7-22-2011

Berkshires Investments, LLC v. Taylor Appellant's Brief Dckt. 38599

IN THE SUPREME COURT OF THE STATE OF IDAHO

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV. and COLLEEN BIRCH-MAILE, husband and wife,

Appellants,

v.

CONNIE WRIGHT TAYLOR, f/k/a CONNIE TAYLOR, DALLAN TAYLOR, R. JOHN TAYLOR, CLARK and FEENEY, PAUL T. CLARK, THEODORE L. JOHNSON REVOCABLE TRUST, JOHN DOES I -JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION.

Respondents

Supreme Court Docket No. 38599
District Case No. CV OC 07-23232

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada

The Honorable Richard Greenwood, District Judge presiding

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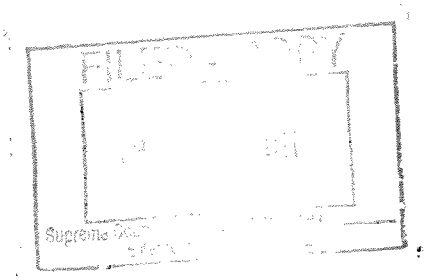

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal by Berkshire Investments, Thomas Maile and Colleen Maile, from a Judgment dismissing the Appellants' complaint, and a Judgment entered February 28, 2011 on the trust's counter-claim. The dispute evolved from a real estate transaction between the Theodore L. Johnson Revocable Trust, as seller (referred to as the "trust") and Berkshire Investments, as buyer. The Appellants filed their complaint against the Respondents alleging certain wrongful conduct including criminal conduct, fraudulent misrepresentations, and tortious conduct relating to a prior consolidated case captioned Taylor v. Maile. The Appellants assert multiple claims against the Respondents, to wit: (1) committing a fraud upon the court, (2) an imposition of a constructive trust, (3) tortious interference with contract, (4) tortious interference of prospective economic advantage and/or opportunity, (5) committing acts that constitute abuse of process, (6) committing acts constituting negligence, (7) violating criminal statutes which amount to Negligence Per Se, (8) committing acts constituting gross negligence, (9) committing acts amounting to equitable estoppel, (10) committing acts amounting to quasi estoppel, (11) committing acts in violations under Chapter 18 Title 78 of the I.C. (Racketeering), (12) committing acts which constitute judicial estoppel. The Respondents, The Theodore L. Johnson Revocable Trust, Dallan Taylor, and R. John Taylor filed their counter-clam alleging abuse of process, slander of title, and tortious interference of prospective economic advantage.

B. COURSE OF PROCEEDINGS

A complaint was filed by the Appellants on December 31, 2007. An Amended Complaint was filed on March 25, 2008 (R. Vol 1. p. 000060). The Respondents filed their Answers in May 2008. The Respondents filed their Motion to Dismiss/Motions for Summary Judgment. The parties filed pleadings in support and opposition to the motions. The trust & the Taylor brothers filed their Amended Answer and Counter-claim on February 17, 2009 (R. Vol 1. p. 001019). Clark & Feeney, Connie Taylor & Paul T. Clark filed their Amended Answer and Counter-claim on March 13, 2009 (R. Vol 1. p. 001030). The Appellants filed their Motion for Summary Judgment and supporting affidavits on March 17, 2009 (R. Vol 1. p. 01042). The Honorable Richard Greenwood, granted the Respondents' Motion for Summary Judgment dismissing the Appellants' claims by an Order entered July 2, 2009 (R. Vol 1. p. 001363). The District Court, reasoned that the claims of the Appellants were barred by res judicata.

The counter-claims of Clark & Feeney, Connie Taylor and Paul T. Clark were dismissed by stipulation on December 2, 2010 (R. Vol 1. p. 001882). The counter-claims of The Theodore L. Johnson Revocable Trust, Dallan Taylor, and R. John Taylor proceeded to jury trial resulting in a judgment against the Appellants on February 4, 2011 (R. Vol 1. p. 002408). On March 7, 2011, the Appellants filed their Notice of Appeal (R. Vol 1. p. 002438).

Pursuant to post-trial motions the District Court entered its Order on May 9, 2011, denying the Appellants' Motion for JNOV (R. Vol 1. p. 002521). The District Court awarded the

Respondents Clark & Feeney their costs and attorneys fees and further awarded the Respondent trust its costs (R. Vol 1. p. 002524).

C. STATEMENT OF THE FACTS

This Court previously considered certain issues involving the Appellants and The Theodore L. Johnson Revocable Trust, Reed Taylor, Dallan Taylor, and R. John Taylor, in the consolidated case captioned, Taylor v. Maile. Addendum "A" is a condensed recital of sworn verified statements, portions of deposition testimony, declarations against interests of key facts supporting the Appellants' claims.

Reed Taylor, Dallan Taylor, and R. John Taylor, as beneficiaries of the trust filed, their complaint against the Appellants on January 23, 2004 (T. E. 110 p. 385). The Honorable Judge Ronald Wilper, entered his Order dismissing the claims of the Taylors ruling that as beneficiaries the Taylors did not have standing to pursue their claims on their behalf or on behalf of the trust (R. Vol 1. p. 000198 ln. 19). On June 4, 2004, the Taylor brothers filed their Notice of Appeal regarding the Order dismissing the beneficiaries complaint (R. Vol 1. p. 000211 ln. 9).

On April 14, 2004, Connie Taylor drafted a letter to Bart Harwood which established that her clients, the Taylor brothers would disclaim their rights as beneficiaries of the trust in exchange for the successor nominated trustees, Beth Roger's cooperation and surrender of her trustee status, which would allow the Taylor brothers to gain control of the trust (R. Vol 1. p. 000561). On July 15, 2004, the Taylors entered into a "Disclaimer, Release and Indemnity

Agreement" with the nominated successor trustees and all other beneficiaries of the trust (R. Vol 1. p. 000611- annexed as Addendum B).

The Taylors pursuant to the Disclaimer, assuming they were the successor trustees of the trust filed a new Complaint against the Appellants on July 19, 2004. (Case 33781 R. Vol 1. p. 00005). While the Taylor brothers' appeal was pending, the current Appellants had claims pending against the Taylor brothers and the trust in the two consolidated cases before the Honorable Judge Wilper (Case 33781 R. Vol 1. p. 000053).

On October 20, 2004, the Appellants filed their Motion to Dismiss Complaint and Demand for Jury Trial/Motion for Summary Judgment relating to the "trust's" complaint. One of the issues raised by the Appellants in their Motion to Dismiss was the issue of the legitimacy of the complaint filed by the "trust" since the alleged successor trustees, (the individual Taylors) had not received the required Court appointment making them successor trustees, pursuant to I.C. 68-101 & I.C. 68-107 (case 33781 R. Vol 1. p. 00063).

The Taylor Brothers initially denied any court appointment was necessary for their appointment as successor trustees. After receiving the Motion to Dismiss, Connie Taylor representing her husband John Taylor filed a verified Petition for the Appointment of Trustees. The petition was executed by R. John Taylor on November 12, 2004, as a verification of the facts contained in the petition. Page 2 of the verified petition stated under oath, "the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the

terms of a Disclaimer, Release and Indemnity Agreement." (R. Vol 1. p. 000111). Prior to the Disclaimer Agreement, Helen Taylor was an income beneficiaries for her lifetime. Any distribution of income under the trust was discretionary with the trustees. Prior to the Disclaimer Agreement Helen Taylor had no right under the trust to receive any portion of the trust corpus (R. Vol 1. p. 000431 ln.9 thru 25).

The Taylors obtained an ex-parte order from the probate court on November 17, 2004, appointing them as successor trustees, retroactively to June 10, 2004 (R. Vol 1. p. 000067 ln. 6). On February 28, 2005, the Appellants filed appropriate pleadings before the probate court requesting that the ex-parte Order dated November 17, 2004 be set aside. On April 18, 2005, the probate court, entered its Order declaring the ex-parte Order entered on November 17, 2004 void (R. Vol 1. p. 000068 ln. 3).

On May 2, 2005, the Honorable Judge Christopher M. Beiter, entered an Order appointing R. John Taylor, Reed J. Taylor and Dallan J. Taylor as successor trustees of the Theodore L. Johnson Revocable Trust (R. Vol 1. p. 000068). At that probate court hearing John Taylor testified "my mother is the beneficiary of the trust" (R. Vol 1. pp. 000348).

The Honorable Judge Wilper entered his Memorandum Decision and Order on 7/28/05 allowing the trust to amend its complaint after the Taylor brothers received the required appointment by the probate court, and denying the Appellants' motion regarding that issue of law. Judge Wilper did however, grant the Appellants' motion in part ruling that the Taylor

Brothers, now with standing as trustees, had waived rights to rescind the contract as "once a party treats a contract as valid after the appearance of facts giving rise to a right of recision, the right of recision is waived."(R. Vol 1. p. 000649 ln. 10).

