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Carpenter v. Turrell Respondent's Brief Dckt. 35576

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES C. CARPENTER,

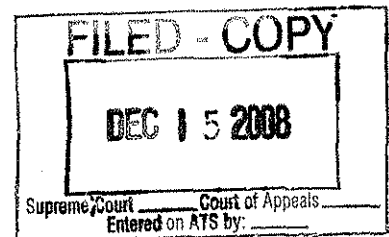
RESPONDENT,

VS.

TIM TURRELL and PEGGY TURRELL,
husband and wife,

APPELLANTS.

Supreme Court No. 35576



RESPONDENT'S BRIEF

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, Presiding

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I.
STATEMENT OF THE CASE

A. Nature of the Case

Respondent, James Carpenter (hereafter "Carpenter") owned a lunchroom modular building and an office modular building (hereafter "buildings"). Carpenter stored the buildings on the real property of Herbert Turrell and Marianne Turrell, husband and wife. Herbert Turrell subsequently passed away. Approximately two years later, the Appellant (hereafter "Turrell"), son of Herbert Turrell and Marianne Turrell took possession of the buildings and sold them to third parties without any prior knowledge, consent or authority of Carpenter.

Carpenter filed suit against Turrell for conversion to recover the fair market value of the buildings from Turrell. Turrell responded to Carpenter's complaint by admitting Carpenter's allegation that Turrell ". . . without Plaintiff's knowledge, authorization or consent sold one storage building to Leonard Turpin on November 26, 2006 and the other storage building to Dan Seldon on December 8, 2006." (See Turrell's Answer: Paragraph 5). Turrell also incorporated in his Answer an affirmative defense that Carpenter's claims are barred by Idaho Code §9-202(3).

A trial was held and the Trial Court entered a Judgment for Carpenter concluding in pertinent part that:

1. Carpenter as owner of the buildings has a gratuitous bailment relationship with Herbert Turrell and Marianne Turrell.
2. That while Turrell had been acting as an agent for his mother, Marianne Turrell, Turrell without authority of Marianne Turrell personally assumed dominion and control of Carpenter's buildings and permanently deprived Carpenter possession of said buildings by the sale of the same to Seldon and Turpin.
3. Notwithstanding Turrell's allegation he was unaware of Carpenter's rights regarding the buildings, the conversion of the buildings to his own use rendered Turrell liable to Carpenter due to wrongful conversion.

4. Idaho Code §9-202(3) was not relevant as a defense to Turrell's claim since Carpenter's lawsuit did not include a claim against the Estate of Herbert Turrell or Marianne Turrell personally. Therefore, any testimony regarding any agreement or conversation between Carpenter and Herbert Turrell is not barred by Idaho Code §9-202(3).

B. Statement of Facts

Carpenter is the sole owner of Quality Modular Homes, a business involved in the buying and selling of modular homes. In May 2003, Carpenter purchased two buildings. (See Exhibit 3). During this time Herbert Turrell was a good friend and neighbor of Carpenter. They both lived on Yukon Road, Post Falls, Idaho approximately one-quarter mile apart. While in the presence of Dave Boudier and Herbert Turrell, Carpenter was unable to store the buildings on his property due to their size. Carpenter and Herbert Turrell had a conversation about the storage of the buildings on Herbert Turrell's property. Herbert Turrell allowed Carpenter to store the buildings on his property. (Tr 29, L 1-9). Carpenter and Dave Boudier made one trip per building to Herbert Turrell's property to store the buildings. While moving the buildings on the Herbert Turrell property, Herbert Turrell was present, observed the moving of the buildings onto his property and did not object or contest the placement and storage of the same on his property. (Tr 91, L 15-22). Herbert Turrell's wife, Marianne Turrell was not present during this time. (Tr 91, L 9-14).

During this period of time Carpenter had built an addition to Herbert and Marianne Turrell's mobile home (Tr 72, L 17-18) and had moved three cabins from Lake Chatcolet to the Herbert Turrell property. (Tr 71, L-12-13, Tr 72, L-2).

Herbert Turrell passed away in the early part of 2005. Carpenter testified that no funeral service was held.

