

9-28-2011

# Blankenship v. Washington Trust Bank Respondent's Brief Dckt. 38426

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TERESA R. BLANKENSHIP,

Petitioner,

v.

WASHINGTON TRUST BANK,

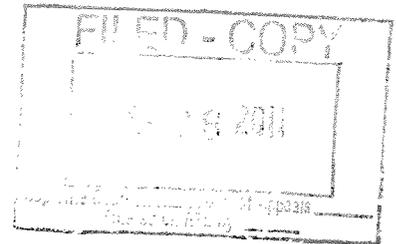
Respondent-Respondent on Appeal.

WILLIAM MICHAEL BOWMAN and ERIC  
BOWMAN,

Intervenors-Appellants.

Supreme Court Docket No. 38426-2011  
Bonner County Case No. CV-2007-572

RESPONDENT'S BRIEF



**RESPONDENT'S BRIEF ON APPEAL**

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Appeal from the District Court of the First Judicial District  
of the State of Idaho, in and for the County of Bonner

---

The Honorable John T. Mitchell, District Court Judge

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## I. STATEMENT OF THE CASE

### A. Statement of the Case

This case is on appeal from the Idaho District Court for the First Judicial District Court, Bonner County. Appellants/Intervenors William Michael Bowman and Eric Bowman appeal from the trial court's *Order Regarding Respondent's Motion for Summary Judgment*, made final by entry of *Final Judgment Dismissing All Claims of Teresa A. Blankenship, William Michael Bowman, and Eric Bowman*.<sup>1</sup>

### B. Course of Proceedings

On April 3, 2007, Teresa Blankenship ("Teresa") filed a judicial *Petition* seeking removal of WTB as trustee and an injunction preventing WTB from selling real estate trust assets to replenish the principal of the trust shares.<sup>2</sup> Teresa later amended her *Petition* to add a damages claim against WTB for negligent operation of trust.<sup>3</sup>

On August 26, 2008, WTB moved the trial court for leave to resign as Trustee,<sup>4</sup> and the trial court granted the motion on September 10, 2008.<sup>5</sup> On October 21, 2008, William Michael Bowman ("Michael") moved to intervene in the action and was granted leave on November 12, 2008; however, he did not file a *Complaint* at that time.<sup>6</sup> On January 29, 2009, WTB moved for summary judgment dismissing all of Teresa's claims.<sup>7</sup> Michael still had not yet filed a complaint

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<sup>1</sup> R., Vol. III, p. 586-589

<sup>2</sup> R., Vol. I, p. 23-26.

<sup>3</sup> R., Vol. I, p. 158-64.

<sup>4</sup> *Id.* at 163-65.

<sup>5</sup> *Id.* at 174-77.

<sup>6</sup> *Id.* at 197-98; R., Vol. II, p. 209-10.

<sup>7</sup> R., Vol. II, p. 213-51.

asserting any claims and therefore Michael was not yet subject to WTB's pending summary judgment motion.<sup>8</sup>

Michael eventually filed his *Complaint* on February 17, 2009, seeking an injunction against the sale of real estate trust assets, an order quieting title as to the Deed of Trust, and damages for breach of fiduciary duty and negligent operation of trust.<sup>9</sup> On February 24, 2009, Eric Bowman ("Eric") moved to intervene, relying on Michael's causes of action.<sup>10</sup> The trial court granted Eric's motion to intervene at the hearing held March 2, 2009, just prior to the hearing on WTB's motion for summary judgment.<sup>11</sup> Eric did not file his *Complaint* until March 12, 2009, well after the summary judgment hearing.<sup>12</sup>

At summary judgment, the trial court heard argument, granted WTB's motion in part, and dismissed the claims for removal of WTB as Trustee and injunctive relief on the grounds that those claims were moot in light of WTB's voluntary resignation<sup>13</sup> as Trustee. The trial court also dismissed the claims for breach of fiduciary duty on the grounds that WTB's actions were authorized by the trust instrument and Idaho law.<sup>14</sup> The trial court denied WTB's remaining motion and left the claim for negligent administration of trust for trial, as well as the issue of whether Teresa, Michael, and Eric had standing to bring suit.<sup>15</sup>

On the morning of trial, Teresa settled and voluntarily dismissed her claims against WTB, and Michael and Eric advised the court that they would not participate in trial but would instead preserve their right to appeal only the trial court's order granting summary judgment to

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<sup>8</sup> R., Vol. II, p. 296-300

<sup>9</sup> *Id.* at 296-300.

<sup>10</sup> *Id.* at 322-24; R., Vol. III, p. 454-58.