The trust & the Taylor brothers moved for summary judgment regarding the Appellants' counter-claim on May 13, 2005 (case 33781 R. Vol I. p. 84). On December 23, 2005, the Supreme Court, issued its Decision on the first appeal brought by the individual Taylors brothers (case 33781 R. Vol II. p. 227). The Supreme Court in its December 2005 Decision, held in Taylor v. Maile I, that beneficiaries such as the Taylor brothers had standing to pursue claims based upon the allegations contained in their complaint filed in January 2004. In light of the Decision, Judge Wilper ordered additional briefing regarding pending motions for summary judgment (case 33781 R. Vol II. p. 241).

On January 13, 2006, Connie Taylor prepared and filed a motion for leave to file an amended complaint with a proposed verified Amended Complaint, which R. John Taylor executed as a verified pleading (T.E. 132 p. 478). The Amended Complaint & Demand for Jury Trial was filed on March 9, 2006, alleging "all of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust" (case 33781 R. Vol II. p. 260).

Judge Wilper entered his Order Regarding Plaintiffs' Motion for Summary Judgment, on February 13, 2006, which granted in part and denied in part the trust & the Taylor brothers' Motion for Summary Judgment ruling that the Appellants were entitled to pursue portions of

their counter-claim, to wit: tortuous interference with contract claims, equitable estoppel, quasi-estoppel, and their claim alleging a fraudulent transfer (R. Vol 1. pp. 000268, 273 ln. 10).

On February 13,2006, the individual Taylor brothers, alleging they were beneficiaries, filed their Motion for Summary Judgment & Memorandum Brief (R. Vol I. pp. 000655, 000660). On May 15, 2006, the district court entered its Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claims (case 33781 R. Vol II. p. 281). The district court entered the "Judgment on ***Beneficiaries***' Claims" on June 7, 2006 (R. Vol 1. p. 000119). The Appellants filed their Lis Pendens on May 18, 2006 (R. Vol 1. p. 001052. An appeal was filed on December 12, 2006. Judge Wilper denied the Taylor Brothers' motion to remove the Vendee's Lien (R. Vol I. p. 001440).

During the appeal, the Appellants filed their independent action on December 31, 2007, alleging both equitable remedies and claims for damages (R. Vol 1. p. 000017). The Appellants filed their amended complaint and filed a Lis Pendens on March 18, 2008 (R. Vol 1. p. 001396).

On October 14, 2009 the Honorable Judge Wilper determined, the Appellants were entitled to maintain a vendee's lien against the property to secure the return of the purchase price, less costs which have been previously awarded by the Court (R. Vol I. p. 001440).

II. ISSUES ON APPEAL

1. Was the District Court correct in entering the Order dismissing the Appellants' Amended Complaint and Demand for Jury Trial?

2. Was the District Court correct in denying the Appellants' Motion to Reconsider?

3. Was the District Court correct in denying the Appellants' affirmative defense of litigation privilege which would have barred the counter-claims of the Respondents?

4. Was the District Court correct in denying the Appellants' claims to set aside the "Judgment based upon Beneficiaries' Claims", based upon "fraud upon the court" and/or fraud upon the court by "officers of the court"?

5. Was the District Court correct in dismissing the Appellants' claims based upon the fraudulent-criminal conduct of the Respondents in obtaining "Judgment based upon Beneficiaries' Claims"?

6. Did the "fraud upon the court" committed by the "officers of the court" vitiate all subsequent legal actions?

7. Was the Judgment entered on February 28, 2011 supported by substantial, and competent evidence?

8. Can the filing of a complaint give rise to a finding of an abuse of process and tortious interference with prospective business advantage?'

9. Was the verdict finding an abuse of process and tortious interference with prospective business advantage improper as respondents failed to provide any evidence contradicting that the lis pendens were properly filed?

10. Was the District Court correct in denying the Appellants' Motion for JNOV?

11. Was the District Court correct in awarding costs and attorneys fees pursuant to I.C. §§ 12-123 to the Respondents and denying the Appellants' costs?

12. Are the Appellants entitled to attorney's fees and costs on appeal pursuant to rules 40 and 41 of the Idaho Appellate Rules and I.C. §§ 12-121, 18-8701 et. Seq.?

II. ARGUMENT

1. SUMMARY JUDGMENT WAS IMPROPER AS RES JUDICATA DOES NOT APPLY TO THE APPELLANTS' CLAMS.

A. There was litigation misconduct committed by respondents that defeats the application of res judicata.

An analysis of the facts is required to determine the extent of the fraudulent-criminal behavior perpetrated by the Respondents before Judge Wilper. The fundamental and essential truth is that the Taylor Brothers and their counsel knew beyond certainty that the Taylor Brothers were no longer beneficiaries of the trust when they filed their verified pleadings in January 2006 claiming they were residual beneficiaries of the trust. The reason they provided such misrepresentations was to take advantage of the Idaho Supreme Court Decision rendered in December 2005, holding beneficiaries had standing to sue. The Respondents committed perjury and the subordination of perjury in obtaining the "Judgment on Beneficiaries' Claims". The case of State v. Wolfrum, 145 Id. 44, 175 P.3d 206, (Ct. App. 2007), commencing at p. 210 of 175 P.3d R, provides:

> The test for materiality is whether the testimony probably would or could influence a tribunal or jury on the issue before it. The false statement relied upon

> need not bear directly upon the ultimate issue of fact. A statement is material if it is material to any proper point of inquiry, and if it is calculated and intended to bolster the witness's testimony on some material point or to support or attack his credibility. The degree of materiality is not important.... It is sufficient that it was material, and might have been used to affect such proceeding.

The Taylor brothers suffered the loss of their claims as beneficiaries by Judge Wilper's Order of dismissal in April 2004. In order for any claim to continue they had to obtain control of the trust from the nominated successor trustees, the Rogers, and file a new action on behalf of the trust. The Taylor Brothers sold their birthrights to obtain control of the trust.

After the execution of the Disclaimer Agreement, John Taylor was clear and unequivocal under oath when he stated *"my mother, Helen Taylor, is the sole remaining beneficiary of the trust by virtue of the Disclaimer, Release and Indemnity Agreement"*. The verified petition executed on November 12, 2004, requested the Probate Court to appoint the Taylor brothers as trustees of the Theodore L. Johnson Revocable Trust. The petition prepared by Connie Taylor was executed by John Taylor as a verification of the facts. A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signatory is in substance an affidavit, and is accorded the same probative force as an affidavit. Ponderosa Paint Mfg., Inc. v. Yack, 125 Id. 310, 870 P.2d 663 (Ct. App. 1994).

The Verified Petition was filed by the Taylor brothers as a result of Appellants' Motion to Dismiss the trust's complaint. The motion alleged the Taylors had not obtained judicial appointment as non-nominated successor trustees. The Verified Petition before Probate Court

obtained the result it was intended to achieve. The Probate Court on November 17, 2004, appointed the Taylor brothers as successor trustees retroactive to the date of June 10, 2004. John Taylor not only provided his verified petition but he also provided clear and unequivocal deposition testimony that his mother was to receive any and all benefits of any fruits from the litigation (R. Vol 1. p. 2008) (tr. 2/3/11 p. 377 ln. 2; tr. 2/4/11 p. 95 ln.19 thru p.96 ln.9). A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact. Sun Valley Potato Growers, Inc. v. Texas Refinery Corp., 139 Id. 761, 86 P.3d 475 (2004).

John Taylor provided such declarations on two occasions prior to the opinion in Taylor v. Maile (1). Connie Taylor, acting for the benefit of the Taylors brothers in negotiating the terms of the Disclaimer Agreement, provided declarations that her clients would be willing to give up their rights as beneficiaries (R. Vol 1. p. 000561). Beth Rogers signed an affidavit as requested in the letter from Connie Taylor (R. Vol 1. p. 000541).

The Disclaimer Agreement, provides: "1.2 Disclaimer of All Other Interests....1.2.3: Taylor.... hereby disclaim all interests whatsoever in the Trust, in favor of their mother, Helen Taylor, and hereby approve immediate distribution to Helen Taylor." The Agreement recited the Taylors claimed an ownership interest in the claim or cause of action by the trust. The Taylor Brothers did not say they considered themselves residual beneficiaries of that portion of the

corpus relating to the cause of action. Nor did they say they were retaining an interest in any future corpus. The Taylor Brothers as beneficiaries did not have any ownership interest in the cause of action initiated by the trust. The trustee(s) owned the chose in action. Trust property is owned by the trustee. Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Id. 737, 215 P.3d 457 (2009). The beneficiaries of a trust do not have an ownership in the property.

The Taylor brothers were claiming an ownership interest in the litigation which they intended to pursue as a new cause of action as successor trustees. The Taylors wanted control of the new lawsuit because their prior suit ***initiated as beneficiaries*** had been dismissed.