As referenced in the Turrell's Opening Brief, Herbert and Marianne Turrell lived on a five acre parcel on Yukon Road, Post Falls, Idaho. The property over time became a storage for just about anything that Herbert Turrell was able to collect, such

as old cars, scrap metal, etc. Most of the items stored on Herbert Turrell's property was not marketable except for salvage value. See Exhibit "D". The only buildings being stored on Herbert Turrell's property were Carpenter's buildings and the Lake Chatcolet cabins. Such items were readily distinguishable from the remainder of the "junk" on the Herbert Turrell property. (Tr 146, L 12-25).

Marianne Turrell acknowledged that Carpenter and Herbert Turrell were friends and she observed both of them outside talking at various times but she never paid attention to what they talked about, nor was she ever involved in any of Herbert Turrell's affairs. (Tr 95, L 21-22; Tr 107, L 19-20; Tr 112, L 21-23) Marianne Turrell acknowledged that she was not aware of all the personal property on the property or even the buildings being on the property and that "everybody stored stuff it seemed like." (Tr 107, L 17).

Subsequent to Herbert Turrell's passing, Carpenter showed the buildings to several perspective purchasers without success. During each showing, Carpenter always made contact with Marianne Turrell to advise her of his presence and purpose for being there (Tr 38, L-24-25; Tr 39, L 20-22).

Carpenter also received a telephone call from Turrell regarding the status and sale price of the buildings after Turrell was contacted by an interested party. (Tr 42, L 19-20; Tr 45, L 8-12; Tr 46, L 9-10). The buildings did not sell as a result of this contact.

In 2007, Carpenter was driving by Marianne Turrell's property and noticed that the buildings were gone. Carpenter telephoned Turrell and left a message with Turrell's wife to call him about the status of the buildings. Turrell never returned Carpenter's telephone call. Carpenter called again and made contact with Turrell. Turrell told Carpenter that he had gave them away. (Tr 44, L 1-2). Turrell acknowledges that he did not tell Carpenter that he had sold the buildings. (Tr 125, L 16-18).

Being in the business of moving buildings, Carpenter was able to trace the status of these particular buildings and determined that Turrell had sold the buildings to

Leonard Turpin and Dan Seldon.

Upon being confronted by Carpenter with this information, Turrell finally acknowledged the sale of the buildings to Turpin and Seldon and did not dispute Carpenter's claim to ownership of the buildings during this telephone contact. (Tr 44, L-11-19; Tr 171, L 1-12).

In various attempts to legitimize Turrell's sale of the buildings, Turrell denied that he knew that Carpenter owned or made a claim to the buildings. Turrell felt that his father owned the buildings and wanted to attach the buildings to his mobile home. It is un rebutted that Carpenter built an addition to the mobile home. Carpenter further testified that the buildings would have had to been substantially altered and remodeled to pass code to render them habitable as an addition to the mobile home. (Tr 202, L 4-17).

Turrell also claims that he assumed the buildings were his father's because it was just like all the other junk stored on his father's property. (Compare Exhibits 1 (A-H), 2 (A-E), with Exhibit D).

Turrell's brother, Tom Turrell, testified that Carpenter telephoned him on three to four occasions to see when Carpenter could move the buildings to his brother's, Terry Turrell's property in Bayview, Idaho. Carpenter testified that he called Tom Turrell once to determine when he could move the Lake Chatcolet cabins (not the buildings) to Terry Turrell's Bayview property. Turrell did not proffer any testimony corroborating and/or confirming Terry Turrell's testimony in this regard nor acknowledge any knowledge of the telephone calls as alleged by Terry Turrell. (Tr 171, L 2-12). Turrell repeatedly testified that when he took possession of the buildings and sold them to third parties, he was acting either as a Personal Representative of the Herbert Turrell Estate or a Successor Trustee of the Turrell Living Trust (hereafter Trust).

Upon being confronted by Carpenter as to the status/sale of the buildings, Turrell never indicated that he was acting as a Personal Representative of the Estate of Herbert Turrell and/or Trustee of the Trust.

The Trust was never registered with the Kootenai County District Court nor was Turrell's status as Successor Trustee of the Trust registered in any Court in Idaho. (Tr 178, L 14-19).