<sup>11</sup> Tr. Hr'g re: Mot. for Summ. J., at 26:23—27:1 (Mar. 2, 2009).

<sup>12</sup> R., Vol. III, p. 454

<sup>13</sup> R., Vol. III, p. 425-29.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

WTB.<sup>16</sup> On November 10, 2010, the trial court entered its *Final Judgment Dismissing All Claims of Teresa A. Blankenship, William Michael Bowman, and Eric Bowman*.<sup>17</sup> Michael and Eric filed their *Notice of Appeal* on December 21, 2010.<sup>18</sup> In their *Appellants' Brief*, Michael and Eric appeal only the trial court's grant of summary judgment to WTB dismissing their claim for breach of fiduciary duty.

### **C. Statement of the Facts**

1. Michael and Eric are the sons of Althea Lorraine Bowman ("Althea"), who is deceased. In addition to Michael and Eric, Althea had two other children, Teresa Blankenship and Ryan Bowman ("Ryan"), all of whom survived her.<sup>19</sup>

2. On October 9, 1998, Althea executed her Last Will and Testament ("Will").<sup>20</sup> The Will provided that, upon her death, the residual of Althea's estate would go into a trust that was to be divided into four equal shares, one for each of Althea's children ("Trust").<sup>21</sup>

3. The Will expressly provided that each child's share was to be managed and distributed separately from the other children's shares.<sup>22</sup>

4. During the term of the Trust, the Trustee was directed to pay to each child all of the current net income of that child's "trust."<sup>23</sup> Whenever the Trustee determined that the net income of any child, from all sources known to the Trustee, was not sufficient for his or her support, health, maintenance, and education, the Trustee was to pay to the child or use for his or

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<sup>16</sup> *Id.* at 588.

<sup>17</sup> *Id.* at 586–89.

<sup>18</sup> *Id.* at 590–94.

<sup>19</sup> R., Ex. Affidavit of Susan Kuzma in Supp. of Resp't's Mot. for Summ. J., Ex. A, art. I [hereinafter "Kuzma Aff."].

<sup>20</sup> *Id.* Ex. A.

<sup>21</sup> *Id.* art. IV, § A.

<sup>22</sup> *Id.* § C.

<sup>23</sup> *Id.*

her benefit so much of the principal of the child's "trust" as the Trustee in his or her discretion determined to be reasonable for those purposes.<sup>24</sup>

5. When any child reached the age of sixty (60) years, the Trustee was to distribute to the child the balance of "his or her trust."<sup>25</sup>

6. The Will repeatedly refers to each child's share as an individual "fund" or "trust."<sup>26</sup> After the creation of the trust upon Althea's death, each of the children's shares held different assets, save for real estate assets that each child's share had an undivided one-fourth interest in.<sup>27</sup>

7. Respondent WTB took over as Trustee in late 2002 after being appointed successor Trustee by the Trust.<sup>28</sup> As Trustee, WTB administered the children's shares as four separate trusts.<sup>29</sup>

8. The duties, powers and rights imposed and granted by the Will were additional to those imposed by and granted by law, which under Idaho law, such powers and rights expressly and specifically included the power of the Trustee to borrow money to be repaid from trust assets, to advance funds for the protection of the trust, and to encumber, mortgage, or pledge a trust asset.<sup>30</sup>

9. In the course of the Trust's term, Ryan's reasonable support and health expenses greatly exceeded the income of his trust share and began drawing on the principal<sup>31</sup> of Ryan's trust. When Ryan's reasonable financial needs exceeded his trust share, WTB's wealth

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § C(3).

<sup>26</sup> *Id.* §§ B-C.

<sup>27</sup> R., Ex. Affidavit of Peter J. Smith in Supp. of Resp't's Mot. for Summ. J., Ex. D at 47:8-13 [hereinafter "Smith Aff."].

<sup>28</sup> R., Vol. I, p. 23-26, ¶ 3; Smith Aff., Ex. B, Interrogatory No. 25.

<sup>29</sup> See Kuzma Aff., ¶ 4, at 2.

<sup>30</sup> *Id.*; see also Idaho Code § 68-106(c)(18); Idaho Code § 68-106(c)(17).