The judicial admissions clearly establish the Taylors were no longer beneficiaries. The Taylors' mother became the " the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement". The Taylors after the Decision in Taylor v. Maile (1) found it convenient to attempt to undo their judicial admissions. The Respondents knew the district court had ruled prior to the Supreme Court Decision, that the **trust** did not have the remedy available of having the real property restored. The district court stated, "once a party treats a contract as valid after the appearance of facts giving rise to a right of rescission, the right of rescission is waived" (R. Vol 1. p. 000649 ln. 10).

Not only were the Taylor brothers no longer beneficiaries of the trust in 2006, they did not represent the interests of their mother. Helen Taylor was never a represented individual or an interested party in any part of the proceeding before Judge Wilper. The Taylor brothers

circulated written contracts to all beneficiaries which required beneficiaries to contribute to the cost of litigation if they were to be represented by the Taylor brothers. Helen Taylor never participated in the litigation which was brought by the Taylor brothers in January 2004. "(R. Vol I. pp. 000565, 569, 570,571, 574, 575).

The Taylor brothers' fraudulent-criminal conduct directly influenced the district court in entering the "Judgment on Beneficiaries' Claims". The Taylor brothers in their motion for summary judgment and their briefing were moving for summary judgment solely in their capacity as alleged "residual beneficiaries" (R. Vol I. pp. 000655, 000660). On May 15, 2006, the district court entered its Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claims (R. Vol I. p. 001355). The Order and resulting Judgment on Beneficiaries' Claims had nothing to do with Helen Taylor.

The primary object in interpreting a contract is to discover the intent of the parties, which should, if possible, be ascertained from the language of the document. Win of Michigan, Inc. v. Yreka United, Inc., 137 Id. 747, 750, 53 P.3d 330, 333 (2002). The objective in interpreting a contract is to ascertain and give effect to the intent of the parties. Luzar v. Western Sur. Co., 107 Id. 693, 697, 692 P.2d 337, 341 (1984). Where a contract is determined to be ambiguous, the interpretation of the document is a question of fact which focuses upon the intent of the parties.

Whether an ambiguity exists in a legal instrument is a question of law, over which an appellate court exercises free review. Cool v. Mountainview Landowners Coop. Ass'n, 139 Id.

770, 772, 86 P.3d 484, 486 (2004). Where a legal instrument is found to be unambiguous the legal effect must be decided by the district court as a matter of law; it is only when that instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact. Knipe Land Co. v. Robertson, 37002 (IDSCCI 2011).

Appellants properly alleged criminal and fraudulent misconduct on the part of the Respondents that removes res judicata as a bar to the Appellants' claims. Claims brought under I.R.C.P. 60(b) are not barred by res judicata because they are one of the recognized "avenues . . . for attacking a judgment." Waller v. State, Dept. of Health and Welfare, 146 Id. 234, 192 P.3d 1058 (2008). Allegations relating to a "fraud upon a court" and/or acts which amount to criminal conduct and/or misrepresentations warrant a good faith argument that a constructive trust should be imposed as well as relief of the judgment based upon such criminal conduct.

Whether to grant relief under Idaho Rules of Civil Procedure 60(b)is committed to the discretion of the trial court and will not be disturbed absent an abuse of the court's discretion. W. Cmty. Ins. Co. v. Kickers, Inc. 137 Id. 305, 306, 48 P.3d 634, 635 (2002). In reviewing whether or not a court abused its discretion this Court relies on a three-part test:

> (1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason. Campbell v. Kildew, 141 Id. 640, 115 P.3d 731 (2005).

The lower court did not articulate in its decision any appropriate basis for the denial of

equitable relief (R. Vol I 001374). The facts are overwhelming. The Taylors and their attorneys make a prima facie case against themselves solely on their own deposition testimony, verified pleadings and other declarations against interest. The judicial admissions and declarations against interest establish that there is a showing that the attorneys performed "some additional act in the use of the legal process that is not proper in the regular prosecution of the proceedings". Perjury and/or subordination of perjury is an act not performed in the proper course of legitimate representation of a client. See generally, Taylor v. McNichols, 149 Id. 826, 243 P.3d 642 (2010). The Respondents were playing loose and fast with the judicial system which demonstrated a tampering that is a wrong against the judicial institution and the public. Res judicata should have no application to the matter.

B. Officers of the court committed a "fraud upon the court" that warrants the Judgment on Beneficiaries' Claims being set aside.

Connie Taylor and her husband, R. John Taylor, were at all relevant times licensed Idaho attorneys and as such were "officers of the court".

Vol 12 Moore's Federal Practice § 60-21(4)(b) provides:

> One of the distinguishing facts in the leading Hazel-Atlas case was the participation of a lawyer for one of the party's in the creation as well as the presentation of the fraudulent evidence relied on by the Patent Office and the Third Circuit. As a result, subsequent courts have stated that the participation of an officer of the court in the fraud is either an essential element of fraud on the court contributing to the subversion of the adjudication process or an alternative basis for finding fraud on court.

The Sixth Circuit has quoted, with approval, a definition of fraud on the court that

consists of five elements: (1) conduct on the part of an officer of the court; (2) that is directed to the "judicial machinery" itself; (3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard of truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus, misconduct of an officer of the court is an essential element of fraud on the court; but there is fraud on the court only if this misconduct precludes proper adjudication by the court.

The Ninth Circuit apparently treats misconduct by an officer of the court as an alternative basis for finding fraud on the court; an alternative to the definition involving subversion of the adjudication process as discussed in [a], above. The Ninth Circuit has quoted Moore's for the proposition that fraud on the court is a "species of fraud which does or attempt to, defile the court itself or is a fraud perpetrated by officers of the court".

The Fourth Circuit has agreed.

"Although perjury of a witness will not suffice, the "involvement of an attorney, as an officer of the court, in a scheme to suborn penury should certainly be considered fraud on the court"
As has the Second Circuit and the Sixth Circuit:
"Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.

The record clearly establishes "fraud upon the court" by officers of the court. " Fraud on the court" is a claim that exists to protect the integrity of the judicial process, and therefore a claim for fraud on the court cannot be time-barred. See 12, Moore's Federal Practice § 60.21[4][g] & n. 52 (3d ed.2009) (citing Lockwood v. Bowles, 46 F.R.D. 625, 634 (D.D.C.1969).

The affect of the fraudulent-criminal conduct was grave in the ultimate holding before Judge Wilper. The prior litigation before Judge Wilper was consolidated with the court having

two claims before it. One claim was on the beneficiaries' claims filed prior to the Disclaimer Agreement. The other was the trust's claims filed after the Disclaimer Agreement. Judge Wilper ruled the trust would be limited to only a potential claim for money damages (R. Vol 1. p. 000649 ln. 10). Even after the Supreme Court Decision in December 2005, Judge Wilper in February 2006 had allowed the equitable claims of the Appellants to proceed to trial against the trust (R. Vol 1. pp. 000268, 273 ln. 10).

The effect of the fraudulent-criminal behavior prevented the Appellants from having their day in court regarding their equitable claims against the trust for title and possession. After the fraudulent-criminal behavior undertaken by the Taylor brothers led to the Judgment on the Beneficiaries' Claims, the court did not allow such balancing of equities. Mr. Maile testified that after the entry of the Order based upon the Taylor brothers' motion for summary judgment, attempts were made before Judge Wilper to proceed with the equitable claims between the trust and Berkshire Investments' right to title and possession. Judge Wilper denied such balancing of competing equitable interests between the trust and the Appellants (Tr. 2/4/11 pp. 42 ln. 7 thru 45 ln. 24; 46 ln. 16 thru p.47).

The lower court was requested to take judicial notice of Judge Wilper's Memorandum Decision and Order dated July 21, 2006 which provided, "The court finds that the effect of the Court's imposition of a constructive trust on the Linder Road property is the reconveyance of the property to the trust and the quieting of the title in favor of the Trust". (R. Vol I. pp. 001354,

001356 ln. 7). Mr. Maile testified that Judge Wilper, after the entry of the "Judgment on Beneficiaries' Claims" refused to consider the equities between the trust and the Appellants, as the judge concluded that the Judgment on Beneficiaries' Claims created a constructive trust and the equities between the trust and the Appellants were no longer at issue (Tr. 2/4/11 p. 43 ln. 22 thru p. 47 ln.12).

The Appellants had fully performed under the real estate contract with the trust as of January 4, 2004 (prior to the Taylor Brothers' initial complaint as beneficiaries), had paid the full appraised value of the property, had received verification from the prior successor trustees Beth and Andy Rogers that the trust would be standing by the transaction, and had expended approximately $250,000.00 in development costs, largely after receiving such assurances from the nominated successor trustees (R. Vol 1. pp. 000281, 000499, 001139, 000649 ln. 4) (Tr. 2/4/11 p. 31 ln. 24 thru p. 32). Where one party to a void agreement has fully performed, the court will not require performance of the other party, even though a money judgment will effect the result, but will leave the parties where it found them. McFall v. Arkoosh, 37 Id. 243, 246 , 215 P. 978, (1923), Finlayson v. Waller, 64 Id. 618, 134 P.2d 1069 (1943), Tew v. Manwaring, 94 Id. 50, 480 P.2d 896 (1971), Barry v. Pacific West Const., Inc., 140 Id. 827, 103 P.3d 440 (2004). Both the trust and the Appellants had fully performed under the void contract.

