the buildings from Building Technologies, Inc. during a liquidation sale. During this period of time he was a neighbor of Herbert Turrell and lived approximately one-quarter mile from Mr. Turrell on Yukon Road, Post Falls, Idaho. Due to the size of the buildings, the Plaintiff was unable to move the same onto his property for storage. The Plaintiff asked Herbert Turrell whether he could store the same on Mr. Turrell's property to which Mr. Turrell agreed. Mr. Boudier testified that during the transport and placement of each of the buildings on Herbert Turrell's property, Mr. Turrell was present, observed the same and did not voice any objection to the storage of said buildings on his property.

The Plaintiff testified that he was a good friend of Herbert Turrell, had known him for years, was familiar with the family dynamics, was acquainted with the Turrell children, previously built an addition to the Turrell mobile home residence and had previously moved three cabins from Lake Chatcolet to the Turrell property. The Plaintiff further testified that Mr. Turrell passed away in the early part of 2005, but there was no funeral service. Subsequent to Mr. Turrell's passing, while showing the buildings to perspective purchasers, the Plaintiff would always make contact with Mr. Turrell's surviving spouse, Marriane Turrell, to advise her of his presence on the property and the purpose for being there. The Plaintiff testified that Marianne Turrell never questioned why he was there nor objected to his presence. Said contacts did not result in the sale of the buildings.

While Marianne Turrell disputes the Plaintiff's testimony in this regard, she did acknowledge that any business arrangements and/or agreements by and between her

husband and the Plaintiff were done without her knowledge. Marianne Turrell further testified that due to her own physical problems she was not cognizant of all the personal property which was located on the Turrell five acre parcel. She further testified that she does not even remember the buildings being on said property. Notwithstanding the numerous contacts that the Plaintiff had with the Turrell family as acknowledged by Tom Turrell, Marianne Turrell denied any contact with the Plaintiff during this period of time. Marianne Turrell's lack of knowledge about her own affairs is further illustrated by her confusion about the Family Trust and the registration of the same. While Marianne Turrell testified that she provided the Defendant authority to liquidate the assets of the Estate/Trust, little weight should be given to this testimony since the Turrell residence has not been sold and Marianne Turrell has not been moved into an assisted care living facility all of which were the reputed purposes of the liquidation of any assets of the Trust. Marianne Turrell's testimony was inconsistent and speculative at best. It appeared in many instances her testimony was coached, canned, and that on many occasions she attempted to minimize the Plaintiff's contact and involvement with the Turrell family.

The Plaintiff testified that subsequent to Mr. Turrell's passing, he received a telephone call from the Defendant who had been contacted by a third-party inquiring as to the status of and sale price of the buildings. Plaintiff advised the Defendant that he would be willing to sell the buildings for \$12,000.00 and \$15,000.00 respectively. While the Defendant disputed this testimony, he did not deny making a telephone call to the Plaintiff and left a voicemail for the Plaintiff to call him about the buildings based upon the inquiry of two unidentified people who had referenced the Plaintiff's name. The Plaintiff denied receiving a voicemail from the Defendant and testified he returns all calls left on his voicemail.

The Defendant does not dispute that he sold the buildings to Leonard Turpin and

Dan Selden. In defense of the Plaintiff's claim, Defendant testified that he was acting as Successor Trustee of the Turrell Family Trust and as Successor Trustee he was clearing off all the "junk" off the Turrell property for purposes of rendering it suitable for sale. This particular testimony is simply not substantiated by the facts of this case. The Defendant signed the Bills of Sale to Turpin and Selden in his individual capacity and not in his capacity of a reputed Successor Trustee. Additionally, Defendants' exhibits show that a lot of "junk" remains on the property notwithstanding the passing of Mr. Turrell approximately three years ago. The Turrell property has not been sold nor is it currently listed for sale. Marianne Turrell continues to reside on the property, living semi autonomously. There is no formal documentation verifying the appointment of the Defendant as the Successor Trustee of the Turrell Living Trust. While Herbert and Marianne Turrell executed a Living Trust Agreement in 1993 said Trust appoints Herbert Turrell and Marianne Turrell as Trustees of the same.

The Defendant constantly attempted to discredit the Plaintiff regarding the alleged bailment status of the Plaintiff's buildings being located on the Turrell property due to the failure of any written agreement regarding the same. The Plaintiff's testimony as to how Herbert Turrell conducted his business affairs and made informal agreements with his friends is consistent with Herbert Turrell's own bailment arrangement he had with a third-party in Rathdrum, Idaho regarding the storage of certain automobiles on said property, the same being confirmed by the Defendant and the Defendant's Exhibit "D".

Due to Herbert Turrell's advanced age and significant construction alterations which would had to be made to the mobile home to accommodate the addition to or affixing of the buildings to said mobile home, the Defendant's testimony that said buildings were owned by Herbert Turrell in order to remodel or improve the Turrell residence is not consistent with the facts of this case and not credible.

Upon discovery that the buildings had been removed from the Herbert Turrell property, the Plaintiff did what any rightful owner of said property would do: immediately contact the person he felt would have knowledge of the status of said buildings. The Plaintiff made contact with the Defendant on his second phone call to the Defendant's residence. The Defendant lied to the Plaintiff when he advised that he had given the buildings away and additionally refused to tell the Plaintiff who currently had possession of the buildings. When the Plaintiff advised the Defendant that he owned the buildings and that the Defendant owed him \$27,000.00, the Defendant never disputed the Plaintiff's ownership of said buildings, never advised the Plaintiff that he was acting as a Trustee of the Turrell Living Trust or that the Turrell family owned the buildings. Due to the Defendant's admission that he transferred possession of the buildings to unknown third-parties, the Plaintiff again did what any owner of said property would do. He determined the persons who possessed said buildings and then filed a police report.

Being in the business of buying, selling and transporting modular homes, the Plaintiff is familiar with the market and has been consistent in his valuation of said buildings ranging from \$12,000.00 to \$15,000.00 each. Said values were specifically recited to the Defendant on the telephone, referenced in the Kootenai County Sheriff police report, noted in the Plaintiff's demand letter to the Defendant as a preface to this lawsuit and additionally testified to by the Plaintiff at trial. The Defendant testified that he had no idea as to the fair market value of said buildings.

It is submitted that Defendant's brother Tom Turrell's testimony is of little weight. The numerous telephone conversations Tom Turrell had with the Plaintiff pertaining to moving certain buildings to Terry Turrell's property actually dealt with the three cabins which the Plaintiff had previously moved to the Turrell property from Lake Chatcolet, not the Plaintiff's buildings.

Notwithstanding the consistent attempts of the Defendant and the Turrell

witnesses to discredit the Plaintiff and question his character and integrity the following facts are undisputed:

1. The Plaintiff purchased the buildings from Building Technologies, Inc.;
2. The Plaintiff stored said buildings on the property of Herbert Turrell with Herbert Turrell's knowledge and permission;
3. That any arrangement regarding the storage of said buildings between the Plaintiff and Herbert Turrell was informal which is consistent with how Herbert Turrell conducted his other personal affairs;
4. There is no formal documentation that the Turrell Living Trust owned said buildings;
5. There is no evidence or verification that the Trustee or Successor Trustee registered the Turrell Living Trust in the Court in and for the County of Kootenai, State of Idaho;
6. That the Defendant personally sold the Plaintiff's buildings to third-parties for financial consideration (See Exhibits 4 and 5 - Bills of Sale);
7. That the Defendant's sale of the Plaintiff's buildings to third-parties was without the Plaintiff prior knowledge, consent or authority.
8. That the fair market value of the two buildings is \$12,000.00 and \$15,000.00 respectively.

LEGAL ARGUMENT

I.

BAILMENT

Herbert Turrell or in the alternative the Turrell Living Trust was a recipient of the Plaintiff's buildings as a gratuitous bailee. A bailee is:

"A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to

such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and to carry out such object, and thereupon to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the Trust." Black's Law Dictionary (4th Edition) *Loomis vs. Imperial Motors, Inc.*, 88 Idaho 74, 78 (1964).

A delivery of bail property by bailee to one unauthorized by the bailor to receive it is a conversion or a breach of the bailment contract for which the law imposes the liability on the bailee irrespective of negligence. Reinstatement, (2nd) of Torts §234.

While it would appear that the Defendant suggests that his actions as a Successor Co-Trustee would result in the Turrell Living Trust as being the tortfeasor in this particular matter, the Defendant's Answer to the Plaintiff's Complaint did not plead the Plaintiff's failure to join an indispensable third party as an Affirmative Defense nor did the Defendant interplead the Turrell Living Trust as a Third Party Defendant. Additionally, the Plaintiff had no actual or constructive notice that the Defendant was acting as a Successor Trustee of the Turrell Living Trust upon his conversion of the Plaintiff's buildings.

II.

DEFENDANT'S DEFENSE/DEAD MAN'S STATUTE

Defendant sole defense to Plaintiff's conversion action was premised behind the Defendant's attempt to hide behind the guise of being a Successor Trustee of the Turrell Living Trust. While the Defendant submitted exhibits verifying the existence of the Turrell Living Trust, said exhibits do not provide a sufficient evidentiary foundation to sustain Defendant's claim that he was acting as a Successor Trustee when he sold the Plaintiff's buildings.

The Turrell Living Trust and/or the Estate of Herbert Turrell was not a party to this proceeding nor based upon the facts of this case should be a party to this proceeding. As the Defendant's own exhibits reflect, the Turrell Living Trust failed to

comply with the registration requirements of Idaho Code §15-7-101 *et. seq.* While the Defendant attempted to show compliance therewith, the recording of the Trust with the County Recorder's Office is not tantamount to the registration of the Trust with the Clerk of the Court. Even in the event the Court determines that the recording of the Trust with the Recorder's Office suffices for purposes of compliance with Idaho Code §15-7-101 *et. seq.*, the Defendant failed to amend said recording of said Trust with the County Recorder's Office. The record before this Court void of any evidence that the Defendant complied with the trust registration requirements of Idaho Code §15-7-101 *et. seq.* in perfecting his status as Successor Trustee.