The record does not reflect any evidence other than Turrell's own self serving statements that he was acting a Personal Representative of the Estate of Herbert Turrell or that a formal probate of the Herbert Turrell had been filed either prior to or at the time of sale of the buildings. (Tr 166, L 14-15).

Turrell sold the buildings to Leonard Turpin and Dan Seldon personally and executed sale receipts reflecting the sale of the buildings in Turrell's name only and not in his alleged capacity as either a Personal Representative of Herbert Turrell's estate or as Successor Trustee of the Living Trust. (Exhibits 4 and 5).

Although Turrell was sure that all property located on Herbert Turrell's property was his father's, Turrell did acknowledge that his father stored some personal property as a friends residence in Rathdrum, Idaho. Like Carpenter herein, Herbert Turrell was also involved in a gratuitous bailment situation. (Tr 167, L 21-23; Tr 171, L 16-20).

Notwithstanding the specific reasons Turrell tendered to the Trial Court regarding the conversion of Carpenter's buildings, Turrell acknowledged that not all the items stored on his father's property has been sold or removed (Tr 148, L 2-14) and Marianne is still residing at the home. (Tr 116, L 8-9).

C. Appellant's Issues Presented on Appeal

Turrell raises six issues on appeal which are summarized as follows:

1. Issues 1 through 4 (Opening Brief page 9) can be summarized as follows: Whether Idaho's Dead Man Statute is applicable to Carpenter's claim of conversion against Turrell in the absence of any formal probate proceeding pending, or in the absence of Turrell formally documenting his status as Personal Representative or in the absence Turrell formally documenting his status Successor Trustee of the Trust at the time that he converted Carpenter's buildings to his own use and sold the same.
2. Whether the Trial Court's finding of gross negligence is supported by the

evidence is a germane or relevant issue as it applies to the Trial Court's finding that Turrell was culpable of conversion.

3. Whether Judgment was properly entered against Peggy Turrell, spouse of Turrell in light of the evidence that Turrell was personally involved in the conversion of Carpenter's buildings and failed to substantiate the status of the proceeds of the sale of said buildings.

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the issues raised by Turrell in his Opening Brief on Page 9, Carpenter contends that the following issue is germane:

1. Whether Carpenter is entitled to an award of attorney's fees on appeal since Turrell arguments simply request the Court to re weigh and/or recharacterize substantial competent evidence which substantiate as to the inapplicability of the Dead Man's Statute to the instant case. (I.C. §12-121, IAR 41).

III.

ARGUMENT

A. STANDARD OF REVIEW APPLICABLE BEFORE THIS COURT

The standard of review applicable to this appeal has been summarized by the Court as follows:

When a case has been tried to the Court without a jury, we will not disturb the Trial Court's Findings of Fact unless they are clearly erroneous. Idaho Rule of Civil Procedure 52(a); In Re *Williamson*, 135 Idaho 452, 454,(2001); *Rueth vs. State*, 103 Idaho 74, 77 (1982). In determining whether a finding is clearly erroneous, this Court

does not weigh the evidence or assess the credibility of witnesses as to the Trial Court. *Williamson, supra; Kootenai Electrical Coop., Inc. vs. Washington Power Co.*, 127 Idaho 432, 434-35(1995). "The Trial Court's Findings and Conclusions which are based on substantial although conflicting evidence will not be disturbed on appeal." *Sun Valley Shamrock Resources, Inc. vs. Travelers Leasing Corp.*, 118 Idaho 116, 118 (1990). "The Trial Court's Findings of Fact will be liberally construed in favor of the judgment entered." *Id.* With respect to the Trial Court's Conclusions of Law, we exercise free review *Erickson vs. Flynn*, 138 Idaho 430 (Id. App 2002).

B. IDAHO DEAD MAN'S STATUTE IS NOT APPLICABLE

Turrell's appeal primarily focuses on whether Idaho's Dead Man's Statute (IC§9-202(3)) applies to a Trust *vis a vis* Turrell's uncorroborated and unverified testimony that at all times pertinent to his possession and sale of Carpenter's buildings, he perceived himself as a Successor Trustee of the Trust.