Part performance can give rise to estoppel against the party seeking to void a transaction. See generally Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Id. 485, 20 P.3d

21 (Ct. App. 2001). It is universally recognized that the statute of frauds is inapplicable to a contract fully performed by both sides. Frantz v. Parke, 111 Id. 1005, 729 P.2d 1068 (Ct. App. 1986), quoting WILLISTON § 528, at 727-28.

There was full performance by the Appellants which should have been considered against any claim by the trust which sought to cancel the real estate transaction. The trust's nominated successor trustees(s) Beth and Andy Rogers had endorsed and approved the real estate transaction which they knew that their uncle Ted wanted and Berkshire relied upon their endorsement and approval of the transaction in making substantial improvements to the property. The Taylor brothers and their attorneys' fraudulent-criminal behavior precluded a proper adjudication by the court relating to the issues of estoppel between the Appellants and trust.

Respondents Connie Taylor and John Taylor's actions as "officers of the court" constitute a "fraud upon the court" that warrants the equitable powers of the Court to set aside the Judgment on Beneficiaries' Claims.

C. The criminal/fraudulent conduct vitiates all subsequent proceedings.

A "fraud upon the court" makes the orders and judgments of that court null and void. An attempt to commit "fraud upon the court" vitiates the entire proceeding. The People of the State of Illinois v. Fred E. Sterling, 357 Ill. 354, 192 N.E. 229 (1934). Fraud vitiates any transaction based thereon and will destroy any asserted title to property no matter in what form the evidence of such title may exist. Batterton v. Douglas Mining Co., Ltd., 20 Id. 760, 120 P. 827 (1911).

The maxim that fraud vitiates every transaction into which it enters applies to judgments as well as to contracts and other transactions. Allen F. Moore v. Stanley F. Sievers, 336 Ill. 316; 168 N.E. 259 (1929), In re Village of Willowbrook, 37 Ill. App.2d 393 (1962).

A decision produced by fraud upon the court is not in essence a decision at all, and never becomes final. Fraud vitiates a judgment caused by the active agency of some party to the proceeding, as the court is misled and deceived as to the facts upon which it attempts to administer the law, and the mistake is equally efficacious in procuring a wrong. Trim v. Trim, 33 So.3d 471 (Miss. 2010). Any subsequent orders or judgment entered after such fraudulent-criminal behavior should be declared null and void.

***D.* The Judgment on Beneficiaries' Claims should be set aside because Appellants acted reasonably in filing their fraud action.**

There is no express time limit for filing an independent action seeking relief from a judgment other than that the action must be brought within a reasonable time. Campbell v. Kildew, 141 Id. 640, 115 P.3d 731 (2005). The determination whether an independent action was brought within a reasonable time is ordinarily a question of fact to be resolved by the trier of fact. Waller v. State, Dept. of Health and Welfare, 146 Id. 234, 192 P.3d 1058 (2008).

The Appellants discovery the fraudulent/criminal behavior while preparing their opening brief in Taylor v. Maile 2. The Appellants raised the misrepresentations as a standing issue in an attempt to defeat the Taylor brothers masquerading as beneficiaries. The Idaho Supreme Court found the Taylors had standing pursuant to the Disclaimer Agreement. When an issue of

standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief. Miles v. Idaho Power Co., 116 Id. 635, 641, 778 P.2d 757, 763 (1989), Scona Inc. v. Green Willow Trust, 133 Id. 283, 286, 985 P.2d 1145, 1148 (1999).

The Appellants' complaint requests that the judgment be set aside based upon the Respondents' criminal-fraudulent actions and the title quieted in Berkshire Investments LLC. The lower court failed to determine a reasonable time (R. Vol 1 001374). There was no determination of what constitutes a reasonable time. There is no express time limit for filing an independent action seeking relief from a judgment. Res judicata does not apply to the present matter.

E. There were no damages until the "Judgment on Beneficiaries' Claims".

There can be no claim preclusion if there is not ripe for judicial determination a valid cause of action. Idaho First Natl. Bank v. Bliss Valley Foods, Inc., 121 Id. 266, 283-84, 824 P.2d 841, 858-59 (1991). The time when a cause of action accrues may be a question of law or a question of fact, depending upon whether any disputed issues of material fact exist. Where there is no dispute over any issue of material fact regarding when the cause of action accrues, the question is one of law for determination by the court. Reis v. Cox, 104 Id. 434, 660 P.2d 46 (1982). The date for when a cause of action accrues may be a question of fact or law. Jemmett v. McDonald, 136 Id. 277, 279, 32 P.3d 669, 671 (2001).

The McNichols, case, supra, provides:

> we conclude that a cause of action against one party's opponent's attorney in litigation, based on conduct the attorney committed in the course of that litigation, may not be properly instituted prior to the resolution of that litigation, even where the allegedly aggrieved party believes that the attorney in question has been acting outside the legitimate scope of representation and solely for his own benefit.... Until the Underlying Case is resolved a court cannot determine whether any tortious act was committed, let alone acts constituting the aiding and abetting of those alleged tortious acts.

Res judicata does not apply to the present matter when there are allegations of fraud and/or criminal behavior in obtaining a judgment. There could be no cause of action ripe for judicial determination until the underlying case was resolved and the Appellants sustained damages. The claims should not be determined barred as a matter of law. At the very least the accrual of the cause of action should be determined to be a factual issue in dispute. Respondents Clark & Feeney, Paul T. Clark, and Connie Taylor represented the interests of the Theodore L. Johnson Revocable Trust, Dallan Taylor, R. John Taylor, together with Reed Taylor and acted in concert with the Co-Respondents.

The Appellants after the McNichols, supra, decision, requested the lower court to reconsider its earlier order granting Respondents' Summary Judgment and denying the Appellants' Motion for Summary Judgment. The lower court denied the Motion to Reconsider to allow the Appellants' claims to continue to trial (Tr 10/29/10 p.13 ln. 7). In addition the lower court denied the Motion to Reconsider to bar Respondents' claims based upon litigation privilege which the court determined did not apply to party litigants (Tr 11/30/10 p.19 ln. 8 thru p. 20 ln. 21). The trial court must consider new evidence that bears on the correctness of an interlocutory

order if requested to do so by a timely motion under Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure. PHH Mortg. Services Corp. v. Perreira, 146 Id. 631, 200 P.3d 1180 (2009). The lower court should have applied the principles of the McNichols, supra, case, by allowing the Appellants' claims to proceed to trial and barring the Respondents' counter-claim.

F. There can be no application of res judicata based upon the litigation misconduct by the respondents.

The case of Robinson v. Robinson, 70 Id. 122, 128, 212 P.2d 1031, 1034 (1949) holds that res judicata will not bar a claim when fraud is involved. Commencing at page 128 of 70 Id. Reports, the Idaho Supreme Court declared:

> One of the oldest and most universally accepted juridical principles is that embraced in the doctrine of res judicata. In the ***absence of fraud*** or collusion a judgment is conclusive as between the parties and their privies on all issues which were (or should have been) litigated in the action....
>
> Generally speaking, the fraud which will invalidate a judgment must be extrinsic or collateral to the issues tried, by which the aggrieved party has been prejudiced, or prevented from having a fair trial. It is not sufficient to charge only intrinsic fraud, or that which is involved in the issues tried, such as the presentation of perjured testimony.

A party committing fraud will not be afforded the protection of res judicata. The Appellants never had a trial before Judge Wilper. There was no presentation of testimony at trial. The Respondents' committed perjury and subordination of perjury surrounding the preparation and execution of the Verified Amended Complaint filed January 13, 2006 and committed false pretenses in the supporting pleadings that resulted in the Judgment on

Beneficiaries' Claims.

47 Am. Jur. 2d Judgments § 537, Fraud or Collusion provides:

> Fraud by a party will not undermine the conclusiveness of a judgment unless the fraud was extrinsic, that is, it deprived the opposing party of the opportunity to appear and present his or her case. With respect to extrinsic fraud, the doctrine of res judicata will not shield a blameworthy defendant from the consequences of his or her own misconduct. Accordingly, the principles of res judicata may not be invoked to sustain fraud, and a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata.