The Defendant's attempt to now re-characterize his status a Trustee upon conversion of the Plaintiff's buildings is a ruse and simply not consistent with the evidence. The Defendant executed a Bill of Sale reflecting the sale of said buildings in his individual capacity and not as a Successor Trustee. The Defendant, upon being confronted by the Plaintiff as to the Plaintiff's ownership interest and inquiry as to the location of said buildings failed to advise the Plaintiff that he either owned the buildings or that he was acting as Successor Trustee of the Turrell Living Trust at the time of the sale of said buildings.

The Defendant further attempted to invoke Idaho Code §9-202(3) as a continuing objection to bar any hearsay statements made by Herbert Turrell during the period of time of the placement of the Plaintiff's buildings on the Herbert Turrell property. For reasons as previously recited herein, this evidentiary/procedural statute is not applicable to this evidence and would not bar the introduction or admissibility of said hearsay statements by Herbert Turrell. Any testimony regarding Herbert Turrell inevitably falls under the "Statement Against Interest" heresay exception". (I.R.E. 804(3)).

Therefore, even in interpreting the Turrell Living Trust evidence most favorable to

the Defendant there would be no testimony which would be excluded under the Dead Man's Statute or would legally preclude the Plaintiff's claim against the Defendant Tim Turrell personally for Mr. Turrell's conversion of the Plaintiff's property.

CONVERSION

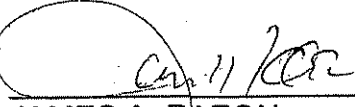
The undisputed facts in this case reflect that the Plaintiff purchased the buildings and stored the same on the property of Herbert Turrell with Herbert Turrell's consent. The bailment situation between the Plaintiff and Herbert Turrell was gratuitous in nature. The Defendant in his individual capacity exercised dominion and control of the Plaintiff's buildings and sold the same to third-party purchasers. The Defendant's alleged lack of knowledge that the Plaintiff owned said buildings at the time of the Defendant's sale of the same is not a defense to the Plaintiff's conversion claim. The law of conversion does not relieve the Defendant of liability due to his belief based upon a mistake of law or fact that he either has consent to convert the property or that he exercised said dominion and control over the property being unaware of the existence of the property right of the Plaintiff. Reinstatement of Torts §222, 223 and 224, *Wiseman vs. Schaffer*, 115 Idaho 537 (Id App 1989). The Defendant's proffered lack of knowledge and/or allegation that he could not have known that the buildings owned by the Plaintiff is legally irrelevant.

The Plaintiff is entitled to damages representing the fair market value of the buildings at the time and place of the Defendant's conversion of the same. Reinstatement of Torts 222A, Comment C. Based upon the unrefuted testimony of the Plaintiff, Plaintiff is entitled to Judgment against the Defendant individually in the sum of \$27,000.00 reflecting the fair market value of both buildings.

CONCLUSION

For the reasons as recited herein and as previously set forth in the Plaintiff's Pretrial Findings of Fact and Conclusions of Law, it is requested that this Court find that the Plaintiff is the prevailing party and grant the Plaintiff the relief as requested in his Complaint

DATED this 23 day of MAY, 2008.



JAMES A. RAEON
ATTORNEY FOR PLAINTIFF

I hereby certify that on the 23 day of MAY, 2008, a true and correct copy of the foregoing was:

☐ personally delivered
☐ mailed, postage prepaid,
☒ transmitted, via facsimile number

to:

Charles R. Dean, Jr.
Attorney at Law
1110 West Park Place, Suite 212
Coeur d'Alene, ID 83814



JAMES A. RAEON
ATTORNEY AT LAW

FAXED
05-23-08
11:35 A.M.

Charles R. Dean, Jr.
 1110 West Park Place, Suite 212
 Coeur d'Alene, Idaho 83814
 (208) 664-7794 / Fax (208) 664-9844
 ISB #5763

Attorney for Defendants

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:

2008 MAY 23 PM 3:13

CLERK DISTRICT COURT

Cathy Hunter
 DEPUTY

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 STATE OF IDAHO, COUNTY OF KOOTENAI

JAMES C. CARPENTER,

Plaintiff,

vs.

TIM TURRELL and PEGGY TURRELL,
 husband and wife,

Defendant

) Case No.: CV 07-5840

) DEFENDANT'S POST TRIAL BRIEF

INTRODUCTION

Plaintiff failed both legally and factually to prove that Tim Turrell wrongfully appropriated and thus converted the personal property at issue in this case. Not only is plaintiff's testimony that he had some unwritten agreement with Herbert Turrell barred by Idaho Code § 9-202(3), but what little evidence that remained is not sufficient to establish either that plaintiff was the owner of the buildings in 2006 or that Tim Turrell's sale of those buildings was wrongful.

STATEMENT OF EVIDENCE

A. Tim Turrell Was Acting As His Father's Personal Representative.

The evidence established beyond doubt that Tim Turrell was at all times relevant to this case acting as the personal representative of his father's estate. Both his parents'

living trust and his father's will are before the Court. Both clearly appoint Tim Turrell as a successor trustee and personal representative of the estate. Undisputed is the fact that Marian Turrell is, and was at the time of Herbert's death, no longer capable of fulfilling either role and that the responsibility of settling Herbert's affairs lay primarily with Tim Turrell by agreement of the family.

Equally undisputed is the testimony that Tim Turrell was acting in his representative capacity when he sold the buildings. He was attempting to clear the trust's real property of the mountains of junk Herbert had accumulated in order to make the property suitable for sale so the trust could fund the anticipated care his mother (the primary beneficiary of the trust) would need. Consistent with that goal, the modest and unexpected proceeds from the sales of the buildings were deposited in the trust's bank account.

Moreover, no evidence was offered, much less admitted, to suggest Tim Turrell personally benefited from the sale or was doing anything other than what was expected from someone acting in his capacity as the personal representative of his father's estate.

B. Plaintiff's Claims of Ownership Are Not Credible.

Without even considering the testimony of Tom Turrell about statements plaintiff made to him about the buildings and apart from plaintiff's testimony taken subject to objection that he had an unwritten agreement with Herbert in May of 2003 that he could indefinitely store the buildings on the Turrell property free of charge, none of the evidence is consistent with plaintiff's claim to ownership of the buildings. While denying that he sold or traded the buildings to Herbert, plaintiff did not give a satisfactory explanation as to why he would store buildings he claims he bought for \$20,000 in cash

(a claim that was completely undocumented¹) for almost 4 years on the Turrell property without taking steps to insure that all involved knew the buildings were his. Not even Dave Boudier who had been friends with both plaintiff and Herbert for many years and who had helped move the buildings to the Turrell property knew anything about the "deal" plaintiff wants this Court to accept.

Instead, plaintiff wants this Court to believe that he moved his supposedly valuable buildings on to the Turrell property with only the verbal okay from a man he knew was in ill health and suffering from Parkinson's. Plaintiff did not mark the buildings with his name, put a "for sale" sign on them with his telephone number, post the buildings with the bill of sale he supposedly got when he purchased them or do anything to insure that his property could be distinguished by Herbert's family from the other junk he collected and hoarded.

Even when Herbert suffered a massive stroke 6 months later and was confined to a nursing home, plaintiff did nothing to document or confirm his ownership. Plaintiff simply allowed the buildings to remain where they were for the remainder of Herbert's life without doing anything to make sure plaintiff's ownership was accepted and recognized by the Turrell family.

Herbert's death 13 months later in January of 2005 did not spur plaintiff to assert a claim of ownership. He did not post the buildings, attempt to move them to his property, send the Turrell family a copy of his alleged bill of sale, or even ask the family if it was "okay" for him to continue to store his buildings free of charge until they could be sold. He simply did nothing, even while he understood the Turrell family was trying

¹ The Court will note that Exhibit 3 does not mention a purchase price and that no evidence was presented to show from where plaintiff drew the \$20,000 he claims to have handed to the seller.

to dispose of Herbert's accumulated junk. Plaintiff left the buildings where they had been for one month short of four years before making any claim to ownership to Herbert's survivors. In other words, plaintiff did not do what would be expected of a reasonable person who actually the buildings.

C. Plaintiff's Testimony Concerning Conversations With the Turrells Is Also Not Credible.

Plaintiff's claims that he discussed the building before they were sold to Marian Turrell and Tim Turrell are not worthy of belief.

To avoid application of Idaho's "Dead Man's Statute", plaintiff alleged in his complaint that he had stored the buildings "in May of 2005" on the Turrell property with the "permission and consent" of Marian Turrell. At trial, plaintiff was forthright enough to concede that that allegation was not accurate. Acknowledging that the buildings had been in place since May of 2003, the best he could do was state that on two occasions over the course of three years he told Mrs. Turrell that he was there to show the buildings to possible buyers.² Though irrelevant to any issue in this lawsuit (see *infra*), Mrs. Turrell was convincing in her testimony that she had never had any contact with plaintiff after her husband's stroke and never spoke to plaintiff about the buildings.

