

5-13-2011

# Kinghorn v. Clay Augmentation Record Dckt. 38109

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## Recommended Citation

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In the Supreme Court of the State of Idaho

KRYSTAL M. KINGHORN, f/w/a KRYSTAL M. BARRETT,

Plaintiff-Respondent,

v.

KELLY N. CLAY, an individual,

Defendant-Crossdefendant-Appellant,

and

BRP, INCORPORATED,

Defendant-Crossclaimant-Respondent,

and

BANK OF COMMERCE,

Defendant.

ORDER RE: APPELLANT'S MOTION FOR EXTENSION OF TIME AND TO AUGMENT RECORD AND RESPONDENT'S MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL

Supreme Court Docket No. 38109-2010  
Fremont County No. 2007-306

A MOTION FOR EXTENSION OF TIME AND TO AUGMENT RECORD and an AFFIDAVIT OF BRYAN D. SMITH with attachments, were filed by counsel for Appellant on April 28, 2011. A NON-OPPOSITION TO ATTORNEY SMITH'S MOTION FOR EXTENSION OF TIME AND TO AUGMENT RECORD and BRP INCORPORATED'S UNCONTESTED MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL were filed by counsel for Respondent BRP Incorporated on April 28, 2011. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT RECORD be, and hereby is, DENIED as to the transcript listed below as I.A.R. 30 provides that any request for an additional transcript must provide the name of the court reporter and an estimate of the number of pages.

- 1. Transcript of the hearing conducted on July 19, 2010.

ORDER RE: APPELLANT'S MOTION FOR EXTENSION OF TIME AND TO AUGMENT RECORD AND RESPONDENT'S MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL - Docket No. 38109-2010

IT FURTHER IS ORDERED that Respondent BRP INCORPORATED'S MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

- 1. Memorandum in Support of petition for Attachment and in Opposition to Motion to Perfect Attorney Fee Lien, file-stamped July 15, 2010.

IT FURTHER IS ORDERED that Appellant's MOTION FOR EXTENSION OF TIME be, and hereby is, DENIED and the due date for filing Appellant's Brief shall be reset and Appellant's Brief shall be filed with this Court on or before thirty-five (35) days of the date of this Order.

DATED this 13 day of May, 2011.

For the Supreme Court

*Stephen W. Krayon*  
Stephen W. Krayon, Clerk

cc: Counsel of Record  
District Court Clerk

LAW CLERK

AUGMENTATION RECORD

ORDER RE: APPELLANT'S MOTION FOR EXTENSION OF TIME AND TO AUGMENT RECORD AND RESPONDENT'S MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL - Docket No. 38109-2010

# In the Supreme Court of the State of Idaho

KRYSTAL M. KINGHORN, f/k/a KRYSTAL )  
 M. BARRETT, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 KELLY N. CLAY, an individual, )  
 )  
 Defendant-Crossdefendant-Appellant, )  
 )  
 and )  
 )  
 BRP, INCORPORATED, )  
 )  
 Defendant-Crossclaimant-Respondent, )  
 )  
 and )  
 )  
 BANK OF COMMERCE, )  
 )  
 Defendant. )

ORDER RE: APPELLANT'S MOTION  
 FOR EXTENSION OF TIME AND TO  
 AUGMENT RECORD AND  
 RESPONDENT'S MOTION TO  
 AUGMENT THE CLERK'S RECORD  
 ON APPEAL

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 MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL were filed by counsel for  
 Respondent BRP Incorporated on April 28, 2011. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT RECORD be, and  
 hereby is, **DENIED** as to the transcript listed below as I.A.R. 30 provides that any request for an  
 additional transcript must provide the name of the court reporter and an estimate of the number of  
 pages.

1. Transcript of the hearing conducted on July 19, 2010.

ORDER RE: APPELLANT'S MOTION FOR EXTENSION OF TIME AND TO AUGMENT  
 RECORD AND RESPONDENT'S MOTION TO AUGMENT THE CLERK'S RECORD ON  
 APPEAL – Docket No. 38109-2010


IT FURTHER IS ORDERED that Respondent BRP INCORPORATED'S MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Memorandum in Support of petition for Attachment and in Opposition to Motion to Perfect Attorney Fee Lien, file-stamped July 15, 2010.

IT FURTHER IS ORDERED that Appellant's MOTION FOR EXTENSION OF TIME be, and hereby is, **DENIED** and the due date for filing Appellant's Brief shall be reset and Appellant's Brief shall be filed with this Court on or before thirty-five (35) days of the date of this Order.

DATED this 13 day of May, 2011.