The Appellants were deprived their day in court solely based upon the fraudulent-criminal behavior of the Respondents. As stated, in the Wolfrum, supra, the statement is material if it might have been used to affect the proceedings. 50 C.J.S. Judgments § 532, provides:

> § 532. Fraud, collusion, or perjury
>
> A judgment obtained by fraud may, however, be void under some circumstances, and subject to collateral attack, as where such fraud appears on the face of the record or goes to the method of acquiring jurisdiction. ***Likewise, the judgment may be attacked collaterally where fraud has been practiced in the very act of obtaining the judgment, or on the party against whom the judgment was rendered, so as to prevent him from having a fair opportunity to present his case.*** Judgments obtained by extrinsic, rather than intrinsic, fraud may be attacked collaterally. The extrinsic fraud which is required as a basis for collateral attacks on judgments is defined as fraud which is collateral to the issues tried in the case where the judgment is rendered (emphasis added).

Judge Wilper prior to the material misrepresentations by the Respondents, precluded the trust from rescinding the real estate transaction. The claims of the trust were limited to a claim for monetary damages. The Taylor brothers assertion that they continued as beneficiaries of the trust after the Disclaimer Agreement was a material misrepresentations which prevented the

Appellants from defending their purchase of the property based upon the fair market value of the property and pursuing their claim for damages. Mr. Maile testified that Judge Wilper had precluded any attempt to balance equities between the trust and the Appellants, reasoning that Judgment on Beneficiaries' Claims as a constructive trust defeated any trial between the trust and Berkshire. (Tr. 2/4/11 pp. 42 ln. 7 thru 45 ln. 24; 46 ln. 16 thru p.47) (R. Vol I. pp. 001354, 001356 ln. 7).

The perjury, the subordination of perjury, and obtaining money by false pretenses, is established in the record by the sworn testimony, and judicial admissions of the Respondents. 49 C.J.S. Judgments § 310 provides:

> .... In order for a party to obtain relief under such a rule, the party seeking relief must prove the most egregious conduct involving corruption of the judicial process itself by establishing to the satisfaction of the trial judge that there was perjured testimony which influenced the judgment of the court. ...
> In any event, some courts hold that a judgment may be vacated for perjury under certain conditions, as where a party obtains a judgment by that party's own willful perjury, or by the use of false testimony, which the party knows at the time to be false.

The district court entered its "Judgment on Beneficiaries' Claims", solely upon the direct material misrepresentations of the Taylor brothers and their counsel of record. There is no dispute that Connie Taylor prepared the petition and notarized her husband's signature on November 14, 2004 as she did with the January 13, 2006 verified amended complaint.

A non-client may bring a cause of action against an attorney for abuse of process. The absolute privilege that protects attorneys from liability for defamation occurring in the

course of a judicial proceeding does not provide an attorney with an absolute defense to liability for abuse of process. 1 Am. Jur. 2d Abuse of Process § 21 Attorneys. All Respondents had actual knowledge of the true facts as to who was the beneficiary of the trust, consequently there is responsibility for damages by all Respondents.

G. There has been no determination on the merits of the defendants' criminal activity or the fraudulent misrepresentations.

Appellants raised the issue of the Taylors' standing in the prior ligation before the Idaho Supreme Court. The contention is simple, the Taylors and their counsel of record committed multiple criminal acts and committed fraud in representing the Taylor Brothers' status as beneficiaries which was the very foundation to the ultimate "**Judgment on Beneficiaries' Claims**". When an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief. Miles, supra.

The Supreme Court did not rule on the substantive issues of the criminal/fraudulent behavior of the Taylors and their counsel before Judge Wilper's Court nor the resulting damages sustained by the Appellants. The Idaho Supreme Court did not have to consider the same on the merits, since the Supreme Court determined the Taylors had standing in case CV 2004-00473D reserved by an "interest in the litigation" as set forth in the "Disclaimer, Release & Indemnification Agreement" dated July 15, 2004. The material misrepresentations, and the criminal behavior committed by the Respondents, and the damages sustained by the Appellants have not been considered on the merits, nor could they have been. Ticor Title Co. v. Stanion,

144 Id. 119, 122, 157 P.3d 613, 616 (2007) provides:

> There are five factors required for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

There has been no determination of the issues of fraud and criminal behavior of the Respondents, and the resulting damages sustained by the Appellants. The Appellants had no claim for relief until they sustained damages. There is no bar to the Appellants' claims based upon res judicata or collateral estoppel.

H. Different operative facts precludes res judicata & collateral estoppel.

The Appellants never had a cause of action against the Respondents until the wrongful actions of the Respondents resulted in a loss of the property. The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the Appellants' loss of use and enjoyment of the property became apparent. McCuskey v. Canyon County Commissioners 128 Id. 213, 912 P.2d 100 (1996). There can be no application of the doctrine of res judicata, as the Appellants had no cause of action that stemmed from the same operative facts which where involved in the 2002 real estate transaction. See generally Sage Willow, Inc., v. Idaho Dept. of Water Resources, 138 Idaho 831, 835-36, 70 P.3d 669, 673-74 (2003).

Res judicata may apply to claims that arose out of the same "transaction or series of

transactions" as the previous litigation. U.S. Bank v. Kuenzli, 134 Id. 222, 999 P.2d 877 (2000) The Appellants were damaged solely by the wrongful conduct of the Respondents in January 2006. The Appellants' claims for relief are unrelated to the real estate transaction of 2002. The operative facts involving the prior litigation, involved an alleged breach of fiduciary, allegedly paying less than market value and whether a conflict of interest of a successor trustee required notice to be given in 2002 to beneficiaries of the trust. The present action is based upon the wrongful conduct of the Respondents in the misuse of the judicial institution itself which occurred in 2006.

2. THE JURY VERDICT WAS NOT SUPPORTED BY SUBSTANTIAL, SUFFICIENT AND COMPETENT EVIDENCE AND MUST BE STRICKEN.

A. As a matter of law the mere filing of a complaint cannot form a basis for any claims of abuse of process or intentional interference with a business advantage.

The trust and the Taylor brothers acknowledged the basis for their counter-claim was predicated upon the filing of the perjury complaint. As Connie Taylor admitted in trial in support of an objection, we're here to decide the process for filing the complaint" (Tr. 2/4/11 p. 68 ln. 15). The Appellants filed a motion in limine seeking to preclude evidence of any tortious action which related to the reasonableness of filing of the perjury complaint (R. Vol 1. p. 01917). During the trial, the court overruled an objection relating to the question posed to Mr. Lewis' "do you have an opinion as to whether a reasonable attorney could have had any reasonable expectation of winning that case" (Tr. 2/2/11 p. 128 ln. 23 thru p.129 ln.13). The lower court allowed the witness to

render his opinion.

The Court in Badell v. Beeks, 115 Id. 101, 104, 765 P.2d 126, 129 (1988), dismissed an abuse of process claim, noting: "Even assuming, arguendo, that a factual issue exists with regard to an ulterior, improper purpose, there is no evidence of subsequent misuse of process after it was lawfully issued." Idaho courts have not extensively discussed the fact that the "improper" element of the tort of abuse of process requires a subsequent wrongful act, but the Court in *Badell, supra,* cited the decision in *Bickel v. Mackie,* 447 F.Supp. 1376, 1382 (N.D. Iowa 1978) for this proposition. In that case, the Court stated:

> "Abuse of process, . . . , is the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, . . . The improper use which is the essence of the tort is ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself, and is, in Prosser's words, 'a form of extortion' in which a lawfully used process is perverted to an unlawful use."
> Prosser states:
> Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. Prosser, Law of Torts, 4th Ed. § 121 (1972)
> Abuse of process requires an improper purpose which "usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself. . . ".

As courts have declared in many other jurisdictions, an abuse of process requires more than the mere filing of a lawsuit. Seidner v. 1551 Greenfield Owners Assn. 108 Cal. App.3d 895 at p. 904 (1980), Tellefsen v. Key System Transit Lines 198 Cal. App. 2d 611, 615, 17 Cal. Rptr. 919 (1961). Tellefsen, supra, 198 Cal. App.2d at pp. 615– 616, provides, some definite act or

threat not authorized by the process, or aimed at an object not legitimate in the use of the process, is required before a party can sue for abuse of process. A process is not abused unless there is a definite act or threat beyond the scope of the process. As a result, the mere filing of a complaint, regardless of the motive, cannot serve as the basis for an abuse of process cause of action. Abraham v. Lancaster Community Hospital, 217 Cal. App.3d 796, 826 (1990). The overwhelming majority of states hold that the mere filing of the complaint is insufficient to establish the tort of abuse of process. Laxalt v. McClatchy, 622 F. Supp. 737, 752 (D. Nev.1985).

In this case, there was no proof that subsequent to the filing of the perjury complaint and lis pendens associated with it, that there was any subsequent misuse of process by the Appellants. Thus, there was no basis in law or fact supporting the jury's verdict on the abuse of process claim. There was no proof that Appellants did anything "independently wrongful" that supported the jury's verdict on the intentional interference claim. As noted in Highland Enterprises, Inc. v. Barker, 133 Id. 330, 338, 986 p.2d 996, 1004 (1999), that tort requires proof that "(4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the defendant interfered for an improper purpose or improper means)."