The same is true as to plaintiff's claim that he spoke with Tim Turrell about the buildings approximately a year before he discovered they were sold. Not only is the alleged conversation irrelevant to any issue in this case (again, see *infra*), but that claim defies logic for two reasons. First, at the time of the alleged conversation, Tim (with the occasional help of his brothers) was in the process of trying to clear the trust's real property of junk in preparation for sale. To the estate, those buildings were part of the

² Notably, plaintiff did not even claim that he told Mrs. Turrell that the buildings were his.

accumulated mess that had to be cleared. They could not be burned because they were vinyl sided and would have to be hauled at significant expense. Had plaintiff told Tim (or had Tim already known) that the buildings belonged to plaintiff, Tim would have promptly told plaintiff to remove them from the trust's property instead of allowing them to remain for another year as a continuing blight on the property. Second, and equally illogical, is the suggestion that Tim Turrell would sell the buildings for virtually 10 cents on the dollar after being told they belonged to plaintiff and were for sale for \$27,000. Doing so would expose not only himself but the trust (effectively, his mother) to the type of claim plaintiff now makes. Clearly, the conversation plaintiff claims (which is found nowhere in plaintiff's report to the Sheriff's Department (Exhibit E)) did not occur and is of recent fabrication.

ARGUMENT

A. Plaintiff's Testimony is Barred by Idaho Code § 9-202(3).

Idaho's "Dead Man's Statute" has been in effect in one form or another for more than 125 years. Its provisions are "positive, plain and mandatory" (*Johnson v. Flatness*, 70 Idaho 37, 42 (1949)). Section 9-202(3)³ "excludes evidence ... in an action against the *personal representative* of a deceased person" (*Kolouch v. First Security Bank of Idaho*, 128 Idaho 186, 194 (App. 1996)) "upon a claim or demand against the estate ... arising from "*any* communication or agreement not in writing, occurring before the death of such deceased person" (9-2-2(3)).

The purpose of all "Dead Man's Statutes" is the same – "to prevent parties from giving self-serving testimony about conversations or transactions with the deceased" that cannot be contradicted (*Estate of Miller*, 134 Wn. App. 885, 890 (2006)). While extrinsic

³ Section 9-2-2(3) is repeated and affirmed in IRE 601(b).

evidence and the testimony of non-parties to the conversations or events giving rise to the claim can be presented, the interested party to the "communication or agreement" is not permitted to testify as to what the decedent said or promised since to do so would allow opportunistic claimants to make uncorroborated and fraudulent claims against the estate of someone who can no longer defend himself.

In this case, § 9-202(3) unquestionably prevents this Court from considering the testimony of plaintiff as to his alleged agreement with Herbert Turrell (even if the Court were otherwise to find that testimony credible). First, the claim of conversion is clearly one made against the personal representative of Herbert's estate. Tim Turrell was unquestionably acting at all times as his father's executor and the trustee of the trust he created to insure the orderly passing of his estate.⁴ Plaintiff cannot avoid the application of the "Dead Man's Statute" by simply deciding not to asserting in his complaint that Tim was acting in that capacity when the alleged conversion occurred. To permit otherwise would completely defeat the purpose of the evidentiary preclusion by allowing a claimant who is otherwise barred from making what the law deems so be a potentially fraudulent claim against the estate to sue the personal representative in his individual capacity. A representative who is required to preserve and protect the estate for the benefit of legitimate creditors and heirs would thus be at risk of personal liability for doing what the law requires.⁵

⁴ Section 9-202(3) speaks in terms of an "executor or administrator". However, cases applying the statute make clear that the operative role is one of "personal representative" (See *Kolouch v. First Security Bank of Idaho, supra*). Given that the statute was enacted in 1881, the modern day role of the successor trustee pursuant to the terms of a living trust of a deceased person serves the same effective (and logical) function.

⁵ For example, a personal representative is required in the discharge of his duties to the heirs of an estate to reject a third party's claim against the estate based on an alleged oral agreement with the decedent in the absence of any evidence to corroborate the testimony of the claimant. If the representative does so and then sells the estate asset at issue in that claim, the representative could, by plaintiff's logic, then be personally sued for converting property that the claimant was not entitled to recover from the estate. Nonsense!

The claim is also one based upon a claim against the estate. Since Tim was acting in his representative capacity when the buildings were sold, any wrongful conduct on his part is on agency principals the responsibility of Herbert's estate. [In fact, unless the Court were somehow to find that Tim was guilty of intentional misconduct or bad faith, Tim would undoubtedly have indemnity rights back against the estate for his expenses in this action and any liability he is determined to have *vis-à-vis* plaintiff.] Again, one cannot avoid the application of § 9-202(3) simply by deciding not to name the estate. For example, in *Kolouch v. First Security Bank of Idaho, supra*, the Court held that the bar applied despite the fact no action against the estate was pending. In *Kolouch*, a personal representative tried to justify her use of estate funds to pay for the defense of an action in which she had a personal interest by claiming she had an oral agreement with the decedent to fund that litigation. The Court held that even though there was technically no action pending against the estate, a proceeding against the estate would have been required had she (wearing two hats) first presented and then rejected her own claim.

No distinction exists in this case. Plaintiff's claim arises from a claim against the estate based on a contract plaintiff allegedly had with Herbert Turrell. The estate, through its representative, sold that property. If the sale was wrongful, a claim exists against the estate and the proscription of § 9-202(3) cannot be "backdoored" by the simple act of leaving the estate's name off of the pleadings.

B. Tim Turrell Did Not Convert Plaintiff's Property.

Section 9-202(3) and IRE 601(b) preclude testimony *by a party* as to the terms of "*any* communication or agreement, not in writing" in an action against the personal

representative of a deceased person "upon a claim or demand against the estate".⁶ If the buildings had not been sold, plaintiff could not force Herbert's estate to return the buildings to him or to pay their fair value based solely on his testimony about his oral arrangement with Herbert. Herbert's personal representative, whether the executor of his estate or the trustee of the trust he created) would be duty bound to the estate to reject any such claim and required to deal with the buildings as any other estate property (Idaho Code §§ 15-3-703 and 15-7-302).⁷ Plaintiff thus would not have been entitled to possession of the buildings when Tim Turrell sold them in late 2006.⁸

Proof that a claimant is entitled to immediate possession of the property allegedly converted is an essential element of the tort of conversion (*Luzar v. Western Surety Co.*, 107 Idaho 693, 696 (1984)). Without proof of such a right, the claim must fail.

In this case, the only proffered evidence that would give plaintiff a right to immediate possession is his *inadmissible* testimony given over defense objection that he had an oral agreement with Herbert. Without that testimony, Herbert's possession of the buildings (especially for the extended period of time as exists in this case) is evidence of ownership and creates a presumption that Herbert was rightfully in possession (*Nelson v. Enders*, 82 Idaho 285, 292 (1960); *Hare v. Young*, 26 Idaho 691, 702 (1915)). As

⁶ Section 9-202(3) does not preclude a party from presenting the testimony of non-party witnesses to the conversation or agreement. It only precludes the party from making self-serving and self-interested statements.

⁷ An executor is required to act in the best interest of the estate and the best interest of the successors to the estate. A trustee is similarly required to act as a prudent person would in the care of another's property. Doing so does not mean giving away estate property based on the recognition of a contract the law says cannot be enforced.

⁸ Plaintiff's testimony that he told Tim and his mother (at least indirectly) about his claim to ownership after Herbert died is thus completely irrelevant. Absent independent, corroborative evidence of the agreement plaintiff claimed, Tim was legally entitled (and, in fact, obligated) to dismiss plaintiff's assertion. The claimed conversations with Mrs. Turrell are further irrelevant since she is not a party to this action.

described above, none of the admissible evidence in the case offered by plaintiff is sufficient to rebut that presumption.

C. Plaintiff Failed To Prove Another Essential Element of Conversion.

The wrongful act of conversion can take place in two ways. A party can unlawfully take property from the possession of the person entitled possess the same or, in the absence of such an appropriation or taking, a party can refuse a demand to deliver possession of the property to a person entitled to immediate possession thereof (*Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732,743 (1998)). Where possession is obtained rightfully such as where property is entrusted by the owner to another, an unlawful taking does not occur until the rightful owner makes demand for the return of his property, is entitled to immediate possession and the demand for possession is wrongfully refused (*Gissel v. State*, 111 Idaho 725, 730-31 (1986)).

Here, Herbert (and after his death, his estate or the trust) was in lawful possession of the buildings even if all of plaintiff's testimony is admitted and accepted at face value. Neither Herbert nor Tim thus "appropriated" the buildings because they were legally in possession thereof at the date of sale.

To establish the tort of conversion, plaintiff thus had to prove that a demand for return of the buildings was made on Tim (or rather the trust) for the return of the buildings and that that demand was wrongfully rejected. Plaintiff offered no proof of either. Plaintiff did not testify that he demanded of Tim that the buildings be returned to him at any time before they were sold or that Tim refused to do so. Accordingly, even if plaintiff was entitled to enforce his agreement with Herbert, plaintiff failed to prove the tort of conversion as a matter of law.

D. Plaintiff Also Sued the Wrong Parties.

A seller of personal property has no ability to convey a greater title than he had, regardless of whether the purchaser had notice or any reason to believe of the real owner's interest in the property (*Massey-Ferguson, Inc. v. Talkington*, 88 Idaho 501, 502 (1965)). Even the intervention of bona fide purchaser for value of such property does not defeat the true owner's ability to regain the property. A bona fide purchaser who refuses the demand of an owner entitled to immediate possession of stolen personal property is guilty of conversion (*Nora v. Safeco Insurance Co.*, 99 Idaho 60, 68 (1978)).

If the buildings belonged to plaintiff, Tim Turrell did not have the authority to convey title thereto to the individuals who bought them. Plaintiff accordingly had, and still has, the ability to retrieve possession from those buyers after making proper demand on them.