<sup>31</sup> R., Ex. Smith Aff., Ex. D at 70:3-6.

management department, acting as Trustee for Ryan, borrowed money from WTB's lending department, which was not acting in a trustee capacity.<sup>32</sup> The borrowed funds were distributed to Ryan's trust share for Ryan's reasonable support, maintenance and financial needs, and were to be repaid by future income and principal from Ryan's trust share or the sale of real estate trust assets.<sup>33</sup>

10. After the necessary advances were made to Ryan's trust share, a tenant who was leasing real property trust assets contacted WTB about a sale of the leased real property.<sup>34</sup> In light of the depleting principal, WTB, as Trustee, considered selling some of the real estate assets<sup>35</sup> in order to generate necessary income for the beneficiaries' needs. Upon learning that WTB was considering the sale of Trust real property, Teresa, Michael, and Eric objected and filed this lawsuit, seeking an injunction blocking the sale of any real estate assets. Ryan never objected and never participated or appeared in this litigation in any way.

11. By the Fall of 2007, Ryan was not the only child who exceeded the income of his trust share; all of Althea's children (including Petitioner Teresa and Intervenors Michael and Eric herein) exceeded the income of his or her trust share and began drawing on the principal of their individual trust shares.<sup>36</sup> Although insufficient income existed, Teresa, Michael, and Eric also requested that WTB increase their monthly income distributions from \$1,750 to \$3,000.<sup>37</sup>

12. Pursuant to the advances to Ryan's trust share, which Ryan needed to cover his reasonable support and financial expenses, WTB, as Trustee, issued a promissory note ("Note")

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<sup>32</sup> Kuzma Aff., ¶ 9–10, at 3.

<sup>33</sup> *Id.* at ¶ 10; Smith Aff., Ex. C at 49:21–50:1.

<sup>34</sup> *Id.* Ex. D at 70:23–72:14.

<sup>35</sup> *Id.* at 69:21–70:9.

<sup>36</sup> *Id.* at 70:3–6.

<sup>37</sup> *Id.* Ex. C at 56:23–57:2; 51:22–52:23.

and granted a deed of trust (“Deed of Trust”) to WTB’s lending department.<sup>38</sup> The Deed of Trust explicitly states that it encumbers only the undivided one-fourth interest held by Ryan’s trust share in the real property collateral.<sup>39</sup> No assets of Teresa, Michael, or Eric’s trust shares were encumbered. The Note and Deed of Trust only applied to Ryan’s trust share because Ryan’s trust share income was inadequate to cover his reasonable support and financial needs, and WTB was blocked by Teresa, Michael, and Eric from selling any real property assets to generate trust income.

13. Ryan has never sued and has never asserted any claims against WTB.

## **II. ADDITIONAL ISSUES PRESENTED ON APPEAL**

Did the trial court properly dismiss Michael and Eric’s claim for breach of fiduciary duty on account of actions taken by WTB that affected only Ryan’s one-fourth share of trust assets?

## **III. ARGUMENT**

WTB seeks a ruling upholding the trial court’s grant of summary judgment dismissing Michael and Eric’s claim for damages for breach of fiduciary duty on the grounds that WTB’s actions were authorized by the Will and Idaho law and that Michael and Eric have suffered no damages or injury as a result of WTB’s actions.

### **A. Standard of Review**

On an appeal from an order granting summary judgment, although the appellate court applies the same standard of review that is used by the trial court, the appellate court may affirm on the correct theory even if the district court’s order was based on an erroneous theory. *Summers v. Cambridge Joint School Dist. No. 432*, 139 Idaho 953, 955, 88 P.3d 772, 774 (2004). In other words, an appellate court is not constrained by the legal theories relied upon by the trial

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<sup>38</sup> Kuzma Aff., Ex. B; R., Ex., Aff. of Susan J. Kuzma in Supp. Of Resp.t’s Mot. For Ord. Directing Trustee to Make Loan Payment, Ex. 1.

<sup>39</sup> *Id.*

court and “may affirm a lower court’s decision on a legal theory different from the one applied by that court.” *In re Suspension of Driver’s License of Gibbar*, 143 Idaho 937, 948, 155 P.3d 1176, 1187 (Ct. App. 2006).

Additionally, “[a] cause of action not raised in a party’s pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.” *O’Guin v. Bingham County*, 139 Idaho 9, 15, 72 P.3d 849, 855 (2003); *see also Obenchain v. McAlvain Constr., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) (“Appellate court review is limited to the evidence, theories, and arguments that were presented below.”)