For the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk

ORDER RE: APPELLANT'S MOTION FOR EXTENSION OF TIME AND TO AUGMENT RECORD AND RESPONDENT'S MOTION TO AUGMENT THE CLERK'S RECORD ON APPEAL – Docket No. 38109-2010

**Exhibit A**

**Exhibit A**

Bradley J. Dixon, ISB No. 6167  
 Email: *bjdixon@stoel.com*  
 Jennifer M. Reinhardt, ISB No. 7432  
 Email: *jmreinhardt@stoel.com*  
 STOEL RIVES LLP  
 101 S. Capitol Boulevard, Suite 1900  
 Boise, Idaho 83702  
 Telephone: (208) 389-9000  
 Fax Number: (208) 389-9040

DISTRICT SEVEN COURT  
 County of Fremont State of Idaho  
 Filed: JUL 15 2010  
 ABBIE MACE, CLERK  
 By: *[Signature]* Deputy Clerk

Attorneys for Defendant/Cross Claimant BRP,  
 Incorporated

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

KRYSTAL M. KINGHORN, f/k/a  
 KRYSTAL M. BARRETT,

Plaintiff,

v.

KELLY N. CLAY, an individual, BRP,  
 INCORPORATED, an Idaho corporation,  
 and THE BANK OF COMMERCE, an  
 Idaho Banking corporation,

Defendants.

BRP INCORPORATED, an Idaho  
 corporation,

Cross-Claimant,

v.

KELLY N. CLAY, an individual,

Cross-Defendant.

Case No. CV-07-0306

**MEMORANDUM IN SUPPORT OF  
 PETITION FOR ATTACHMENT AND  
 IN OPPOSITION TO MOTION TO  
 PERFECT ATTORNEY FEE LIEN**

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN  
 OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 1**

## I. INTRODUCTION

Kelly N. Clay ("Clay") opposes BRP Incorporated's ("BRP") Petition for Writ of Attachment with the legally unsupportable position that he should be provided the benefit of the funds necessary to finally effectuate a rescission of the property dispute at the center of this lawsuit. In sum, Clay's counsel is requesting that he be allowed to take the entirety of the sums that Clay could use to pay a portion of the BRP judgment, even though this Court has already ruled that Clay is not a prevailing party and that BRP is entitled to reimbursement of the purchase price.<sup>1</sup> The position taken by Clay is even more novel when considering the simple reality that this Court has ruled that Clay and his former counsel are singularly at fault for this debacle. Indeed, Clay both failed to properly foreclose on the mortgage and breached the warranty deed executed with BRP.

## II. ARGUMENT

### A. Idaho Code §3-205 Permits Counsel to Take a Lien on the Proceeds of the Successful Prosecution of a Cause of Action or Counterclaim.

Idaho Code § 3-205 states in relevant part:

*From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.*

---

<sup>1</sup> A conflict exists between Clay and his counsel in this regard. BRP has a judgment against Clay for damages resulting from the breach of the warranty deed and attorney fees related to defending the title of the property and prosecuting the breach of warranty deed claim. That judgment is accruing interest at the statutory rate. Clay's counsel effectively seeks to retain the entirety of the sums owed to Clay by Kinghorn and prevent Clay from resolving a significant portion of judgment to BRP occurring within the same lawsuit that is accruing interest on a daily basis.

(emphasis added).

For purposes of the dispute now before this Court, the attorney lien statute imposes two requirements. First, the lien is only available to counsel that actually prosecutes a complaint or counterclaim. Second, counsel may only place a lien on funds that are a result of a **successful prosecution** of such complaint or counterclaim. Clay's counsel does not satisfy either of these requirements.

**1. Defendant/Cross-Defendant Clay Has Not Plead Any Cause of Action or Counterclaim.**

This lawsuit stems from a bungled loan transaction resulting from the actions of Clay and his former counsel. The complaint served in this lawsuit was asserted by Ms. Kinghorn against Clay, BRP and The Bank of Commerce. Clay served his answer to the complaint on June 22, 2007. Therein, Clay asserts no counterclaim or cross claim against any of the parties. Following this Court's determination that BRP was not a bona fide purchaser in good faith, BRP successfully prosecuted a claim against Clay for breach of warranty deed.

In his Brief in Support of the Motion for Order to Perfect Attorney's Fees Lien, Clay states "Clay has a cause of action against Kinghorn and BRP," *Id.* at 4. In sum, Clay's position is that he **could assert** a cause of action against Ms. Kinghorn based on her failure to make loan payments to the bank and **could have had** an action against BRP for return of the property. This argument does not satisfy the statute and ignores the plain language of the statute. Idaho Code § 3-205 provides the attorney with a lien on the proceeds from the commencement of a cause of action or counterclaim. Clay's counsel has never served any cause of action or counterclaim in this lawsuit.