E. Plaintiff Failed to Prove Damages.

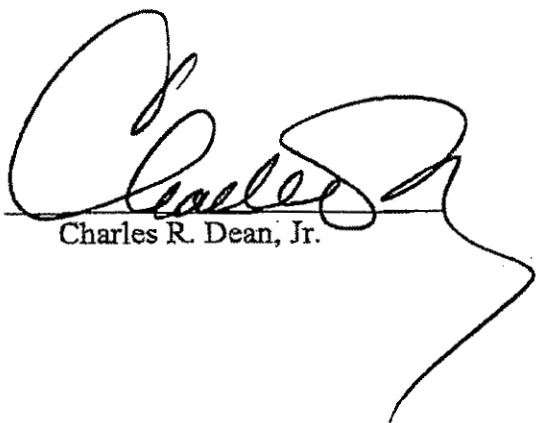
The only evidence of value as to the buildings before this Court is plaintiff's self-serving statement that the buildings were for sale for \$27,000 and that he paid \$20,000 for property he left to sit unattended for almost 4 years in a pasture. Not only is his claim to have paid "cash" in an amount that would have triggered a mandatory report to the Federal Government in a business transaction for which he would need and want a proper paper trail for tax purposes highly suspect on its face, but plaintiff offered nothing to corroborate that claim. Don Murrell (listed as a witness), the owner of the business that allegedly sold the buildings to plaintiff, was not called to verify his receipt of cash, the alleged bill of sale is silent as to what plaintiff paid, and no banking records were offered to establish where plaintiff drew the money, if in fact he did.

The only hard evidence before the Court is what two willing buyers paid for the buildings - \$3,500.00.

Dated: 5/23/08

Dean & Kolts

By

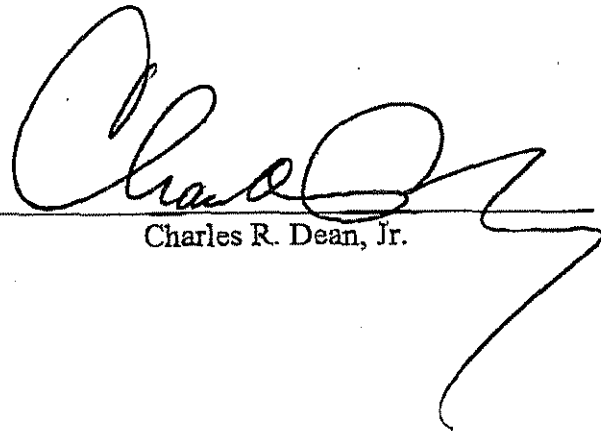

Charles R. Dean, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of May 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James A. Raeon
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	FEDEX GROUND
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	OVERNIGHT MAIL
<input checked="" type="checkbox"/>	FACSIMILE



Charles R. Dean, Jr.

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 6-10-08
AT 5:00 O'CLOCK P.M.
CLERK, DISTRICT COURT
Glenn Causey
DEPUTY

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone: 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

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

JAMES CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NO: CV07-5840

JUDGMENT RE: ATTORNEY'S
FEES AND COSTS

Pursuant to this Court's Order regarding Plaintiff's Motion In Limine Re:
Defendants' witnesses previously entered on the 9th day of May, 2008, Plaintiff
submitted a Memorandum of Attorney's Fees and Costs on or about the 19th day of May
2008 which Memorandum reflects the total Attorney's fees incurred in the sum of FIVE
HUNDRED FIFTY DOLLARS (\$550.00) and no timely objection to said Memorandum of
Attorney's fees being filed by the Defendants pursuant to I.R.C. P. Rule 54(d)(6),

NOW, THEREFORE,

Plaintiff is hereby awarded against the Defendants and each of them a Judgment
in the sum of FIVE HUNDRED FIFTY DOLLARS (\$550.00) as and for attorney's fees

1-JUDGMENT RE: ATTORNEY'S FEES AND COSTS

and costs incurred in the prosecution of the above-reference Motion which Judgment shall accrue interest at the statutory legal rate.

ENTERED this 10th day of June, 2008.


JOHN T. MITCHELL
DISTRICT COURT JUDGE

I hereby certify that on the 11
day of June, 2008, I caused to be
served a true and correct copy of the foregoing
by the method indicated below, and addressed to the
following:

Charles R. Dean, Jr.
Attorney at Law
1110 West Park Place, Suite 212
Coeur d'Alene, ID 83814
(208) 664-9844

[] U.S. Mail
[✓] Facsimile

James A. Raeon
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene, ID 83814
(208) 666-9211

[] U.S. Mail
[✓] Facsimile

DANIEL J. ENGLISH
CLERK OF THE COURT


DEPUTY

2-JUDGMENT RE: ATTORNEY'S FEES AND COSTS

STATE OF IDAHO)
County of KOOTENAI)ss

FILED 6-19-08

AT 11:55 O'clock a M

CLERK OF DISTRICT COURT

Jeanne Clausen
Deputy

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

JAMES C. CARPENTER,

Plaintiff,

vs.

TIM TURRELL and PEGGY TURRELL,
husband and wife.

Defendants.

Case No. **CV 2007 5840**

**MEMORANDUM DECISION,
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

I. MEMORANDUM DECISION.

This matter came before the Court for a court trial on May 12, 2008. At the conclusion of trial, the Court requested post-trial briefing (plaintiff did not prepare such pre-trial), and post-trial proposed findings of fact and conclusions of law (defendant did not prepare such pre-trial), from all parties. Such submissions were due on May 23, 2008, were received and reviewed by the Court. Accordingly, the matter is now at issue.

Plaintiff James C. Carpenter (Carpenter) was a friend of Herbert Turrell (Herbert). Carpenter lived just down the road about a quarter-mile from Herbert. On May 23, 2003, Carpenter purchased two portable buildings from Building Technologies, one which could be used as office space or a classroom, one as a lunchroom. Exhibit 3. Carpenter

testified he paid \$20,000 in cash for these two buildings, and expected to sell one for \$15,000 and another for \$12,000. For about eighteen years, Carpenter had his own business, Quality Modular, in which he transported modular homes. Carpenter and others, including David Bodner, moved these two portable buildings and three others from their location at the time of purchase on Seltice and Corbin Road (per Carpenter, Seltice and Pleasant View according to Bodner) in Post Falls to Carpenter's property in Post Falls. Three of the portable buildings were placed on Carpenter's property. As Carpenter was attempting to move one of the bigger buildings onto his land, Herbert drove by, and since Carpenter was blocking the road, the two talked. Carpenter asked Herbert if Carpenter could borrow Herbert's loader, to which Herbert said "OK, but don't do that, leave it at my place as long as you'd like." Carpenter testified that Herbert never made any request for payment of storage fees. Because two of the buildings would not fit through Carpenter's gate, and because Herbert offered to let Carpenter use Herbert's land to store those two buildings, Carpenter drove those two buildings to and placed them on Herbert's land. This move occurred on Memorial Day weekend in 2003, just after Carpenter purchased the buildings. Herbert Turrell died in June 2005. Even though Carpenter knew Herbert had passed away, he made no arrangements to get these two buildings off Herbert's land. Herbert's wife, Marianne, continued to live on the property.

Carpenter testified that he went on Herbert and Marianne's property three times to show potential buyers these two portable buildings. Carpenter testified that the last of those three visits occurred in the fall of 2006, when he took Kim Anderson and Michael Williams onto Marianne's property. Later, Carpenter took Kurt Hall to show him the buildings. It was during this visit that Carpenter noticed the buildings were gone.

Defendant Tim Turrell (Tim) is Herbert's son. On November 29, 2006, Tim sold one of the buildings to Leonard Turpin for \$1,750 (Exhibit 5), and on December 8, 2006, Tim sold the other building to Dan Selder for \$1,750 (Exhibit 4). In each of the receipts to Turpin and Selder, Tim simply listed himself as the seller ("Tim R. Turrell" in Exhibit 4, and "T. Turrell" in Exhibit 5). On those receipts Tim Turrell did not list himself in any other capacity such as personal representative of the estate of Herbert Turrell or the trustee of Herbert's trust.

Defendant Tim Turrell claims: "The evidence established beyond doubt that Tim Turrell was at all times relevant to this case acting as the personal representative of his father's estate. Both his parents' living trust and his father's will are before the Court." Defendant's Post-Trial Brief, pp. 1-2. Tim Turrell's claim that his was "acting as the personal representative of his father's estate" is completely false, and Tim Turrell's claim that "his father's will [is] before the Court" is deceptive. Tim Turrell was **not** acting as personal representative of his father's estate because **no probate has ever been filed**. Tim Turrell's father's will is "before the Court" only in that it is an exhibit in this case, but that exhibit has absolutely no significance because it has not been admitted into probate. Tim Turrell then argues:

The claim is also one based upon a claim against the estate. Since Tim was acting in his representative capacity when the buildings were sold, any wrongful conduct on his part is on agency principals the responsibility of Herbert's estate. [In fact, unless the Court were somehow to find that Tim was guilty of intentional misconduct or bad faith, Tim would undoubtedly have indemnity rights back against the estate for his expenses in this action and any liability he is determined to have *vis-à-vis* plaintiff.] Again, one cannot avoid the application of § 9-202(3) simply by deciding not to name the estate. For example, in *Kolouch v. First Security Bank of Idaho*, *supra*, the Court held that the bar applied despite the fact no action against the estate was pending. In *Kolouch*, a personal

representative tried to justify her use of estate funds to pay for the defense of an action in which she had a personal interest by claiming she had an oral agreement with the decedent to fund that litigation. The Court held that even though there was technically no action pending against the estate, a proceeding against the estate would have been required had she (wearing two hats) first presented and then rejected her own claim.

No distinction exists in this case. Plaintiff's claim arises from a claim against the estate based on a contract plaintiff allegedly had with Herbert Turrell. The estate, through its representative, sold that property.