**B. Under the Express and Specific Terms of the Will, WTB Lawfully Exercised Its Power To Advance Its Own Funds To Ryan’s Trust Share and To Secure the Advance of These Funds with a Deed of Trust Encumbering the One-Fourth Real Property Interest of Ryan’s Trust Share.**

The express terms of the Will make it clear that Althea intended that trust funds were to be used for the reasonable and necessary support of her children. The Will mandates that “during the term of this Trust, the Trustee shall pay to the child all of the current net income of the child’s trust share.”<sup>40</sup> If the income is insufficient to meet the child’s needs, the Will requires the Trustee to dip into the principal of each child’s trust share as is reasonable:

*Whenever the Trustee determines that the net income of any child of mine from all sources known to the Trustee is not sufficient for his or her support, heath, maintenance, and education, the Trustee shall pay to the child or use for his or her benefit so much of the principal of the child’s trust as the Trustee determines to be reasonable for those purposes.*<sup>41</sup>

Althea also gave the Trustee the express authority to loan trust funds to a child in the midst of an urgent financial hardship that his or her own resources cannot solve.<sup>42</sup> Because the Will divided the Trust corpus into four (4) equal shares, a loan of trust funds to one beneficiary who had

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<sup>40</sup> Kuzma Aff., Ex. A, art. IV, § C(1).

<sup>41</sup> *Id.* at § C(2) (emphasis added).

<sup>42</sup> *Id.* art. VI, § 10.

insufficient resources would necessarily come from the other three beneficiaries' income and principal accounts, thereby depleting the funds available to those beneficiaries. Thus, it is evident from the Will that the fundamental purpose of the trust is to ensure the reasonable needs of Teresa, Michael, Eric, and Ryan, without depleting the funds available to the other beneficiaries.

Michael and Eric assert that the loan of funds made by WTB to Ryan's trust share and the Deed of Trust granted to WTB violate the terms of the Will, despite the undisputed fact that the funds were distributed to Ryan for his care and support.<sup>43</sup> When Ryan's support, health, and maintenance needs exceeded the income account and principal in his trust share and he faced a financial hardship, WTB had a duty under the terms of the Will to use its discretion and ensure that Ryan's reasonable financial needs were met. WTB contemplated selling real estate trust assets to liquidate principal and generate income, as it was explicitly authorized to do under Idaho law<sup>44</sup>; however, Teresa, Michael, and Eric objected to the selling of the real property since the income and principal accounts in their trust shares were sufficient to cover their financial needs at that time. Based upon the threat of litigation, WTB determined it could not sell the real property to raise the necessary capital for Ryan's reasonable needs.<sup>45</sup> Therefore, WTB used its discretion as Trustee and decided the most prudent course of action was to advance its own money to Ryan's trust share in order to provide for Ryan's financial needs.<sup>46</sup> No harm would come to the other beneficiaries under this approach.

After Teresa filed her *Petition* seeking an injunction against the sale of real property trust assets, it became apparent that Teresa, Michael, and Eric's trust shares were also exceeding the

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<sup>43</sup> Smith Aff., Ex. C at 47:11-18. At her deposition, Susan J. Kuzma, the Trust Officer handling Ryan's trust share, testified that WTB expended \$147,000 to Ryan's trust share upon determining that the funds were "needed for [a] hardship reason." *Id.* Appellants have never disputed this fact.

<sup>44</sup> *Id.* Ex. D at 69:13-70:20; Idaho Code § 68-106(c)(7).

<sup>45</sup> Smith Aff., Ex. D. at 46:11-47:13.

<sup>46</sup> *Id.* Ex. C at 39:4-18.

income and depleting their trust principal.<sup>47</sup> Due to the litigation, WTB elected in its discretion to continue to advance funds to Ryan's trust share, for Ryan's reasonable medical and financial support, in order to avoid liquidating all four beneficiaries' interest in the real estate assets.<sup>48</sup> The Note and Deed of Trust were granted accordingly as against Ryan's trust share. In order to provide for Ryan's necessary financial needs, WTB advanced its own money to only Ryan's trust share<sup>49</sup> and secured the advance to Ryan's trust share with a Deed of Trust encumbering only the undivided one-fourth real property interest of Ryan's trust share.<sup>50</sup> No burden or encumbrance applied to Teresa, Michael, or Eric. In so doing, WTB acted for Ryan's benefit, ensured that only Ryan's interests were affected, and complied with all provisions of the Will. No violation of the Will or Idaho law occurred, and no harm or damages to Teresa, Michael, or Eric occurred.

1. Both the Will and Idaho Law Provided WTB With the Authority to Borrow Against Trust Assets and Advance Funds to the Trust.

The question before the Court is a purely legal one: Whether WTB's actions of loaning or advancing the funds to Ryan's trust share and encumbering Ryan's trust share's one-fourth real property interest, violated the Will or Idaho law.<sup>51</sup> The prudence or reasonableness of WTB's actions in loaning the money to Ryan's trust, is not at issue. Michael and Eric appeal only the trial court's grant of summary judgment; their claims that WTB negligently or imprudently managed the trust were not dismissed at summary judgment and were left over for trial.<sup>52</sup>

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<sup>47</sup> *Id.* Ex. D at 69:13–70:20.