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN  
OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 3**

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In addition, Clay does not have a cause of action against BRP. First, following the decision by this Court that BRP was not a bona fide purchaser, BRP reconveyed the property to Clay. Secondly, Clay himself executed a warranty deed in favor of BRP representing and warranting that the property was free from encumbrances. There is no basis for Clay to assert a cause of action against BRP when the result of his own actions is the basis for both the breach of warranty deed and BRP's bona fide purchaser status.

**2. Even if Defendant/Cross-Defendant Had Plead a Cause of Action, He is Not the Prevailing Party With Respect to Any Portion of This Lawsuit.**

Clay brashly suggests that "this court has issued a decision or judgment in Clay's favor on both the \$22,235.33 and return of the property to Clay." See Brief in Support of the Motion for Order to Perfect Attorney's Fees Lien at 4.

Clay's argument in this regard is a myopic presentation of the resolution of this lawsuit and asks this Court to ignore the reality of his litigation position throughout the case. From the beginning of this lawsuit, Clay argued that the loan arrangement between him and Ms. Kinghorn was not a mortgage. Ms. Kinghorn prosecuted this lawsuit for nearly two years to establish that she was deprived of her statutorily guaranteed rights under a mortgage agreement. Similarly, Clay argued for the same period of time that he took title free and clear of any encumbrance and that BRP was therefore a bona fide purchaser in good faith. Indeed, had Clay argued otherwise, he would have effectively admitted to a breach of the very warranty deed he signed.

On August 22, 2008, this Court entered the Opinion, Decision, and Order on Parties' Motions for Summary Judgment. Therein, this Court ruled against Clay, and in favor of Ms. Kinghorn finding that the loan arrangement was a mortgage and that Clay "failed to honor Plaintiff's right of redemption." *Id.* at 6. In so deciding, this Court specifically addressed the

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN  
OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 4**

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fact that both BRP and Clay had argued that BRP was a bona fide purchaser in good faith. *Id.* However, the Court concluded that there was an issue of fact as to the reasonableness of BRP's investigation.

On January 12, 2009, this Court entered the Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment and Defendant Clay's Motion to Reconsider. In that decision, this Court determined that BRP's knowledge of the quitclaim deed, reliance on Clay's representations of the loan and failure to physically inspect the property were not sufficient investigation. *Id.* at 6. The same Order required the parties to proceed with unwinding the transactions at-issue in this lawsuit. BRP was order to reconvey the property and Clay was ordered to hold a foreclosure sale.

On August 6, 2009, Clay and Ms. Kinghorn agreed to perform an accounting and file cross motions for summary judgment on the costs that should be charged to them each in lieu of a foreclosure sale.

On January 26, 2010, this Court entered the Opinion, Decision, and Order on Motions for Summary Judgment and Defendant Clay's Motion to Strike ruling on the cross motions regarding the accounting. In sum, the Court concluded that Ms. Kinghorn was entitled to reclaim the property but would be required to pay Clay \$22,235.33 related to his payment of the loan from the Bank of Commerce. In addition, this Court ruled that neither Clay nor Kinghorn were the prevailing party in this lawsuit and neither entitled to their attorney fees. *Id.*

Since that time BRP has prevailed on its claim against Clay and has been awarded damages against Clay in the amount of \$31,408.96 and \$32,691.00 in attorney fees and costs.

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN  
OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 5**

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It is unfortunate that this lawsuit proceeded the way it did. With the clarity of hindsight it is obvious that the appropriate approach was to simply unwind the transaction. That is precisely what this Court has done with its rulings. This resolution requires that Ms. Kinghorn gets her property back, Clay gets reimbursed for the loan obligation he paid on Ms. Kinghorn's behalf and BRP is reimbursed for its purchase of the property and Clay's breach of the warranty deed. However, Clay's counsel now asks this Court to give him the benefit of sums his client wrongfully obtained from BRP and leave the entirety of the judgment intact. In effect, the motion to perfect an attorney lien is an attempted end around this Court's ruling that Clay is not a prevailing party, to BRP's detriment. Worse, this gambit by Clay would provide him the opportunity to avoid a judgment owed to BRP arising out of the same transaction.

**B. BRP is Entitled to a Writ of Attachment on the Funds Owed to Defendant/Cross-Defendant Clay by Plaintiff.**

Idaho Code § 8-501 provides the basis for a writ of attachment. Clay has argued that a writ of attachment upon the proceeds owed by Ms. Kinghorn to Clay is not proper because BRP has obtained a final judgment. Clay's argument in this regard fails to consider the procedural reality of this lawsuit and requests that the Court consider form over function.

There is no doubt that Idaho Code § 8-501 is often used as a provisional remedy. However, one must consider the mechanism by which the attachment statute is utilized. The attachment statute is utilized as a provisional remedy in a lawsuit where a liquidated amount is owed under contract and finite unencumbered property or assets are available to attach. The statute is used very differently as collection mechanism involving a final judgment. Obviously, following final judgment the easiest collection effort is to simply foreclose on the asset or seek an order of garnishment. However, Idaho Code § 8-502 specifically contemplates a separate

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action for attachment. *See Idaho Code § 8-502(b)*. There is no statutory basis for the argument that attachment cannot apply after the existence of a final judgment or when the lawsuit is still pending and not final as to all parties.