There was a complete lack of evidence that the lis pendens in either case were independently wrongful. There can be no legitimate claim of damages connected to any wrongful act stemming from the filing of a lis pendens. No testimony was proffered that the filing of the lis pendens was frivolous or wrongful. The perjury complaint sought a quiet title

action and a constructive trust; both claims allow as a matter of law the filing of a lis pendens.

No one testified that the lis pendens before Judge Wilper was wrongful or improper, in light of the fact that the trust continues to owe $400,00.00 to the Appellants. The evidence established a legitimate right to maintain the lis pendens (Tr. 2/4/11 pp. 49 ln. 17 thru 51 ln. 1). The Appellants filed their Notice of Vendee's Lien on August 3, 2009 (R. Vol 1. p. 001428). On October 14, 2009, Judge Wilper specifically authorized a vendee's lien to be filed to protect the return of the $400,000.00 (R. Vol 1. p. 001440). On November 5, 2009, the Appellants filed their Motion for Foreclosure of Vendee's Lien before Judge Wilper (R. Vol 1. p. 001445). The foreclosure was stayed by Judge Wilper, pending the outcome of the present matter (R. Vol 1. p. 001614).

The Appellants were lawfully entitled to maintain a lis pendens on their vendee's lien foreclosure as any litigant would be entitled to record a lis pendens in any foreclosure proceeding. A plain reading of I.C. § 45-1302 supports the Appellants' position that a lis pendens is proper until the vendee's lien is foreclosed upon. The foreclosure of vendee's lien as with any lien foreclosure is addressed in I.C. § 45-1302, which provides:

> Determination of All Rights upon Foreclosure Proceedings.
> In any suit brought to foreclose a mortgage ***or lien upon real property***... the plaintiff..., claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

Judge Wilper entered his Order on March 1, 2007 which authorized the Appellants' lis pendens (R. Vol 1. p. 001408). The Appellants since the entry of that Order, have had a lawful right to foreclose a vendee's lien. A vendee's lien is afforded the same right as any other type of lien foreclosure referenced in I.C. § 45-1302 and is given the same effect as a quiet title action. Appellants were entitled to record a lis pendens on their claim for a return of the purchase price, as provided in I.C. § 45-1302. The Respondents admitted that they had not returned the purchase price, and would not return the purchase price unless the Appellants agreed to dismiss their potential right to an appeal (R. Vol 1. p. 001475).

In addition the Appellants properly filed a lis pendens in the lower court's proceeding alleging a constructive trust, & Idaho racketeering violations. Any action "affecting the title to real property" clearly allows the filing of a lis pendens by an interested party in order to protect their interest in the property subject to the litigation. Such actions include suits attempting to set aside a fraudulent conveyance of real property to establish a constructive trust over real estate. See generally, Bengoechea v. Bengoechea, 106 Id. 188, 677 P.2d 501 (Ct. App.1984), where a claim for constructive trust relating to real property allegedly obtained by fraud allowed the filing of lis pendens. A constructive trust can be imposed where property was obtained either fraudulently or through violation of a fiduciary duty. Hettinga v. Sybrandy, 126 Id. 467, 469, 886 P.2d 772, 774 (1994), Witt v. Jones, 111 Id. 165, 722 P.2d 474 (1986). An action to impress a constructive trust on realty affects title to that property, so that a notice of lis pendens may be

filed. Ross v. Specialty Risk Consultants, Inc., 240 Wis.2d 23, 621 N.W.2d 669, 677 (Ct. App.2000).

The Idaho Racketeering Statute provides a remedy for the wrongful conduct of the Respondents, which provides a court may enter an order divesting the defendants of any interest, direct or indirect, in the real property obtained in violation of I.C. Chapter 18 Title 78, and specifically section 18-7805(c)(d)(1). A filing of a lis pendens is appropriate in light of the allegations set forth in the Appellants' Amended Complaint and Demand for Jury Trial.

In reality the Appellants were entitled to maintain the lis pendens throughout these proceedings including the appeal as reasoned by Judge Wilper in the companion case (R. Vol 1. p. 001408). The Appellants voluntarily released the lis pendens in the present matter immediately after Judge Greenwood issued his Decision dismissing the Appellants' complaint (R. Vol 1. p. 001421).

There was no evidence presented by the Respondents to show that the lis pendens in Judge Wilper's case remained of record for any improper time or purpose. Nor was there any evidence at trial that the lis pendens filed in the current action was improper. The publication of the notice of lis pendens is not defamatory. It merely informs the public that the property is involved in litigation. Vanderford Co., Inc. v. Knudson, 144 Id. 547, 165 P.3d 261 (2007).

The case of Dalley v. Dykema Gossett PLLC, 287 Mich. App. 296, 788 N.W.2d 679 (2010) involved a second lawsuit alleging the plaintiff and the attorneys in the first suit

improperly pursued their litigation. The Dalley court stated in dismissing the claims of abuse of process and tortious interference with a business relationship, at p. 324 of 287 Mich. App., "In order to succeed under a claim of tortious interference with a business relationship, the plaintiffs must allege that the interferor did something illegal, unethical or fraudulent. There is nothing illegal, unethical or fraudulent in filing a lawsuit, whether groundless or not".

The issue of whether or not the actions complained of are or are not "wrongful" in this context was for the court to determine in defining the issues. The issue for the jury to determine is whether or not the alleged tortfeasor acted in the manner alleged. The decision in Carter v. Carter, 143 Id. 373, 146 p.3d 639 (2006) established the right of a party to institute legal action to protect their economic interests, even if it resulted in interference with an economic expectancy of another.

An abuse of process claim requires proof that the tortfeasor filed process not proper in the course of the proceedings. The fact that the lower court dismissed the perjury complaint does not alter the fact that the Notice of Lis Pendens was properly filed in conjunction with the complaint seeking to quiet title to the real property. There was no proof that the Appellants did anything wrong beyond resorting to the legal process in an attempt to set aside an earlier judgment and/or advancing a complaint seeking damages. As a matter of law there was no proof that the actions of the Appellants were independently wrongful. The jury verdict must be set aside as a matter of law.

B. The Litigation Privilege is a defense to the Respondents' counter-claim.

The Appellants' in a motion in limine requested the trial court to limit the Respondents' counter-claim to facts that could be considered beyond the litigation privilege (R. Vol 1. p. 001823). The District court reasoned that the litigation privilege applied to attorneys but not to litigants appearing pro se (Tr. 11/30/10 pp. 19 ln. 7 thru 20 ln. 21).

The case of Wynn v. Earin, 163 Wa. 2d 361, 181 P.3d 806 (Wash. 2008), examined the application of the litigation privilege and held:

> The California Supreme Court explained the purposes of the rule (which is codified in that state):
> The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.
> The rule promotes the effectiveness of judicial proceedings by encouraging "open channels of communication and the presentation of evidence" in judicial proceedings...
> Ultimately, the rule protects litigants, whose interests at stake in a case range across the entire spectrum of property, family, and individual circumstances, by encouraging the full, truthful, and complete testimony of witnesses.

The immunity afforded to statements made during the course of a judicial proceeding extends not only to the parties in a proceeding but to judges, witnesses, and counsel as well. Cox v. Klein, 546 So.2d 120 (Fla. 1st DCA 1989). What the above holdings establish is that the courts allow the privilege to attorneys advocating on behalf of clients, the litigants themselves, and witnesses involved in pursuing court proceedings.

The lower court rejected Appellants' Motion in Limine reasoning that Mr. Maile and Mrs.

Maile were litigants and the privilege applied to attorneys. The evidence presented by the Respondents and their argument to the jury throughout the case was directed at Mr. Maile's actions as an attorney, representing Berkshire Investments, LLC and Colleen Maile. John Taylor testified that he did not think that Colleen Maile did anything wrong (tr 2/2/11 p. 44 ln. 6). Over the objection of the Appellants, Dr. Lewis offered his opinion regarding the expected actions of a reasonable "attorney," and offered no opinion regarding the expected actions of a reasonable person. The McNichols, supra, holding is on point and applicable to the facts in this case regarding the Appellants' litigation privilege and the lower court should have determined that the litigation privilege applied to the Appellants. The filing of the perjury complaint and the recording of the lis pendens were subject to a litigation privilege. The jury verdict should be set aside .

The case of Weitz v. Green, 148 Idaho 851, 230 P.3d 743, (2010) provides:

> As the finding of slander of title in this case was premised upon a statement made in the complaint, a necessary first step in litigation, where such statement was related to the underlying claim against Respondents, that statement is deemed ***immune***. (emphasis added).

The Weitz, supra, case has important implications in light of the law in the McNichols, supra, case. The Respondents' contentions related to an alleged improper filing of Lis Pendens and the alleged misuse of judicial process relating to allegations contained in the amended complaint filed by Appellants. As the Weitz & McNichol cases hold, such statements which are set forth in a lis pendens filed of record or contained in allegations of a complaint are immune

from liability if they "had a reasonable relation to the cause of action of that proceeding". Whether protected under a vendee's lien or a claim for a constructive trust, the pleadings and the lis pendens were reasonably related to the claims for relief which were properly pursued in the course of litigation in both cases.