<sup>48</sup> *See id.* Ex. C.

<sup>49</sup> *See id.* at 28:5–18, 33:3–34:21.

<sup>50</sup> R., Ex. Affidavit of Susan Kuzma in Supp. of Resp't's Mot. for Summ. J., Ex. B; *see also* Smith Aff., Ex. C at 40:17–41:15.

<sup>51</sup> In their *Memorandum in Opposition to Motion for Summary Judgment*, Michael and Eric argued only that WTB violated the terms of the trust and breached its fiduciary duty by referencing allegations related to “excessive expenses and costs incurred by the trustee, as well as the allegations of excessive charges by the trustee and the failure to obtain the appropriate income from the commercial tenants.” R., Vol. II, p. 291.

<sup>52</sup> R., Vol. III, p. 425–29.

However, Michael and Eric abandoned those claims by declining to participate in the trial and choosing instead, merely to preserve an appeal of the trial court’s grant of summary judgment.<sup>53</sup>

The Will expressly allows WTB to exercise “the duties, powers, and rights imposed and granted by law.” The powers of a trustee are set forth in the Uniform Powers of Trustees Act. Idaho Code §§ 15-7-401, 68-104 to -113. Section 68-106 states, in relevant part:

- (a) *From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).*
- (b) *In the exercise of his powers including the powers granted by this act, a trustee has a duty to act with due regard to his obligation as a fiduciary.*
- (c) *A trustee has the power, subject to subsections (a) and (b):*

.....

- (18) *to borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary.*

*Id.* § 68-106(c)(18) (emphasis added).

In sum, Idaho Code § 68-106(c)(18) states that the Trustee has the power “to borrow money to be repaid from trust assets” and “to advance money for the protection of the trust.” Thus, WTB possessed the power to borrow money to be repaid from trust assets and to advance funds to Ryan’s trust share pursuant to § 68-106(c)(18). In this case, WTB, as Trustee, borrowed money from itself for Ryan’s trust share. This loan was to be repaid from assets of Ryan’s trust share, including his trust’s one-fourth share of the income received from the rental or the sale of

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<sup>53</sup> *Id.* at 588.

real property trust assets.<sup>54</sup> Therefore, pursuant to the plain language of Idaho Code § 68-106(c)(18), WTB was within its express statutory authority to borrow money for the benefit of Ryan's trust share.

2. Both the Will and Idaho Law Provided WTB With the Authority to Encumber Ryan's Trust Assets By Granting a Deed of Trust.

Not only was WTB authorized to borrow against trust assets and to advance funds to the trust, Idaho Code § 68-106(c)(7) also authorizes the Trustee to “encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the Trustee.” Based upon the statutory authority set out in sections 68-106(c)(18) and (c)(7), WTB possessed the legal authority to borrow money, advance funds, and to encumber a trust asset. Section 68-106(c)(18) explicitly states that the Trustee may borrow money to be repaid by trust assets, and the Deed of Trust is an authorized encumbrance of trust assets that simply secures the repayment.

In this case, WTB borrowed and advanced funds for “the protection of the trust” and “because of the holding or ownership of trust assets,” pursuant to § 68-106(c)(18). The terms of the Will required that WTB distribute principal to Ryan for his support, health, and maintenance and to use trust assets to provide for Ryan in the case of a financial hardship. When the principal in Ryan's trust share dwindled to the real property assets,<sup>55</sup> WTB was required to distribute them to him in order to provide for his support, health, and maintenance. However, because those assets were also held by the Trustee for the benefit of Teresa, Michael, and Eric's trust shares, and those parties threatened to sue and objected to liquidation, WTB could not make a principal or income distribution to Ryan. Thus, in order to comply with Teresa, Michael, and Eric's demands that the real property not be sold, and also to ensure Ryan's support, health, and

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<sup>54</sup> Kuzma Aff., Exs. A & B.

<sup>55</sup> See Smith Aff., Ex. C at 54:8–12.

maintenance, WTB advanced its own funds to Ryan's trust share, and secured the encumbrance against Ryan's trust share in full compliance with Idaho Code § 68-106(c)(7).

In conclusion, as a matter of law, WTB possessed the power and authority under the Will and Idaho code to loan/advance its own funds to Ryan's trust share and to record a Deed of Trust to secure its loan/advance by encumbering the interest held by Ryan's trust share. Because the Trustee acted with specific and express authority granted under the Will, and pursuant to specific and express legal authority granted under Idaho Code, the trial court properly granted summary judgment and dismissed the Petitioner/Intervenors' claim seeking damages for breach of fiduciary duty. And because no breach of fiduciary duty occurred as a matter of law, the trial court's summary judgment order should be affirmed.