The overwhelming evidence supports the finding of the Trial Court that Turrell was not a Successor Trustee at the time he converted Carpenter's buildings. The record fails to reflect an initial registration of the Trust or an Amended Registration designating Turrell as Successor Trustee of the Trust as required by Idaho Code §15-7-101 *et. seq.* The sales receipts provided to Leonard Turpin and Dan Seldon, purchasers of Carpenter's buildings, reflect that Turrell was acting in his personal capacity. (See Exhibits 4 and 5).

Turrell objected to any testimony proffered by Carpenter relating to any conversation with Herbert Turrell regarding the storage of the buildings on Herbert Turrell's property. The Trial Court concluded that "Idaho Code §9-202(3) is not relevant because the Estate of Herbert Turrell is not a party or a named Defendant in this matter." (R, page 72). The Trial Court did not conclude that ". . . protection of Idaho Code §9-202(3) was available only to Personal Representatives formally appointed by

the Court.” (Opening Brief page 10). Turrell’s objection is not a barr to Carpenter’s claim. There is no evidence that the Estate of Herbert Turrell was formally or informally probated or involved in the conversion of Carpenter’s buildings. There was no factual basis to include the Estate of Herbert Turrell as a party Defendant herein.

Regarding the applicability of the Dead Man’s Statute, Turrell does acknowledge that

“... *extrinsic evidence and the testimony of disinterested witnesses to the conversations or events giving rise to the claim can be presented, the interested party to the ‘communication or agreement’ is not permitted absence such testimony to testify as to what the decedent said or promised since to do so would allow opportunistic claims to make uncorroborated and fraudulent claims against the estate of someone who can no longer defend himself.*” (Opening Brief page 10).

A disinterested witness, Dave Boudier, corroborated Carpenter’s testimony that Herbert Turrell acquiesced, did not object to and observed Carpenter moving two buildings on to Herbert Turrell’s property to store the same. (P 89, L 11-16; P 91, L15-22).

Turrell’s appeal suggests that the Dead Man’s Statute is a claims barr statute rather than an evidentiary barr statute. In this regard he had little choice. Turrell acknowledged that he converted and sold Carpenter’s buildings. Turrell felt his only defense to Carpenter’s claim was to suppress any conversation between Carpenter and Herbert Turrell regarding the storage of said buildings. In light of the gratuitous bailment situation, (R 71), Carpenter did not need proffer any hearsay testimony from Herbert Turrell. As corroborated by Boudier, the facts are clear and uncontroverted. Carpenter purchased the buildings and moved them on Herbert Turrell’s property on two separate occasions in the presence and without objection of Herbert Turrell.

Rather than moving to dismiss Carpenter’s Complaint for failure to join an indispensable third party or in the alternative joining the Estate of Herbert Turrell and or the Trust as a third party defendant, Turrell chose to personally defend this litigation. Turrell’s status in this litigation is inconsistent with his attempt to hide behind guise of a

Trustee in an attempt to barr Carpenter's claim.

Turrell fails to recognize statutory differences involved in probating an estate and the formalities required in the registration of a Trust. In this regard Turrell misrepresents the facts as it relates to the rationale of Idaho Code §9-202(3) (See Opening Brief page 11). Even if it is determined that Turrell was acting as a Personal Representative or as Successor Trustee, the terms and conditions of the Trust was that Estate would vest in the surviving Grantor (Marianne Turrell). As such, since there was still a surviving Grantor, Turrell was not acting ". . . to wind up a decedent's estate and affairs." (Opening Brief page 11, Defendant's Exhibit "H"). Turrell consistently attempted to recite hypotheticals and other speculative arguments in his attempt to render Idaho Code §9-202(3) applicable. These attempts were unsuccessful before the Trial Court.

The facts do not provide a proper predicate for this Court to consider Turrell's request in this regard. The Estate of Herbert Turrell and the Trust are not parties to this action.

In the event the Court determines that the Dead Man's Statute did preclude Carpenter's testimony regarding any conversations he had with Herbert Turrell, such error is harmless. Substantial, competent and uncontroverted evidence exists that Carpenter stored the buildings on Herbert Turrell's property under a gratuitous bailment situation. Idaho Code §9-202(3) is irrelevant to this bailment status.