Id., p. 7. According to Tim Turrell, the magic of the dead-man's statute would cause any property held by a person at the time of death to apparently become the decedent's estate, because no one could argue otherwise, as Tim Turrell claims:

Section 9-202(3) and IRE 601(b) preclude testimony *by a party* as to the terms of "*any* communication or agreement, not in writing" in an action against the personal representative of a deceased person "upon a claim or demand against the estate". If the buildings had not been sold, plaintiff could not force Herbert's estate to return the buildings to him or to pay their fair value based solely on his testimony about his oral arrangement with Herbert. Herbert's personal representative, whether the executor of his estate or the trustee of the trust he created) would be duty bound to the estate to reject any such claim and required to deal with the buildings as any other estate property (Idaho Code §§ 15-3-703 and 15-7-302). Plaintiff thus would not have been entitled to possession of the buildings when Tim Turrell sold them in late 2006.

Id., pp. 7-8. (emphasis in original, footnotes omitted). This "black hole" argument finds no support in the law, and specifically, it is not supported by the dead-man's statute.

Tim Turrell testified Exhibit I is a copy of his father Herbert Turrell's will. Tim Turrell testified he took all actions in selling his father's property based upon his capacity as personal representative of his father's estate. Two problems arise with that claim of Tim Turrell. First, Tim Turrell isn't the personal representative. Tim Turrell is listed as the personal representative in his father's will only *after* Marianne and Terry Turrell. Exhibit I, p. 4. Second, no probate has been filed. Tim Turrell was asked at

trial if he had ever probated his father's estate, and it was clear Tim Turrell had no idea what probate was. Without filing a probate action (I.C. § 15-3-102) and without being appointed personal representative by the court (I.C. § 15-3-103), Tim Turrell had no power to do anything vis-à-vis his father's estate.

A similar result follows regarding any claim by Tim Turrell that his actions were as a successor co-trustee of the Herbert and Marianne Turrell Living Trust. That trust, Exhibit H, was admitted in evidence. But if Tim Turrell claims the trust is the tort-feasor in this particular matter, Carpenter correctly argues:

...the Defendant's Answer to the Plaintiff's Complaint did not plead the Plaintiff's failure to join an indispensable third party as an Affirmative Defense nor did the Defendant interplead the Turrell Living Trust as a Third Party Defendant. Additionally, the Plaintiff had no actual or constructive notice that the Defendant was acting as a Successor Trustee of the Turrell Living Trust upon his conversion of the Plaintiff's buildings.

Plaintiff's Post-Trial Brief, p. 7. On August 14, 2007, Carpenter filed this lawsuit against Tim Turrell and his wife Peggy Turrell. Nowhere in that complaint is there any allegation that Tim Turrell performed any of the acts in question as a personal representative of Herbert's estate or as trustee of the trust. Nowhere in the Answer filed by the Turrells is there a claim that Tim even was the personal representative of Herbert's estate or trustee of the trust. At any time, Turrells could have brought in or joined the trust if Turrells truly felt the trust was a reasonable or even an indispensable party. I.R.C.P. 19, 20, 21. Turrells have failed to do this. At any time, Turrells could have filed a motion that Carpenter failed to bring in an indispensable party. I.R.C.P. 12(b)(7). Turrells have made no such motion.

Turrells do claim in their Answer the Affirmative Defense of: "As and for a fourth

affirmative defense, Turrells allege Carpenter's claims are barred by Idaho Code § 9-202(3)." Answer, p. 2. However, that statute, Idaho's "dead man's statute", precludes testimony. The dead man's statute does not operate to "bar" claims.

At the inception of the trial, and again in post-trial briefing, Turrells claim any statements attributed to Herbert Turrell should be excluded pursuant to Idaho's "dead man's statute", Idaho Code § 9-202(3). That statute reads:

9-202. Who may not testify. – The following persons cannot be witnesses:

* * *

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any communication or agreement, not in writing, occurring before the death of such deceased person.

The problem with Turrells' claim is Tim Turrell was not sued in his capacity as personal representative of the decedent's estate. Apparently, no probate has ever been filed on behalf of Herbert Turrell. There is no claim against the estate of Herbert Turrell.

The Idaho Dead Man's statute did not apply in an action by the widow and administratrix of the deceased against the former partner of the deceased where there was no claim or demand against the estate of the deceased. *Ridley v. VanderBoegh*, 95 Idaho 456, 462, 511 P.2d 273, 279 (1973). The objection needs to be made by the representative of the estate or a party having an interest in that estate. *Smith v. Smith*, 95 Idaho 477, 482, 511 P.2d 294, 299 (1974). As noted in *Rowan v. Riley*, 139 Idaho 49, 54, 72 P.3d 889, 894 (2003): "The dead man's statute does not apply where, as here, the action is not against the executor or administrator of an estate and the claim does not represent a demand against the estate."

Argyle v. Slemaker, 99 Idaho 544, 547, 585 P.2d 954, 957 (1978), sets out the

test used to determine whether testimony is barred. *Argyle* states the statute bars, "(1) certain persons from testifying (2) in specified actions (3) as to certain communications." *Id.* *Argyle* goes on to state that all three portions of the test must be satisfied to bar the testimony in question. *Id.* And, further, *Argyle* holds that I.C. §9-202(3), while it does bar testimony concerning oral agreements in appropriate cases, does not bar testimony "concerning a state of affairs or matters of fact occurring before the decedent's death." *Id.* See also, *Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968).

In *Argyle*, the grantors of mineral rights brought an action against the grantees and their successors and assigns to cancel the deed and quiet title. *Argyle*, 99 Idaho at 545. The Idaho Supreme Court reversed summary judgment against appellant, holding that appellant's testimony about delivering a blank deed to the now-deceased respondent (which blank nature makes the deed inoperative to convey any property) was not barred by the dead man's statute and did present a genuine issue of material fact. *Id.* at 546-547. The Idaho Supreme Court in *Argyle* specifically states that, "[a]n additional reason for holding that the evidence is not barred is that I.C. § 9-202(3) prohibits testimony introduced against the estate of a deceased person; it does not prohibit the admissibility of this evidence as against respondent Wiser Oil Company, a corporation."

According to *Rowan v. Riley*, the dead man's statute does not apply where the action is not against the executor or administrator of an estate *and* the claim does not represent a demand against the estate. 139 Idaho 49, 54, 72 P.2d 889, 894. Here, Tim Turrell seeks to bar testimony regarding the oral communication or agreement of a

now-deceased individual, Herbert Turrell. However, defendants cannot demonstrate that all three portions of I.C. § 9-202(3) have been satisfied. Turrells challenge the admissibility of testimony by Carpenter about his agreement with the decedent Herbert. Arguably elements one (certain persons testifying) and three (as to certain communications) of the *Argyle* test above are met. However, the second element (that certain persons testify *in certain actions*) is not met. Carpenter has filed a claim or demand against individuals, Tim and Peggy Turrell, and one of those individuals, Tim Turrell, admits selling the modular office and lunchroom. Carpenter did not file a claim or demand against the estate of a deceased person. In applying the *Argyle* Court's reasoning to this case, although I.C. § 9-202(3) prohibits testimony against the estate of a deceased person, it does not prohibit the admissibility of this evidence as against the defendant in this case, Tim Turrell. Carpenter's action is not against the executor or administrator of Herbert Turrell's estate, and the claim does not represent a demand against the estate. Tim Turrell sold the modular buildings as an individual. He did not sign the receipts as the executor or administrator of Herbert Turrell's estate, or even as trustee of the Herbert and Marianne Turrell Trust. Carpenter's action is against Tim Turrell and his wife, not the estate or trust of Herbert Turrell.

For the reasons stated above, I.C. § 9-202(3) does not bar testimony by Carpenter or others as to communications or agreements that occurred before the death of Herbert Turrell, due to the fact that the action or proceeding is not being prosecuted against an executor or administrator of the estate of a deceased person.

It is understandable how these events transpired. Carpenter, being in the business of moving, owning, buying and selling modular homes, probably was no

particular hurry to sell these two modular homes he had stored on his friend, Herbert Turrell's land. It is easy to see how after Herbert Turrell's death, his wife, Marianne, and his son Tim Turrell, might not be worried about these two additional modular homes remaining on what was now Marianne Turrell's property, as the property contained a lot of items. The Court can understand why Carpenter, even after knowing Herbert Turrell had passed away, kept these two modular homes on Marianne Turrell's property, as Carpenter had no information that they were no longer welcome there. The Court finds credible the testimony of Jim Carpenter, David Bonder, and Marianne Turrell. The Court finds Tim Turrell to be credible on almost all issues, but mistaken on a few critical issues. Likewise, Tim Turrell's brother Tom Turrell is credible, but mistaken on a critical issue.

The actions of Carpenter, who is in the business of moving, buying and selling these mobile or modular homes/buildings, are consistent with his continued ownership of these two buildings. Why would Carpenter buy five buildings, store two at Herbert's only because Carpenter couldn't get them through his gate (Carpenter had the land to store them upon), show those two to prospective buyers on at least three occasions, only to later claim he "gave" them or "traded" them to Herbert? There is no evidence of that. Carpenter's actions would be completely inconsistent with that proposition urged by Turrells. Carpenter's actions are completely consistent with his continuous ownership of these two buildings. The mistake comes from Tom Turrell thinking Carpenter was talking about the two modular buildings at issue in this lawsuit, when instead Carpenter was talking about moving for Herbert some other cabins stored on Herbert's property; cabins that Carpenter *did* want to move for Herbert and that Herbert wanted moved.