3. Article V of the Will is Inapplicable To the Facts of This Case and Thus There Has Been No Violation of Its Provisions.

The advance of funds to Ryan's trust share and the accompanying Deed of Trust do not violate Article V of the Will because that provision is a spendthrift provision that applies only to actions taken by Ryan Bowman as an individual/beneficiary; it does not apply to actions taken by WTB as trustee on behalf of Ryan's trust share. Article V is a standard spendthrift trust provision that states in its entirety:

*Neither the income nor principal of any trust created by this instrument shall be alienable by any beneficiary, whether by assignment or by any other method, and shall not be subject to be taken by his creditors or by any representative thereof, by any process whatever, including, but not limited to, proceedings in bankruptcy. This provision shall not limit the exercise of any power of appointment or the right to disclaim.<sup>56</sup>*

(Emphasis added).

Article V unambiguously applies only to a beneficiary's ability to alienate trust assets.

(Emphasis added). It places no limits on the actions that may be taken by the Trustee, and

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<sup>56</sup> Kuzma Aff., Ex. A, art. V.

because it is the actions of WTB as trustee that are being challenged in this appeal, Article V does not apply. The plain terms of the Note and Deed of Trust state that they were granted by WTB as Trustee, not by Ryan as beneficiary. Under Idaho law, the Trustee is the legal owner of trust assets. *See Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 745, 215 P.3d 457, 465 (2009). Accordingly, the Trustee is vested with ordinary powers of ownership such as the power to borrow funds against trust assets and to encumber trust assets. *See supra* Part III.B.1 & 2. If Article V were interpreted to prohibit the Trustee's ability to alienate trust assets, as Michael and Eric assert it does, it would directly conflict with Article VI which vests the Trustee with all the powers "imposed and granted by law," and Idaho Code §§ 68-106(c)(7) and (18).<sup>57</sup> Thus, the Court must construe Article V by its plain terms, which limit only a beneficiary's actions.

**C. Dismissal of Michael and Eric's Claim for Breach of Fiduciary Duty Was Correct Because They Have Not Been Injured or Damaged by WTB's Actions and Thus Have Neither Standing Nor a Right to Their Requested Relief.**

Not only did the trial court correctly rule that WTB's actions were authorized by the Will and Idaho law, summary judgment in favor of WTB on the claim for breach of fiduciary duty was proper because Michael and Eric suffered no injury or damages on account of WTB's actions. In the absence of injury, Michael and Eric's breach of fiduciary duty claim fails because (1) they do not have standing to bring suit, and (2) they are not entitled to their requested relief as a matter of law. Although the trial court's grant of summary judgment was not based on these theories, this Court has established that it is not constrained by the legal theories relied upon by the trial court and may affirm a lower court's decision on a legal theory different from the one applied by that court. Thus, the trial court's order dismissing the claim for breach of fiduciary

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<sup>57</sup> *Id.* art. VI, § A.

duty must be affirmed. *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 948, 155 P.3d 1176, 1187 (Ct. App. 2006).

1. Michael and Eric Lack Standing To Bring a Claim for Breach of Fiduciary Duty.

The issue of whether a party has standing is jurisdictional and therefore may be raised at any time, including on appeal. *E.g.*, *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006). In any event, the issue of whether Michael and Eric have standing was briefed and argued before the trial court at summary judgment.<sup>58</sup> “To satisfy the requirement of standing, ‘litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.’” *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).

In this case, there is no factual dispute relating to damages; instead, the parties disagree about the legal effect of WTB holding a Deed of Trust on the one-fourth real property interest of Ryan’s trust. Thus, the issue is purely one of law and is well-suited for review by this Court. Michael and Eric cannot demonstrate injury in fact that would allow a court to award damages to them because there has been no injury to either of their beneficial interests in the trust assets. Neither is there any future risk of injury to their beneficial interests because the Note and Deed of Trust granted to WTB only apply to Ryan’s one-fourth trust share, and does not apply to Michael and Eric’s trust shares.

The Will is explicitly clear that the trust estate was divided into four separate shares upon Althea’s death—one for each of her children—and that each share is to be independently managed and distributed for the respective child.<sup>59</sup> In this case, although Michael and Eric allege

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<sup>58</sup> R., Vol. II, p. 216–48; *id.* at 287–92; Tr. Hr’g re: Mot. for Summ. J. (Mar. 2, 2009).