Nevertheless, Turrell insists that:

"This Court should according hold that the legislative intent to protect a decedent's estate from uncorroborated claims whether or not estate is subject to a formal probate and whether or not the Personal Trustee is a successor of an estate planning trust." (Opening Brief p 12).

C. TIM TURRELL WAS NOT A PERSONAL REPRESENTATIVE.

Contrary to the requirements of Idaho Code §15-3-301 *et. seq* or Idaho Code §15-3-401 *et. seq*, Turrell insists that the Trial Court erred in dismissing his claim that

he was acting as a Personal Representative of the Estate of Herbert Turrell when he sold the buildings. Turrell argues that the Trial Court did not have any law or evidence supporting its conclusion that "Tim had not been appointed by the Court in a formal probate proceeding." (Opening Brief page 12).

The record is void of any evidence that the Estate of Herbert Turrell was either informally or formally probated or that Letters Testamentary were issued by the Court appointing Turrell as Personal Representative of the Estate of Herbert Turrell. The burden is on Turrell to substantiate such allegation. He did not. It is difficult to fathom what specific evidence Turrell refers to which would provide a basis for the Trial Court to determine that Turrell had been appointed by a Court ". . . in a formal probate proceeding."

Turrell merges and fails to distinguish the status of the Personal Representative of an estate *vis a vis* a Successor Trustee of a trust. In one instance he is asserting that he is a Personal Representative of the Estate of Herbert Turrell. In another instance he is asserting that he is the Successor Trustee of the Trust. Turrell's self-serving statement were not corroborated by any other testimony and/or formal documentation as required by Idaho Code. The Trial Court's finding that Tim Turrell was not a Personal Representative is based upon Turrell's failure to verify this unsubstantiated allegation.

Turrell has presented no authority to support his position that he personally had standing to barr any testimony pertaining to any conversation between Carpenter and Herbert Turrell pursuant to Idaho Code §9-202(3). Idaho Code §9-202(3) does not exonerate Turrell for the conversion of Carpenter's buildings.

D. THE REAL QUESTION IS WHO IS ATTEMPTING TO BACKDOOR THE DEAD MAN'S STATUTE

It is an ironic twist of logic that Turrell is claiming that Carpenter is attempting to "backdoor" the Dead Man's Statute by filing a cause of action against Turrell personally.

(See Opening Brief page 13).

A review of Turrell's testimony is replete with his attempts to "backdoor" the application of the Dead Man's Statute. The record is void of any factual foundation which sustains the relevance of the statute to his objections and arguments. It is unknown exactly to what extent and how the Dead Man's Statute applies to Carpenter's claim. Turrell has argued that it is a claims barred statute in one instance and in other instances argues that it is an evidentiary/testimonial barr statute. Even the Trial Court had a difficult time parlaying Turrell's application of the Dead Man's Statute to the facts of this case.

Unfortunately, it is again necessary to respond to this issue by again reiterating that the evidence before the Trial Court directly contradicts Turrell's allegations. Turrell signed the sales receipts in his personal capacity. There was no informal or formal probate of Herbert Turrell's Estate. Turrell did not register his status as Successor Trustee of the Trust as contemplated by Idaho Code §15-7-101 *et. seq.* (Tr 118, L 12-15, Tr 156, L 21-23, Tr 178, L 14-19). A third party would not be able to verify either a probate of Herbert Turrell's Estate or the existence of a Family Trust. While Turrell's name appeared on his mother's bank account (Tr 107, L 1) so did his other brothers. (Tr 164, L 16-25, Tr 165, L 1-13).

Notwithstanding Turrell's self serving statements pertaining to his perceived status as either a Personal Representative or a Successor Trustee, the Trial Court concluded that Turrell acted individually when he took dominion and control of Carpenter's buildings and sold them to third parties.

In an effort to distract the Court and minimize his exposure, Turrell attempts to justify his behavior by alleging he was unaware of Carpenter's rights over the buildings. Such lack of knowledge as to who actually owns the buildings is irrelevant. Restatement of Torts (2nd) §222, 223, 224. *Wiseman vs. Schaffer*, 115 Idaho 537 (Ct. App 1989).