The mistake is evidenced by Tom Turrell's testimony. Tom recalls Carpenter

coming up to Herbert Turrell's land on a four-wheeler. Tom recalls Carpenter saying "When are we going to move your father's buildings up to Terry's ranch?" Yet another brother, Terry Turrell, had some property up by Bayview. Tom Turrell thought Carpenter was talking about the two modular buildings Carpenter had brought in, and thus, thought his father must have bought or traded for these buildings. Three days later, Tom Turrell recalls seeing Carpenter, saying hello, and Carpenter wanting to know what Tom's dad Herbert had to say about "moving these up to the ranch." Later that summer Tom Turrell recalls a third conversation where Carpenter again arrived on a four-wheeler, and asked Tom if he had talked to his brother Terry about "when we could move the buildings", then Tom Turrell testified "my dad's buildings" in response to a leading question. Finally, according to Tom Turrell, there was one more instance in August during Herbert's birthday party (which didn't happen because Herbert had to be taken to the hospital), where, on the phone to Tom, Carpenter said: "Have you had time to talk to your brother Terry about putting these buildings up on the ranch?" Carpenter recalls at least some of the conversations, but Carpenter testified that when he said "these buildings", he was referring to some cabins Herbert had brought up from Chatcolet (Tim Turrell testified Corbin Park) which Herbert wanted moved to Terry's land, and not the buildings Carpenter bought in May 2003 and placed on Herbert Turrell's land. Carpenter testified as to the first of these four conversations, when Herbert was present along with Carpenter and Tom Turrell, that Herbert was talking about "his" cabins, meaning the cabins Herbert owned and brought up from Chatcolet. Carpenter testified the reason he kept asking was since he was in the business of moving buildings such as these (both the modular buildings and the cabins), he wanted to be able to plan ahead if Carpenter was going to

be the one to move Herbert's cabins to his son's (Terry's) property.

Tom Turrell testified that he knew his brother Terry was involved in purchasing the cabins Herbert had on his property from Corbin Park, and that Tom thought Terry wanted those cabins on his property in Bayview. This testimony lends credibility to Carpenter's explanation.

The mistake made by Tom Turrell is understandable. However, given the facts, Carpenter's explanation is more credible. Terry Turrell could have testified and did not. Had he testified that there was a plan to move buildings up to his property and that the buildings were unequivocally the modular buildings at issue, we would have a different set of facts. But Terry Turrell, the person who was to receive these buildings according to Tim and Tom Turrell, did not testify. Tom Turrell testified he had never spoken to his brother Terry about this issue. Other than this mistake by Tom Turrell, there is simply no proof that these buildings belonged to anyone other than Carpenter. Carpenter testified he never sold, gifted or traded these two buildings to Herbert Turrell, and Tim Turrell has no evidence to contradict that claim.

There is a dispute of fact and a credibility determination must be made. Carpenter testified that about a year before Carpenter found out that Tim Turrell had sold the buildings, he had a call from Tim Turrell on Carpenter's cell phone, Tim asking Carpenter whether the buildings were for sale, Carpenter explaining \$12,000 for one and \$15,000 for the other. Carpenter testified he believes Tim told him the name of the person that was interested in buying them, but Carpenter could not recall his name. On cross-examination Carpenter was asked if he told Tim Turrell in the conversation that Carpenter owned the buildings, to which Carpenter responded: "I didn't see a need to". That

response makes sense if Tim Turrell was the one who placed the call, and Tim was the one asking for a selling price. Tim Turrell would not have done either if he truly thought his father or his father's trust owned the buildings.

Tim Turrell testified that he had called and left a message with Carpenter because his nephew, Jeremy, told Tim Turrell that Carpenter had sent some people over to Herbert and Marianne's property to look at the buildings. Tim Turrell testified that on another occasion he found Carpenter's cell number written on some of his dad's records, made a call to that number, and left a message that "If you have any interest or any knowledge of these buildings, please call." Carpenter denies receiving such a message.

The testimony of Tim Turrell is telling. First of all, why would Tim Turrell call Carpenter and leave the message: "If you have any interest or any knowledge of these buildings, please call", if he didn't think Carpenter *owned* the two buildings? Second, these buildings are large items and they have a good bit of value. If indeed Tim Turrell left such a message on a phone he knew to be Carpenter's, it is not reasonable for Tim Turrell to just leave it at that, given the size and value of these two buildings. Had this been an old appliance Carpenter had placed three years earlier, certainly a message and if no response, haul it off or sell it. But two fairly large buildings in good shape with a fairly high value, simply one phone call is not reasonable. The bottom line is Tim Turrell's own testimony shows that he knew these buildings belonged at all times to Carpenter.

Carpenter testified that he had an individual named Kurt Hall who was interested in the buildings. Carpenter testified that the first time he noticed the buildings were gone from Herbert and Marianne Turrell's property (after Herbert had died), was when Carpenter took Kurt Hall to look at the buildings. Carpenter testified he contacted Tim

Turrell by phone, and left a message with a woman Carpenter assumed was Tim Turrell's wife, requesting that Tim Turrell call Carpenter. Since no call was returned, Carpenter testified he called Tim Turrell again, that Carpenter spoke to Tim Turrell at that time. Carpenter testified Carpenter asked about the buildings and Tim Turrell responded: "I gave the buildings away", to which Carpenter stated "They weren't yours to give away". Tim Turrell then said "We had to clean the property up", and Carpenter responded "I owned those buildings", to which Tim Turrell said "You'll have to do what you have to do" and then said "My son is here from Iraq and I don't want to talk any more." Tim Turrell denies getting a message from his wife, but admits a conversation occurred with Carpenter. Tim Turrell denies he said "I gave the buildings away", but instead claims he said "I had them hauled off", and admits his son was home from Iraq at the time. Tim Turrell admitted he did not tell Carpenter where the buildings were, and his reason for that was "I was angry with him because he told me I owed him \$27,000.00". Tim Turrell admitted he did not tell Carpenter he had sold them, and stated the reason for that was: "I thought they were my father's and Carpenter didn't have anything to do with them." Essentially, Tim Turrell corroborates all of Carpenter's testimony regarding this telephone conversation.

Tim Turrell makes an interesting argument in claiming that he is not liable for the tort of conversion:

The wrongful act of conversion can take place in two ways. A party can unlawfully take property from the possession of the person entitled possess the same or, in the absence of such an appropriation or taking, a party can refuse a demand to deliver possession of the property to a person entitled to immediate possession thereof (*Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732,743 (1998)). Where possession is obtained rightfully such as where property is entrusted by the owner to

another, an unlawful taking does not occur until the rightful owner makes demand for the return of his property, is entitled to immediate possession and the demand for possession is wrongfully refused (*Gissel v. State*, 111 Idaho 725, 730-31 (1986)).

Here, Herbert (and after his death, his estate or the trust) was in lawful possession of the buildings even if all of plaintiff's testimony is admitted and accepted at face value. Neither Herbert nor Tim thus "appropriated" the buildings because they were legally in possession thereof at the date of sale.

To establish the tort of conversion, plaintiff thus had to prove that a demand for return of the buildings was made on Tim (or rather the trust) for the return of the buildings and that that demand was wrongfully rejected. Plaintiff offered no proof of either. Plaintiff did not testify that he demanded of Tim that the buildings be returned to him at any time before they were sold or that Tim refused to do so. Accordingly, even if plaintiff was entitled to enforce his agreement with Herbert, plaintiff failed to prove the tort of conversion as a matter of law.

Defendant's Post-Trial Brief, p. 9. According to Tim Turrell's argument, even though the modular buildings were Carpenters, they were rightfully on Herbert Turrell's land, and since Tim Turrell sold them *before* Carpenter made a demand for the buildings, Carpenter can never recover damages from Tim Turrell. Interesting theory, and another creative "black hole" argument by Tim Turrell, but a theory which finds no support in the facts or in the law. The phone call between Carpenter and Tim Turrell constitutes a *demand* by Carpenter ("They weren't yours to give away") and a *refusal* by Tim Turrell ("You'll have to do what you have to do"). Carpenter made additional *demand* when he filed this lawsuit. Apparently, at no time has Tim Turrell approached the buyers of these buildings, Dan Selden and Leonard Turpin, to try and get them back. In any event, at no time has Tim Turrell ever offered them back to Carpenter, and that fact can be construed as nothing other than a *refusal*. Tim Turrell's reliance on *Gissel* is misplaced for a variety of reasons. First, the portion of *Gissel* cited by Turrell is from the dissenting opinion, not the majority opinion, and Turrell neglected to mention that fact in his briefing. Second,

Gissel merely discusses the obvious fact that a thief cannot maintain an action in conversion. Third, nothing in either the majority or dissenting opinions in *Gissel* discusses that one must make a demand for possession *and* have it wrongfully refused. Even if *Gissel* did require a refusal, as pointed out above, Carpenter did demand possession and Tim Turrell has at all times during this dispute wrongfully refused such demand.

Next, Tim Turrell claims Carpenter sued the wrong parties, arguing:

A seller of personal property has no ability to convey a greater title than he had, regardless of whether the purchaser had notice or any reason to believe of the real owner's interest in the property (*Massey-Ferguson, Inc. v. Talkington*, 88 Idaho 501, 502 (1965)). Even the intervention of bona fide purchaser for value of such property does not defeat the true owner's ability to regain the property. A bona fide purchaser who refuses the demand of an owner entitled to immediate possession of stolen personal property is guilty of conversion (*Nora v. Safeco Insurance Co.*, 99 Idaho 60, 68 (1978)).

If the buildings belonged to plaintiff, Tim Turrell did not have the authority to convey title thereto to the individuals who bought them. Plaintiff accordingly had, and still has, the ability to retrieve possession from those buyers after making proper demand on them.