The common theme from other jurisdictions is the determination of whether there is fraud or criminal behavior in considering the extent of the litigation privilege. This is also seen in our Supreme Court's reasoning, in the McNichols, surpa, case and is important for the court's analysis. The Respondents failed to allege any specific or general theories of fraud and/or criminal behavior perpetuated by the Appellants. As stated in McNichols, supra, "Reed's failure to make specific factual pleadings is particularly fatal here. It appears most likely that Reed is alleging that the goal of the conspiracy was fraudulent, and civil conspiracy must therefore be pled with particularity under Wasco Prods., Inc. v. Southwall Techs, Inc., 435 F.3d 989, 990-92 (9th Cir. 2006)".

The litigation privilege extends to litigants and attorneys. McNichols, supra, holds:

> In fact, "at common law, the litigation privilege blanketed all participants in the court system; private attorneys were treated no differently than judges, government lawyers, and witnesses....This privilege is predicated on the long established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of reprisal through a civil suit for defamation or libel.

The litigation privilege is presumed to exist. The determination of the privilege is a question of law. The lower court in denying the motion indicated it would be addressed by

instructing the jury (tr 11/30/10 p. 19 ln. 1). Such a determination is a question of law not to be decided by a jury. The existence of a privilege is a question of law for the court, which an appellate court reviews for correctness, giving no deference to the trial court's determination." Staley v. Jolles, 2010 UT 19, 20080492 (UTSC). If there is no dispute as to the operative facts, the applicability of the litigation privilege is a question of law. Any doubt about whether the privilege applies is resolved in favor of applying it. Action Apartment Assn., Inc. v. City of Santa Monica, 63 Cal. Rptr. 3d 39, 41 Cal.4th 1232, (2007).

The Respondents failed to allege any specific or general theories of fraud perpetuated by the Appellants. Without such allegations in their Amended Counterclaim (R. Vol 1. p. 001688) and the Respondents' failure to provide any proof at trial of any alleged criminal or fraudulent behavior, the Appellants are entitled to the absolute litigation privilege, as annunciated in the McNichols, surpa. The Respondents failed to present evidence to limit the application of the litigation privilege. The jury verdict should be set aside.

C. The district court erred in failing to grant the JNOV.

In determining whether a JNOV is proper, the court assumes without deciding that any disputed facts are true, and considers whether those facts suffice as a matter of law to support the verdict. Such a determination is reviewed by the appellate court under the same standard as the district court. Karlson v. Harris, 140 Id. 561, 567, 97 P.3d 428, 434 (2004). The court reviews the facts as if the moving party had admitted any adverse facts, drawing reasonable inferences in favor

of the non-moving party. Gillingham Const., Inc. v. Newby-Wiggins Const., Inc., 142 Id. 15, 20, 121 P.3d 946, 951 (2005).

Whether the trial court should have entered a judgment notwithstanding the verdict is purely a question of law. Kuhn v. Coldwell Banker, 150 Id. 240, 245 P.3d 992 (2010). Based upon the reasons set forth above, the lower court was in error in not entering a JNOV.

3. THE COURT ERRED IN AWARDING FEES AND COSTS TO THE RESPONDENTS.

A. There was no basis for an award of attorneys fees and costs to the Respondents.

The district court erroneously awarded attorneys fees to Respondent attorneys, pursuant to 12-123. It is provided in I.C. § 12-123 that the court "may award attorney fees" on the condition that the court follow the procedure outlined in the statute. In reviewing an award of fees pursuant to I.C. §§ 12-121 or 12-123, the appellate court applies an abuse of discretion standard. Webster v. Hoopes, 126 Id. 96, 878 P.2d 795 (Id. App. 1994).

There is no dispute that the Taylor brothers and their attorneys knew perfectly well that the Taylor brothers had disclaimed their interest as beneficiaries in the trust as established by the verified pleadings, deposition testimony and declarations against their interests. The attorneys had written letters, prepared verified petitions, where the true facts were established. The attorneys sat through depositions with their clients, who reiterated the position that their mother was the sole beneficiary and would be receiving the full benefits of any award from litigation. Their clients never provided any corrections to their deposition testimony in which they represented their

clients (tr 2/3/11 p.378 ln.9 thru 20).

The Respondents were playing fast and loose with the judicial process in perpetrating their criminal conduct. A fraud upon the court was alleged which was well grounded in fact and law. Mr. Lewis was not even aware that the Appellants were seeking equitable relief (tr 2/2/11 p.187 ln.1 thru p. 188 ln.4). The entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. Coward v. Hadley, 246 P.3d 391 (2010), Michalk v. Michalk, 148 Id. 224, 235, 220 P.3d 580, 591 (2009).

Where a case involves a novel legal question, attorney fees should not be granted under I.C. § 12-121. Graham v. State Farm Mut. Auto. Ins. Co., 138 Id. 611, 614, 67 P.3d 90, 93 (2003). However, a court may pursuant to I.C. § 12-123 may sanction frivolous conduct designed to harass or maliciously injure another party in a civil case. Campbell v. Kildew, 141 Idaho 640, 115 P.3d 731 (2005). I.C. § 12-123(2)(b) allows courts to award reasonable attorney fees to a party in a civil action that incurred the fees because of frivolous conduct. Conduct is frivolous if: (1) it serves merely to harass or maliciously injure a party; or (2) it is not supported by fact or a good faith argument in law. I.C. § 12-123(1)(b). Total Success Investments, LLC v. Ada County Highway Dist., 148 Id. 688, 227 P.3d 942 (Idaho App. 2010). The Appellants advanced good faith arguments in filing their perjury complaint. The Appellants are protected by the litigation

privilege. An action is not deemed to have been brought frivolously simply because it ultimately fails. Edwards v. Donart, 116 Id. 687, 688, 778 P.2d 809, 810 (1989). In deciding whether an award of attorney's fees is proper, "the sole question is whether the losing party's position is so plainly fallacious as to be deemed frivolous, unreasonable or without foundation". Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 119 Id. 87, 92, 803 P.2d 993, 998 (1991).

The lower court awarded all attorneys fees requested by Clark & Feeney, even those fees incurred after the filing of its counter-claim which was voluntarily dismissed. The case of Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc., 119 Id. 558, 808 P.2d 1303 (1991), provides that where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims or defenses for the purpose of awarding attorney fees under I.C. §12-121. The claims and defenses were interwoven and fees should not have been awarded.

Respondent attorneys voluntary dismissed their counterclaim. The lower court awarded fees and costs beyond the date of the entry of the dismissal of the perjury complaint. Much of what was incurred after that date related to the preservation of Respondent attorneys' counter-claim which was voluntarily dismissed. The Respondents should not have been awarded their fees.

B. The Offer of Judgment defeated any award of fees and costs to the Respondents and Appellants should have been awarded their costs.

Respondent attorneys filed their Amended Answer and Counter-Claim on March 13, 2009 (R. Vol 1. p. 01030). Appellants served an Offer of Judgment on November 16, 2009 in the

amount of $55,000.00 (R. Vol 1. p. 02346). During the time period between the filing of the two pleadings, Respondent attorneys claimed fees for $8,827.50 and costs for $25.50. A Judgment obtained by the trust was $28,437.36. The combination of the Judgment and fees and costs asserted for the time period prior to the filing of the Amended Answer and Counter-Claim is $54,632.77 which was less than the amount offered in the Offer of Judgment ($55,000.00).

The Supplemental Affidavit provided that $34,854.50 was incurred for attorney's fees up to the date of the filing of the Offer of Judgment on November 16, 2009 (R. Vol 1. p. 02490). The initial affidavit actually demonstrates that attorney's fee and costs from March 13, 2009, (date their Amended Answer and Counter-Claim was filed), up to the date of the Offer of Judgment were in the amount of $8,853.00 (R. Vol 1. p. 02314). This is important for the court's analysis because Clark and Feeney's counterclaim involved the same issues which related to the defense to the perjury complaint. Stewart v. McKamin, 141 Idaho 930, 120 P.3d 748 (Id. App. 2005). Clark & Feeney had to advance the argument that the application of res judicata was blatantly apparent. The experts who testified at trial disagreed upon that point. Where there are multiple claims and multiple defenses, it is not appropriate to segregate those claims or defenses for the purpose of awarding attorney fees.

There was a mixture of attorneys fees related to prosecuting the counter claim and defending Appellants' claims, all of which involved issues of res judicata and collateral estoppel, consequently the motion for costs and attorneys fees submitted by Respondents should have been denied. The

Appellants should have been awarded their costs.