Turrell also attempts to assume facts not in evidence by extending the rationale

of the Dead Man's Statute defense to preclude Carpenter's attempts to recover the buildings from Herbert Turrell's Estate in the event that the buildings still existed. (Opening Brief page 14). This argument fails in that it is premised upon facts which are irrelevant and not applicable to the instant case. In the event that the buildings still existed then it is obvious Carpenter would have had to file the suit against the Estate of Herbert Turrell and/or against Marianne Turrell personally. In this instance different facts would obviously been presented to sustain Carpenter's burden. Such an analogy is inapposite.

Turrell cannot simply invoke the application of Idaho Code §9-202(3) by alleging, as an after thought, that he was unilaterally acting as a Personal Representative or Successor Trustee without any formal appointment confirming the same. (Opening Brief page 14). The *Kolouch* cited by Turrell (Opening Brief page 14) confirms a need for a formal appointment and to this extent is inapplicable to the instant case.

This is not a case where ". . . Carpenter . . . successfully eluded the statute by suing Turrell as an individual." (Opening Brief page 14). This is a case where the Trial Court held that Turrell could not hide behind the Dead Man's Statute to barr Carpenter's conversations with Herbert Turrell pertaining to the buildings.

E. WHETHER CARPENTER WAS ENTITLED TO IMMEDIATE POSSESSION OF THE BUILDINGS IS IRRELEVANT

Turrell argues that Carpenter was not entitled to immediate possession of the buildings and therefore his claim against Turrell must fail. (Opening Brief page 15). Turrell cites the *Lusar* case as authority for the requirement of "immediate possession." *Lusar* is significantly distinguishable from the case at hand. It dealt with a cause of action between a trucking company which as pledgor, pledged certain collateral to a secured party for a bond. The issue before the *Lusar* Court was whether the pledgor had the right to possession of the collateral at the time of demand and refusal of the

secured party to return the collateral.

Lusar did not deal with a gratuitous bailment situation as in the instant case. Additionally, Turrell was not acting as a bailee of the buildings at the time of his conversion and sale of the same. Turrell's motives in this regard are irrelevant. Carpenter's cause of action against Turrell was premised on Turrell being a tortfeasor, not a bailee.

Turrell has not cited any authority which would deny a bailor immediate possession of his property from the bailee in a gratuitous bailment situation. Even in the event that Turrell is able to cite authority to sustain his argument that Carpenter must show a right of "immediate possession" of bail property before the bailee can be culpable of conversion, Turrell lacks standing to raise this issue and his arguments in this regard fail. It is difficult to understand Turrell's logic that Carpenter would have to have a right of possession of the buildings superior to that of Turrell's prior to Turrell's personally converting and selling the same. Turrell simply had no rights of possession of Carpenter's buildings.

F. PERSPECTIVE EXAMPLE

Notwithstanding the various assumptions and arguments tendered by Turrell in support of his appeal, on page 16 of his Opening Brief, Turrell again attempts to explain and/or justify his appeal "by example".

To the extent that such example sets forth additional hypothetical with rhetorical questions, no further comment or argument in this regard is necessary.

G. TURRELL IS BEING HELD LIABLE NOT FOR A BREACH OF A BAILMENT CONTRACT BUT FOR CONVERSION OF CARPENTER'S BUILDINGS

Turrell has erroneously interpreted the Trial Court's decision that Judgment entered against Turrell was premised upon a breach of a bailment contract. The Trial

Court's comments pertaining to the bailment status by and between Carpenter and Herbert Turrell serves as a predicate for its decision. In a gratuitous bailment, no contract exists. There was no specific bailment, *gratuitous or otherwise* between Carpenter and Tim Turrell.

Neither the Estate of Herbert Turrell or Marianne Turrell personally converted Carpenter's buildings. The record is void of any evidence that Marianne Turrell knew what Herbert Turrell was doing with those buildings. (Tr 101, L 15-16, 18, Tr 107, L19-20). Marianne Turrell testified "everyone stored stuff there." (Tr 107, L 17). The record is void of any evidence as to whether Marianne Turrell even knew the buildings were on the property. (Tr 103, L 17-19). All Marianne Turrell knew was that Herbert Turrell and Carpenter had arrangements but she was not aware of what they were. (Tr 113, L 1-3, Tr 108, L 11-12).