Defendant's Post-Trial Brief, p. 9. Once again, Turrells cite to the dissenting opinion in *Nora v. Safeco Insurance Co.*, 99 Idaho 60, 68, 577 P.2d 347, 355 (1978), without telling this Court they are doing so. All of this argument misses the point that Carpenter chose to sue Turrells for conversion. Just as with the Turrells' argument that Carpenter failed to join the estate of Herbert Turrell or the Trust of Herbert and Marianne Turrell (discussed above), Turrells could have brought the buyers Dan Selden and Leonard Turpin into this litigation. At any time, Turrells could have brought in or joined the buyers to whom Tim Turrell sold the buildings as a reasonable or an indispensable party. I.R.C.P. 19, 20, 21. Turrells have failed to do this. At any time, Turrells could have filed a motion that Carpenter failed to bring in an indispensable party. I.R.C.P. 12(b)(7). Turrells have made

no such motion. Turrells argument that Carpenter should be the one to go after these individuals would put the burden of bringing those individuals into the litigation upon the "victim" of the conversion, Carpenter, rather than upon the "tortfeasor", Turrells. The law does not require such. Indeed, by choosing to sue Turrells in conversion, which Carpenter had every right to do, Carpenter might not have been able to also sue the individual buyers for return of the property, if such would be an "inconsistent" remedy. *Largilliere Co. v. Kunz*, 41 Idaho 767, 772, 244 P. 404, 405 (1926).

Finally, Tim Turrell argues Carpenter has not proven damages. His argument, in its entirety is:

The only evidence of value as to the buildings before this Court is plaintiff's self-serving statement that the buildings were for sale for \$27,000 and that he paid \$20,000 for property he left to sit unattended for almost 4 years in a pasture. Not only is his claim to have paid "cash" in an amount that would have triggered a mandatory report to the Federal Government in a business transaction for which he would need and want a proper paper trail for tax purposes highly suspect on its face, but plaintiff offered nothing to corroborate that claim. Don Murrell (listed as a witness), the owner of the business that allegedly sold the buildings to plaintiff, was not called to verify his receipt of cash, the alleged bill of sale is silent as to what plaintiff paid, and no banking records were offered to establish where plaintiff drew the money, if in fact he did.

The only hard evidence before the Court is what two willing buyers paid for the buildings - \$3,500.00.

Defendant's Post-Trial Brief, pp. 10-11. This argument turns the shifting burden of production of evidence between the parties on its head. Carpenter testified to what and how he paid for the buildings. Carpenter's testimony was credible, and more importantly, it was **uncontradicted**! If Tim Turrell finds it odd that he paid cash to Don Murrell and that Don Murrell did not testify, so be it. But finding such odd doesn't shift the burden back to Carpenter. Carpenter put on his proof, Tim Turrell put on none as far as valuation

is concerned. Tim Turrell's briefing does nothing but cast aspersions. Tim Turrell certainly could have called Don Murrell as a witness. Presumably, Tim Turrell's attorney called prospective witnesses such as Don Murrell to find out what they might say at trial. Tim Turrell in his argument above is essentially asking this Court to *presume* complicity due to a cash transaction. This Court will not engage in such an unfounded presumption. Evidence is what carries the day at trial, and Tim Turrell put on none on this issue. Since Turrell did not call Don Murrell as a witness *after Carpenter had testified about value*, the failure of Don Murrell to be called as a witness by either party only cuts against Turrell.

Due to a failure to timely disclose expert witnesses, Carpenter was unable to put on expert testimony as to the value of these two buildings. The evidence is uncontroverted that Carpenter paid \$20,000.00 for both buildings. Carpenter testified that he paid cash for these buildings. While that is unusual, the Court does not find it reason to find Carpenter not to be credible due to the unusual nature of that transaction. Carpenter testified he thought he could sell these two modular buildings for \$25,000.00. Later, Carpenter was asked to give a fair market value of the two buildings as of November 2006, to which he expressed the opinion that the one sold to Turpin (the lunchroom) was worth about \$15,000.00 and the other worth about \$12,000.00, for a total of \$27,000.00. While an owner can testify as to an opinion of value of the owner's property, even if that testimony is uncontradicted, the Court need not believe that opinion that the modular homes could have been sold within a reasonable time for \$25,000 to \$27,000. The Court does not agree with that valuation placed by Carpenter for two reasons. First, in the three and one half years the modular homes were stored on Herbert Turrell's property, they were for sale, and in fact did not sell, for any price. There

was no testimony by Carpenter that he even received an offer that he rejected. Thus, even back in May 2003 when Carpenter acquired these two modular homes, there is evidence that they were not worth the price claimed by Carpenter. Second, there is evidence that the buildings were worth less in November and December 2006 (when Tim Turrell wrongfully sold them) than they were in May 2003 when Carpenter acquired them and placed them on Herbert Turrell's land. December and November 2006 is the time period at which the fair value of these modular homes must be ascertained. There was no evidence that modular homes appreciate over time. There was no evidence that modular homes are in short supply due to some unusual demand in this area. Thus, there is every reason that the passage of three and one half years was probably unkind to these modular homes in that they depreciated and weathered. However, the depreciation and weathering in three and one half years would not result in a drop in value as evidenced by the meager price for which Tim Turrell sold these homes, a mere \$1,750 each, or \$3,500 combined. Tim Turrell testified that when he sold these two homes there was a lot of junk inside and some vinyl siding taken off. Tom Turrell testified that "These were just two more shacks out there with all the other junk, they were nothing special." Carpenter on the other hand testified that he last went in the buildings about a year before they were removed, and at that time each had a little skirting and downspouts stored inside, but otherwise they were in good shape. The evidence shows these two modular homes to be in better shape than Tim Turrell or Tom Turrell testified. Exhibit D. In fact, Exhibit D shows the two modular homes in more recent times were in very good shape. Using the \$20,000.00 that Carpenter, in the business of selling modular homes such as these, paid for these two modular buildings in 2003 as a starting point, and applying depreciation over

three and one half years, this Court finds that in November and December 2006, the home Carpenter hoped to sell for \$12,000 to be worth \$8,000, and the building Carpenter hoped to sell for \$15,000 to be worth \$10,000, for a total of \$18,000.00. That is the fair market value in November and December 2006. Fair market value is the appropriate measure of damages for the tort of conversion. ICJI 9.11.

II. FINDINGS OF FACT.

1. On or about May 23, 2003, the Plaintiff Carpenter purchased from G. Don Murrell, Sr., a lunchroom modular building Serial #601-102A and an office modular building, Serial #400-101A. Subsequent to the purchase of the lunchroom and office buildings, Carpenter delivered and stored the same at real property owned by Herbert F. and Marianne Turrell, husband and wife, located at 2855 W. Yukon Avenue, Post Falls, Idaho with the Turrell's verbal permission.

2. Marianne Turrell testified her husband, Herbert F. Turrell passed away sometime in January, 2005. Defendant Tim Turrell testified his father, Herbert F. Turrell passed away on January 9, 2005.

3. Approximately in June 2006, Tim Turrell telephoned Carpenter about a potential buyer for one of the buildings and gave Carpenter the potential buyer's telephone number. Carpenter contacted the potential buyer, but a sale was never consummated.

4. At no time during the period of time that Carpenter's buildings were stored on the Turrell property was Carpenter ever advised verbally or in writing by either Herbert Turrell or Marianne Turrell to remove the same, nor was he ever requested to pay rent or any form of compensation as for the storage of said buildings on the Turrell property.

5. On or about March 15, 2007, Carpenter took a potential customer to the Turrell property to look at the buildings hoping to sell either one of them and discovered that the buildings were no longer there. Being aware that Herbert F. Turrell had passed away, Carpenter contacted Tim Turrell to determine the status of Carpenter's buildings. Tim Turrell advised Carpenter that Tim Turrell had given and/or gifted both of the buildings but would not reveal to Carpenter to whom or who transported the buildings from the Turrell property.

6. Upon investigation, Carpenter determined Tim Turrell sold the office building to Leonard Turpin for \$1,750.00 on or about November 29, 2006, and the lunchroom building to Dan Selden for \$1,750.00 on or about December 8, 2006.

7. The sale of the lunchroom and office buildings by Tim Turrell was without prior knowledge, consent or authority of Carpenter.

8. Carpenter received no proceeds from the same of the lunchroom building and/or office building from Tim Turrell.

9. The fair market value of the lunchroom building is \$8,000.00.

10. The fair market value of the office building is \$10,000.00.

III. CONCLUSION OF LAW.

1. The Plaintiff Carpenter was the owner of the lunchroom and office buildings hereinafter referred to as buildings.

2. Marianne Turrell was rightfully in possession of the buildings as bailee. The relationship between Carpenter and Herbert F. Turrell and Marianne Turrell was that of a gratuitous bailment, *Quinto vs. Millwood Forest Products, Inc.*, 130 Idaho 162, 165, 938 P.2d 189, 192 (Ct.App. 1997), in that it was solely for the benefit of Carpenter. Tim

Turrell was acting as agent for his mother, Marianne Turrell in cleaning up her property. In a gratuitous bailment, the bailee is only liable for the loss of the bailed item if the bailee was grossly negligent. *Id.* The Court finds Tim Turrell, and thus, Marianne Turrell grossly negligent in selling Carpenter's two buildings.

3. Defendant Tim Turrell, without authority of the bailee, assumed dominion and control of the Plaintiff's buildings.

4. Tim Turrell exercised dominion and control of the buildings, thereby permanently depriving Carpenter of possession of said personal property by the sale of the buildings to Selden and Turpin. *Wiseman vs. Schaffer*, 115 Idaho 537, 540-41, 768 P.2d 800, 803-04 (Ct.App. 1989). Even if Tim Turrell is unaware of the existence of Carpenter's rights in which Tim Turrell interferes, Tim Turrell is still liable. *Id.*

5. Any allegation by Tim Turrell that he was unaware of Carpenter's rights over the buildings which Tim Turrell converted to his own use is irrelevant and Tim Turrell is still liable. *Restatement of Torts* (2nd) Section 222, 223, 224.