This case presents a very different procedural reality from the typical two party lawsuits for the collection of a debt. BRP does have a final judgment. However, the lawsuit before the Court is not final and Clay and Ms. Kinghorn have continued to litigate disputed issues. Indeed, until very recently, it was unclear if Ms. Kinghorn would pay the amounts owed or simply allow Clay to keep the property. With an open lawsuit and issues still in dispute, the attachment statute clearly applies to permit BRP to pursue collection efforts inside the existing lawsuit. It is waste of judicial resources to expect BRP to open a new case to pursue attachment or seek garnishment of Clay's accounts particularly in light of the lack of clarity on the form of the asset.

**1. The Supplemental Brief Opposing Petition for Writ of Attachment is Untimely and Misstates the Facts.**

On the very afternoon that BRP's response was due, Clay served the Supplemental Brief Opposing Petition for Writ of Attachment ("Supplement"). In the original brief Clay argues that a writ of attachment is not available because BRP has or should have a final judgment. As discussed above, that argument ignores the procedural reality of this lawsuit as well as any notion of judicial economy. The Supplement makes the exact opposite argument; that BRP cannot obtain a writ of attachment because it does not have a final judgment and should have to file a separate lawsuit on the judgment. Again, this ignores the procedural setting of this case and misstates the facts.

BRP does have a final judgment. The Amended Final Judgment was entered by this Court on June 7, 2010 and recorded with the Bonneville County Recorder as Instrument 1366203

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN  
OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 7**

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on June 18, 2010. The Amended Final Judgment was also recorded with the Fremont County Recorder as Instrument 528618 on June 15, 2010.

Clay would argue for a ruling that attachment is not proper unless a separate cause of action were filed for collection on the judgment. This approach is not supported under the statute and is a clear effort at providing for the collection of attorney fees by a party that did not prevail.

**C. Counsel For Ms. Kinghorn as Indicated an Intent to Interplead the Disputed Funds and This Court Should Order that Such Funds Be Turned Over to BRP.**

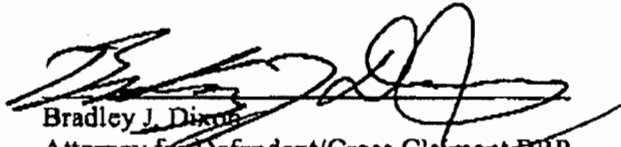
On July 14, 2010, Counsel for Ms. Kinghorn indicated an intention to interplead the disputed funds unless Clay and BRP come to agreement on the disbursement of the money. BRP believes that this may moot the petition for writ of attachment at some level. The attachment and/or interpleader action may be avoided by an order from this Court simply ordering that the redemption funds be turned over by Ms. Kinghorn directly to BRP. This is consistent with the Court's earlier ruling seeking to unwind the at-issue transaction.

**III. CONCLUSION**

Based on the foregoing, this Court should deny the proposed attorney charging lien and should direct that the funds owed by Ms. Kinghorn be paid directly to BRP.

DATED: July 15, 2010.

STOEL RIVES LLP

  
Bradley J. Dixon  
Attorney for Defendant/Cross Claimant BRP,  
Incorporated

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN  
OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 8**

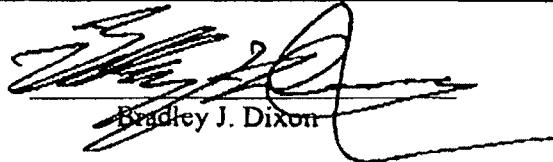
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15 day of July, 2010, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN** by the method indicated below, addressed to the following:

Jon J. Shindurling District Judge Bonneville County District Court 605 N. Capital Avenue Idaho Falls, ID 83402	Via Facsimile
E.W. Pike Erika Lessing E.W. PIKE & ASSOCIATES, P.A. 151 N. Ridge Ave., Suite 210 PO Box 2949 Idaho Falls, ID 83403 Facsimile: 208-528-6447 <i>Attorneys for Plaintiff</i>	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Hand Delivery
Bryan D. Smith SMITH, DRISCOLL & ASSOCIATES 414 Shoup Avenue PO Box 50731 Idaho Falls, ID 83405 Facsimile: 208-529-4166 <i>Attorney for Defendant Kelly Clay</i>	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via Hand Delivery

By:



Bradley J. Dixon

**MEMORANDUM IN SUPPORT OF PETITION FOR ATTACHMENT AND IN OPPOSITION TO MOTION TO PERFECT ATTORNEY FEE LIEN - 9**