<sup>59</sup> Article IV of the Will makes repeated references to “each share,” “each trust,” “the child’s trust,” and “his or her trust,” all indicating that each child’s beneficiary interest is separate and distinct from the other children’s interests. *Kuzma Aff.*, Ex. A. art IV.

that a breach of fiduciary duty occurred when the Note and Deed of Trust were granted against Ryan's trust shares, their trust shares remain wholly unaffected by the alleged breach, and thus, Michael and Eric have not been injured by WTB's actions. By its explicit terms, the Deed of Trust pertains only to the undivided one-fourth interest of Ryan's trust share. Neither Michael nor Eric ever had any rights or interest in Ryan's one-fourth trust share which is the collateral described in the Deed of Trust. As Ryan is the only person who has a beneficiary interest in the collateral, he is the only person who could be affected, i.e., injured by WTB's actions as Trustee in this matter. Ryan is the only person who could have standing to contest the Trustee's actions regarding his one-fourth trust share, yet, Ryan has never appeared or otherwise objected to WTB's actions in this case.

Michael and Eric's inability to raise a genuine issue of fact on the question of injury/standing is only highlighted by what they have alleged as their injury. They assert that they have been injured by the existence of the Deed of Trust because "[o]nce the foreclosure against the Ryan Bowman interest was completed, Washington Trust Bank would have the right to seek a partition action pursuant to Idaho Code § 6-501 and, ultimately, force the property to be sold in order to satisfy the amounts which were improperly advanced." Appellants' Brief, at 13–14. Thus, it appears that Michael and Eric rely solely on the assertion that a potential sale of the real property, at some unknown time in the future, could cause them injury, as the record is void of any other arguments or evidence as to any currently existing injury or damages. This argument is purely speculative and fails to raise any issue as to whether Michael and Eric's beneficial interests have ever been impaired.

In order for Michael and Eric's alleged injury to occur, several purely speculative events would have to occur at some unknown time in the future. WTB would first have to foreclose on

the Deed of Trust. The record is devoid of any indication of if, let alone when, such foreclosure may or may not occur. Thus, it is purely speculative. It is also important to note the effect of foreclosing the Deed of Trust. Upon foreclosure, WTB could then become a cotenant of the real property described in the Deed of Trust. WTB would hold only a one-fourth interest because that is all that was granted in the Deed of Trust, and the Trustee would hold the other three-fourth interests of trust shares for Teresa, Michael, and Eric. Should this occur, Michael and Eric would be in precisely the same situation that they would be in if the Note and Deed of Trust had never been granted—as the beneficiaries of a trust share that has a one-fourth interest in the property. No harm or injury would exist to Michael or Eric.

Michael and Eric’s alleged injury requires a second purely speculative event to occur as well. After foreclosure, WTB as a future owner would have to initiate a partition action. Both the occurrence and the result of a future partition action are highly speculative and based upon conjecture. But regardless, even if the real property was sold pursuant to partition that would not *per se* cause injury to Michael and/or Eric. Michael and Eric do not own the real property; title is vested in the Trustee.<sup>60</sup> They have a right to their share of the income and, in some instances, principal of trust assets. There is nothing in the Will that gives any beneficiary a vested interest in the real property not being sold/liquidated. In fact, the Trustee is vested with all powers under the law, which includes the power to sell real estate trust assets for cash. Idaho Code § 68-106(c)(7). Thus, even if a partition sale occurred, Michael and Eric’s rights under the express trust terms would not change. Michael and Eric would remain the beneficiaries of their trust shares which have a one-fourth interest in the sale proceeds.

Because Michael and Eric cannot demonstrate a “distinct palpable injury” to their beneficial trust interests, they lack standing to bring a claim for breach of fiduciary duty in this

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<sup>60</sup> See *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 745, 215 P.3d 457, 465 (2009).

case. *E.g.*, *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). As a result, the trial court’s order dismissing their claim for breach of fiduciary duty must be affirmed as a matter of law.

2. Michael and Eric Cannot Establish an Injury That Would Entitle Them to Recover Damages on Their Claim for Breach of Fiduciary Duty.