6. Tim Turrell is liable to Carpenter for damages resulting from his wrongful conversion of Carpenter's buildings. The measure of damages is the full value of the buildings at the time and place of the sale to third parties. *Restatement of Torts* (2nd) Section 222(A), Comment C; *Wiseman (supra)*.

7. Idaho Code §9-202(3) is not relevant to the instant case because the Estate of Herbert Turrell is not a party or named defendant in this matter. There is no claim by Carpenter against Marianne Turrell or the Estate of Herbert Turrell, and any proffered testimony as to any agreement or communication between Carpenter and Herbert F. Turrell concerning a state of affairs or matter of fact prior to Herbert Turrell's death is

not barred by said statute. *Argyle v. Slemaker*, 99 Idaho 544, 547, 585 P.2d 954, 957 (1978),


8. It is not necessary to prove a demand and refusal and the intent of the parties is immaterial when a conversion occurs by wrongful taking. *Klam v. Koppel*, 63 Idaho 171, 182-83, 118 P.2d 729 (1941).

9. Defendants Turrells are indebted to plaintiff Carpenter in the sum of \$18,000.00, representing the fair market value of the buildings, for which judgment for Carpenter and as against the Turrells will be entered.

IV. ORDER.

IT IS HEREBY ORDERED that plaintiff Carpenter has prevailed on his claims against defendants Turrells, and that Carpenter's counsel prepare a judgment in accord with this decision, findings and conclusions.

Entered this 19th day of June, 2008.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 19 day of June, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
James A. Raeon

Fax #
666-9211

Lawyer
Charles R. Dean, Jr

Fax #
664-9844


Jeanne Clausen, Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 JUN 26 PM 12: 59

JAMES A. RAEON
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814
Telephone: 208-765-5875
Facsimile No. 208-666-9211
ISB# 2075

CLERK DISTRICT COURT
Joanna Barker
DEPUTY NH

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

JAMES CARPENTER,

PLAINTIFF,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

DEFENDANTS.

CASE NO: CV07-5840

JUDGMENT

The above-entitled matter came before the Court for a Court Trial on May 12, 2008 before the Honorable John T. Mitchell, District Judge. The Plaintiff appearing in person and represented by his Attorney of Record, James A. Raeon and the Defendant, Tim Turrell, appearing in person and represented by his Attorney of Record, Charles R. Dean, Jr. Having heard and considered testimony and evidence and the Court entering of a Memorandum Decision incorporating certain Findings of Fact and Conclusions of Law, the Court renders the following Order as follows:

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant

1-JUDGMENT

shall pay the Plaintiff the amount of EIGHTEEN THOUSAND DOLLARS (\$18,000.00) as and for damages wherein the Plaintiff is hereby entitled to a Judgment against the Defendants in the sum of EIGHTEEN THOUSAND DOLLARS (\$18,000.00) which Judgment will accrue interest at the statutory lawful rate.

ENTERED this 26th day of June, 2008.


JOHN T. MITCHELL
DISTRICT COURT JUDGE

I hereby certify that on the 26th day of June, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Charles R. Dean, Jr.
Attorney at Law
1110 West Park Place, Suite 212
Coeur d'Alene, ID 83814
(208) 664-9844

☐ U.S. Mail
☒ Facsimile

James A. Raeon
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene, ID 83814
(208) 666-9211

☐ U.S. Mail
☒ Facsimile

DANIEL J. ENGLISH
CLERK OF THE COURT


DEPUTY

2-JUDGMENT

Charles R. Dean, Jr.
1110 West Park Place, Suite 212
Coeur d'Alene, Idaho 83814
(208) 664-7794 / Fax (208) 664-9844
ISB #5763

Attorney for Defendants

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 807385

2008 AUG -6 PM 4:43

CLERK DISTRICT COURT
DEPUTY

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF KOOTENAI

JAMES C. CARPENTER,

Plaintiff,

vs.

TIM TURRELL and PEGGY TURRELL,

husband and wife,

Defendant

Case No.: CV 07-5840

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENT AND THEIR ATTORNEY, AND THE
CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Tim Turrell and Peggy Turrell, appeal against the above- named respondents to the Idaho Supreme Court from the judgment for plaintiffs entered in the above-entitled action on the 26th day of June 2008, Honorable Judge John T. Mitchell, presiding.

2. That the appellants have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) and (5), I.A.R.

3. A preliminary statement of the issues on appeal which the appellants then

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intend to assert in the appeal; provided:

a. Whether the trial court erred in ruling that plaintiff's claims were not barred by Idaho's "dead man's statute" (IC 9-202(3)); and

b. Whether the trial court erred in ruling that; and

c. Whether the trial court erred in finding appellants had wrongfully converted plaintiff's property.

4. No order been entered sealing all or any portion of the record

5. (a) Is a reporter's transcript requested? Yes.

(b) The appellants request the preparation of the following portions of the reporter's transcript: All trial proceedings occurring on the record on May 12, 2008.

6. The appellant requests the following documents to be included in the clerk's record:

a. Complaint

b. Answer

c. Appellants' Trial Briefs

d. Respondent's Trial Briefs

e. Appellants' Post-Trial Brief

f. Respondent's Post-Trial Brief

g. Memorandum of Decision, Findings of Fact, Conclusions of Law and Order

h. Judgment

i. Notice of Appeal

7. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) (1) ☒ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(2) ☐ That the appellant is exempt from paying the estimated transcript fee because _____

(c) (1) ☒ That the estimated fee for preparation of the clerk's or agency's record has been paid.

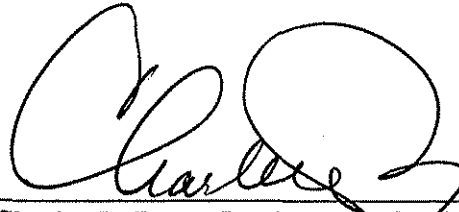
(2) ☐ That the appellant is exempt from paying the estimated fee for the preparation of the record because _____.

(d) (1) ☒ That the appellate filing fee has been paid.

(2) ☐ That appellant is exempt from paying the appellate filing fee because _____.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated this 6th day of August 2008.



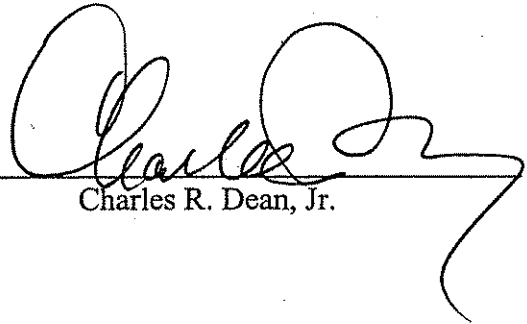
Charles R. Dean, Jr., Attorney for the
Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James A. Racon
Attorney at Law
1424 Sherman Avenue Suite 300
Coeur d'Alene, Idaho 83814

- | | |
|--|----------------|
| <input checked="checked" type="checkbox"/> | U.S. MAIL |
| <input type="checkbox"/> | FEDEX GROUND |
| <input type="checkbox"/> | HAND DELIVERED |
| <input type="checkbox"/> | OVERNIGHT MAIL |
| <input type="checkbox"/> | FACSIMILE |



Charles R. Dean, Jr.

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES C CARPENTER

Plaintiff/Respondent

vs.

TIM TURRELL and PEGGY TURRELL
HEALTH & WELFARE

Defendants/Appellants

SUPREME COURT NO. 35576

CIVIL CASE NO
CV 07-5840

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail; postage prepaid, on the ____ day of _____, 2008.

I do further certify that the Clerk's Record, Reporter's Transcript and Exhibits will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 5 day of Sept, 2008.

DANIEL J. ENGLISH
Clerk of District Court

By: Joanna Baker Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES C CARPENTER
Plaintiff/Respondent

v.

TIM TURRELL and PEGGY TURRELL
Defendants/Appellants

SUPREME COURT NO. 35576

CIVIL CASE NO
CV 07-5840

CLERK'S CERTIFICATE OF EXHIBITS

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court of Appeals.

I further certify that the following documents will be submitted as exhibits to the Record: see attached, except Respondent's Trial Brief (not filed)

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 5 day of Sept, 2008.

Daniel J. English
Clerk of the District Court

Joanna Parker
Deputy Clerk

PLAINTIFF'S EXHIBITS

- 1a Photo
- 1b Photo
- 1c Photo
- 1d Photo
- 1e Photo
- 1f Photo
- 1g Photo
- 1h Photo

- 2a Photo
- 2b Photo
- 2c Photo
- 2d Photo
- 2e Photo

- 3 Bill of Sale
- 4 Sales Slip
- 5 Sales Slip

DEFENDANTS' EXHIBITS

- C Names and Addresses & Phone Numbers
- D CD
- E Kootenai County Sheriff's Report
- G Letter
- H Herbert and Marian Turrell Living Trust
- I Last Will and Testament of Herbert F Turrell
- J Statement of Registration/Herbert and Marian Turrell Living Trust
- K Real Property Deed to Trust
- L Personal Property Deed to Trust
- M Personal Property Deed to Trust
- N Personal Property Deed to Trust

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES C CARPENTER
Plaintiff/Respondent

v.

TIM TURRELL and PEGGY TURRELL

Defendants/Appellants

SUPREME COURT NO. 35576

CIVIL CASE NO
CV 07-5840

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

Attorney for Defendants/Appellants

Charles R Dean, Jr
1110 West Park Place Ste 212
Coeur d'Alene, Idaho 83814

Attorney for Plaintiff/Respondent

James A Raeon
1424 Sherman Ave Ste 300
Coeur d'Alene, Idaho 83814

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 5 day of Sept, 2008.

DANIEL J. ENGLISH
Clerk of the District Court

By:

Joanna Parker
Deputy