Turrell analysis of the Trial Court's conclusion that Marianne Turrell and Turrell were grossly negligent for selling the buildings is misplaced. Be it as it may, the Trial Court was commenting on an issue raised by Turrell. This particular comment was not alternative theory or a basis of the Trial Court's decision. The Trial Court's decision was premised solely on a finding and conclusion that Turrell personally exercised dominion and control of the building and permanently deprived Carpenter possession of the same by their sale to third parties. (See R page 72).

H. AS WIFE OF TURRELL, PEGGY TURRELL IS PERSONALLY LIABLE TO CARPENTER

Carpenter named Peggy Turrell as a party and alleged that Turrell's actions benefitted the Turrell marital community. While Turrell denied this allegation, Turrell did not move the Court at any time during the proceeding to dismiss Peggy Turrell as a party defendant. Since this issue was neither raised, argued or addressed at the Trial Court, this Court must proceed on the assumption that the Defendant's acts benefitted the community and in turn Peggy Turrell.

This Court determined that Turrell committed a tort, the conversion of Carpenter's buildings. Debts incurred by one spouse in the commission of a tort can be satisfied out of community assets. *Hansen vs. Blevins*, 84 Idaho 49 (1962). While alleging that he remitted the proceeds of the sale of Carpenter's building to Marianne Turrell, Turrell never produced any verification of this remittance either through a deposit slip or by testimony by Marianne Turrell. The receipts signed by Turrell personally regarding the conversion and sale of Carpenter's buildings reflect that the Turrell community benefitted from Turrell's tortious act.

I. RESPONDENT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES

This Court has previously observed: "Attorney's fees are awardable if an appeal does no more than simply invite an Appellant Court to second guess the Trial Court on conflicting evidence." *Sun Valley Shamrock Resources, Inc. vs. Traveler's Leasing Corp.*, 118 Idaho 116, 120 (1990) *Anderson vs. Larsen*, 136 Idaho 402, 408 (2001). In granting Carpenter's claim for relief, the Trial Court's Findings of Fact was based upon testimony and record evidence. In appealing to this Court, Turrell did no more than argue the evidence should be reweighed.

This Court has also previously observed: "An award of Attorney's is appropriate 'if the law is well settled and the appellants have made no substantial showing at the District Court misapplied the law.'" *Bowles vs. Pro Indiviso, Inc.*, 132 Idaho 371, 378 (Idaho 1999). As a basis of Turrell's request for this Court's review of the Trial Court's opinion, Turrell cites his own testimony, the same being based upon his own perceptions, feelings and impressions. Turrell had presented no specific factual documentation to sustain the predicate for his legal arguments as presented herein. Said legal arguments are unreasonable and irrelevant. While Turrell has attempted to show that the Trial Court misapplied the law, he is primarily requesting this Court to

reverse the Trial Court's Findings of Fact and adopt his own self serving and "after the fact" characterization of his status and role in this particular matter.

Substantial, competent evidence exists to sustain the Trial Court's finding that Carpenter owned the buildings, stored the buildings on the property of Herbert Turrell *vis a vis* a gratuitous bailment status and that Turrell without any prior knowledge, consent or authorization of Carpenter assumed dominion and control of the buildings and then personally converted the same to his own use and sold them.

Based upon the authority cited above and the Findings of Fact and Conclusions of Law of the Trial Court, Carpenter respectfully requests that he is entitled to an award of attorney's fees and costs incurred in the defense of this appeal.

**IV.
CONCLUSION**

Based upon the reason and authorities as set forth above, Carpenter requests that this Court affirm the Trial Court's decision. Carpenter further requests that he be awarded his reasonable attorney's fees and costs in defending this appeal.

DATED this 12th day of December, 2008.



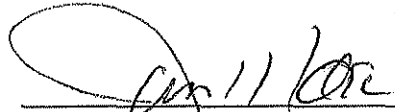
ATTORNEY FOR RESPONDENT
JAMES A. RAEON

I hereby certify that on the 12th day of
DECEMBER, 2008, a true and correct copy of the
foregoing was:

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

to:

Charles R. Dean
Attorney at Law
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JAMES A. RAEON
ATTORNEY AT LAW