Not only does Michael and Eric’s lack of injury deny them standing in this case, it is also fatal to their claim for breach of fiduciary duty because they have requested relief in the form of damages. On the issue of damages, this Court has stated, “Assuming the wrongs were established[,] there could be no recovery without a showing of resultant injury.” *Barron v. Koenig*, 80 Idaho 28, 40, 324 P.2d 388, 395 (1958); *see also Williams v. Bone*, 74 Idaho 185, 188, 259 P.2d 810, 812 (1953) (“The compensatory damages suffered by plaintiff, if any, are limited to the pecuniary loss due to the wrongful acts of defendant.” (emphasis added)). Other courts, when addressing the measure of damages for a trustee’s alleged breach of the duty of loyalty, have held that damages “should be based on what would have occurred if the trustee had complied with the duty of loyalty (i.e., but for the breach of the duty of loyalty).” *Uzyel v. Kadisha*, 116 Cal. Rptr. 3d 244, 277 (Ct. App. 2010). Here, Michael and Eric are in precisely the same position they were in prior to the alleged breach because their beneficiary interests were not affected, much less adversely affected, by WTB’s actions.

Furthermore, Michael and Eric’s claimed damages are far too speculative to support a cause of action. Damages cannot be awarded when they cannot be determined by reasonable certainty, and reasonable certainty requires some evidence that brings the matter out of the realm of speculation. *See Griffith v. Clear Lakes Trout Co., Inc.*, 146 Idaho 613, 618, 200 P.3d 1162, 1167 (2009). Here, Michael and Eric’s asserted injury is entirely within the realm of speculation because it is conditional on two future events occurring—foreclosure of the Deed of Trust and

partition. Both of these events are entirely speculative and may never occur. These speculative future events are therefore insufficient to support any claim for damages. Because Michael and Eric cannot establish damages with any amount of reasonable certainty, they are not entitled to their requested relief, and thus the trial court's grant of summary judgment dismissing their breach of fiduciary claim was proper and must be upheld.

**D. Michael and Eric Impermissibly Raise Arguments Pursuant to Idaho Code § 68-502(3) For the First Time On Appeal.**

Michael and Eric raise issues and legal theories in their Appellate Brief that were not raised or addressed at the trial court, and thus, cannot be considered on appeal. As this Court has held, “[a] cause of action not raised in a party’s pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.” *O’Guin v. Bingham County*, 139 Idaho 9, 15, 72 P.3d 849, 855 (2003); *see also Obenchain v. McAlvain Constr., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) (“Appellate court review is limited to the evidence, theories, and arguments that were presented below.”)

In their *Complaint*, Michael and Eric sought the following relief: (1) an injunction preventing WTB from selling or encumbering trust real property; (2) an order quieting title in regards to WTB’s Deed of Trust; and (3) damages for breach of fiduciary duty/negligent operation and management of trust.<sup>61</sup> The *Complaint* alleges nothing in regards to whether WTB considered the factors set forth in Idaho Code § 68-502(3). Michael and Eric made no arguments regarding Idaho Code § 68-502(3) at the summary judgment proceedings. As a result of Intervenor/Appellants’ failure to raise this issue at the trial court level, they are precluded from raising this issue for the first time on appeal.

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<sup>61</sup> R., Vol. II, p. 299. Eric joined Michael’s *Complaint* thus made no additional claims. *See id.* at 322–23.

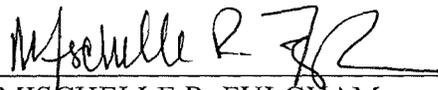
#### IV. CONCLUSION

This is a case in which WTB, as Trustee, used its discretion and acted under the mandates of the Will to ensure that the income and principal of Ryan's trust share were sufficient to meet his support, health, and maintenance needs. The Will authorized the Trustee to act pursuant to the powers granted by law. Idaho Code §§ 68-106(c)(7) and (18) authorize a trustee to borrow funds to be repaid by trust assets, advance funds for the protection of the trust, and encumber trust assets. WTB's actions in granting the Note and Deed of Trust fall within these expressly authorized powers. As a matter of law, no breach of fiduciary duty occurred.

Furthermore, WTB's actions pertained solely to Ryan's trust share and Ryan's trust assets. Michael and Eric have suffered no injuries that would confer standing for them to bring suit against WTB, as Trustee, for a breach of fiduciary duty. Michael and Eric's lack of injury also ensures that they cannot prevail on their claim for damages. For all of these reasons, the trial court's grant of summary judgment to WTB dismissing the breach of fiduciary duty claim was correct and must be affirmed.

DATED this 26<sup>th</sup> day of September, 2011.

LUKINS & ANNIS, P.S.

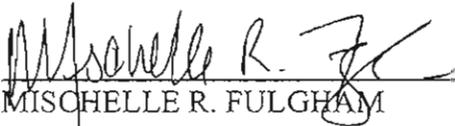
By   
MISCHELLE R. FULGHAM  
Attorneys for Respondent Washington Trust  
Bank

CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of September, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

James Theodore Diehl  
Attorney at Law  
106 West Superior Street  
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- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

  
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MISCHELLE R. FULGHAM