4. THE APPELLANTS ARE ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

Pursuant to I.A.R. Rule 41, an award of attorney fees on appeal is appropriate, when the prevailing party is entitled to attorney fees at the trial court level, pursuant to I.C. § 12-121, see generally, Houston v. Whittier, 147 Id. 900, 216 P.3d 1272 (Idaho 2009). I.C. § 18-7805 provides the court with one of the appropriate standards for the determination of attorneys fees.

§ 18-7805. RACKETEERING - CIVIL REMEDIES

(a) A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees.

Idaho Code, § 18-7805 & § 12-121 provide the basis to award attorney fees to the Appellants. The Appellants should be entitled to their attorneys fees and costs incurred herein.

IV. CONCLUSION

The Appellants properly advanced legal claims against the Respondents for equitable relief to set aside a judgment and a proper claim for damages. The application of res judicata to the facts alleged is misplaced. The dismissal of the Appellants' claims inappropriately led to a jury verdict against the Appellants and should be set aside. The Judgment entered against the Appellants was rendered improperly as there were legitimate and well reasoned principles to assert claims against the Respondents based upon their criminal-fraudulent behavior in obtaining the Judgment on Beneficiaries' Claims. The Respondents were not entitled to their costs and

attorneys fees incurred. The Appellants are entitled to their costs and attorneys fees incurred. The matter should be remanded to allow the Appellants their day in court on their legitimate legal claims of misconduct committed by the Respondents.

DATED this 22 day of July, 2011.

THOMAS G. MAILE IV., ~~co-~~counsel, for Appellants, Berkshire Investments, Colleen Maile.

CHRIST T.TROUPIS, co-counsel, for Appellant, Thomas G. Maile.

V.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22 day of July, 2011, I mailed two (2) true and correct copies of the foregoing APPELLANTS' OPENING BRIEF, by placing the same in the United States Mail, postage prepaid, addressed as follows:

Connie W. Taylor & Paul Henderson 900 Washington St. Suite 1020 Vancouver, Washington 98660	(X) U. S. Mail ( ) Facsimile Transmission
Mark Stephen Prusynski PO Box 829 Boise, ID 83701	(X) U. S. Mail ( ) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery

CHRIST T. TROUPIS, co-counsel for Appellants.

APPENDIX "A" TO APPELLANTS' OPENING BRIEF

I. Respondent Connie Taylor drafted a letter to Bart Harwood on April 14, 2004 which stated, "The Taylors are not willing to give up their rights as beneficiaries of the trust unless Beth will affirm her prior factual statements in the form of an affidavit and agree to cooperate in the action against Mr. Maile. If we aren't able to reach an agreement on that, they will seek a full accounting of the trust and a copy of the trust and estate tax returns". (Affidavit of Thomas Maile Part One Exhibit "B" deposition of Beth Rogers referencing deposition exhibit 39 -R. Vol 1. p. 000561).

II. In response to the Motion to Dismiss before the Honorable Judge Wilper, the Taylors by and their counsel of record, Connie Taylor, filed their verified petition in the probate court on November 12, 2004, requesting the probate court to appoint them as trustees of the Theodore L. Johnson Revocable Trust. The petition was executed by R. John Taylor as a verification of the facts contained in the petition. Page 2 of the verified petition states under oath, "***the petitioner's 88-year-old mother, Helen Taylor, is the sole remaining beneficiary of this trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement.***" (Exhibit "A" to the Verified Amended Complaint and Demand for Jury Trial- R. Vol 1. p. 000111)(emphasis added).

III. Mr. R. John Taylor was sworn under oath and provided testimony before the Honorable Judge Beiter on May 2, 2005 and commencing at page 14, ln 4, testified:
Q. Will you explain to the court just briefly why it is that you want to serve?
A. "Well, primarily, to pursue the claim for the trust. We have always thought it was a valid claim because I think that, for the benefit -- my mother is the beneficiary of the trust, and we expect that we will eventually win on this claim." During that same hearing Mr. Clark provided in his closing argument before Judge Beiter on June 5, 2005 provided: page 17, ln 12:
MR. CLARK: "Yes. Just briefly, Judge. It seems to me that, based upon, first, the agreement of the beneficiaries -- they have all indicated that the Taylors should serve as co-trustees. The Taylors, pursuant to that same agreement, have a guarantee in the disclaimer. So they have some interest in the proceeding. Their mother stands to gain and, thereby, they have an interest in the proceeding."
(Affidavit of Thomas Maile Part One Exhibit "A" transcript of probate court May 2, 2005 hearing-R. Vol 1. pp. 000348, 000350).

IV. The deposition of Reed Taylor provided the following testimony under oath:
Q. Through this lawsuit, if the jury ultimately finds in favor of the plaintiffs in this matter, is your mother going to get anything? Do any of the proceeds from any Judgment that's entered in this lawsuit - A. She will probably get it all.
Q. My question is: In that first lawsuit, although you are a named plaintiff, if that were to -- if the Supreme Court were to reverse the Summary Judgment that was entered, and it goes to trial and you prevail, if I'm understanding what you've told me -- all right? -- quote, your understanding is you don't get anything; everything goes to your mother?
A. My intent is -- I'm not going to say exactly how it's going to be disbursed. My intent

would be for my mother.
Q. In the second lawsuit, the one with the Trust, who gets the money if you prevail?
A. Well, like I said, as far as, uh -- I haven't talked to, specifically, the ones that are out of town. As far as John and I are concerned, uh, we're doing it for our mother, so ...
Q. So you and your brothers are not going to get anything?
A. We're not looking for money out of it, if that's where you're going
(Affidavit of Thomas Maile Part One Exhibit "C" pages 132, 133, 134, of the deposition of Reed J. Taylor, taken on January 31, 2005 -R. Vol 1. pp. 000566, 000567).

V. The deposition of Dallan Taylor provided the following testimony under oath:
Q. What was the purpose, then, of you executing the signature page on Exhibit 24 that relate to the "Disclaimer, Release & Indemnity Agreement? Could you just explain to me, in your own words, what Exhibit 25 accomplishes?
A. We are the disclaimer of all interests. It is being signed by -- 1, dash, 2, dash, 1 by Fishers, which disclaims all the interest in the Trust in favor of their mother, Helen (sic) Fisher, so that they will distribute the money in the Trust to Hazel Fisher. 1.2, dash, 2, Seeley, is so the money, uh -- the children are released (inaudible) –
THE COURT REPORTER: I'm sorry. "The children are released" what? Speak up.
THE WITNESS: -- their interest in the Trust so that the money can be distributed to Joyce Seeley. And Taylor, all children are disclaiming interest in favor of their mother, Helen Taylor, so that she can get the remainder of her assets in the Trust.
(Affidavit of Thomas Maile Part One Exhibit "F" pages 74, 75 of the deposition of Dallan Taylor, taken on September 9, 2004 -R. Vol 1. p. 000582)

VI. The deposition of John Taylor provided the following testimony under oath:
Q. Exhibit 26 of Beth Rogers' deposition, that's the Complaint and Demand for Jury Trial. That's signed by your brother and your wife; is that correct.
A. Yes.
Q. And did you have a chance to review that document?
A. I did.
Q. Before it was actually filed?
A. I did.
Q. Did you concur in the language of the Complaint and Demand for Jury Trial?
A. Yes.
Q. And what is it that the plaintiffs want out of this litigation; what is it they seek?
A. We want the difference in -- well, the difference in the value of the property and the amount that it was sold for. And we believe that is $6 to $800,000.
Q. Okay. You've also sued for damages. Is that the damage claim that you're wanting?
A. Yes, essentially.
Q. Is that you want out of this lawsuit?
A. 6- to 800,000. Yes.
Q. Anything else you want out of this litigation?
A. We would -- we would like to see that, uh -- uh, punitive damages are added to that.
Q. Okay.
A. And we would like to see, uh, you eventually disbarred.

Q. Okay. Anything else?
A. No. That's enough.
Q. Now, there is an allegation that you want a recision of the contract?
A. As an alternative. Yes.
Q. But you want the money first?
A. It would be easier. It goes to my mom.

(Affidavit of Christ Troupis filed December 31, 2010, page 81 of the deposition of R. John Taylor, taken on December 14, 2004-R. Vol 1. p. 2008)(emphasis added).

VII. The Idaho Supreme Court issued its decision in Taylor v. Maile I on December 23, 2005.

VIII. On March 9, 2006, the Verified Amended Complaint was filed by the Taylors, and prepared by the co-defendant attorneys. Page 1 of the Verified Amended Complaint states under oath, "Reed and R. John Taylor are residents of Nez Perce County, Idaho; Dallan Taylor is a resident of Ada County Idaho. ***All of the plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust.***" (The verified amended complaint is annexed to Amended complaint and Demand for Jury Trial as Exhibit "B"- R. Vol 1. p. 000186) (emphasis added) .

IX. The Taylors acting with and through their attorneys on February 13, 2006, filed their Motion For Summary Judgment On Beneficiaries' Claim. The first sentence of the motion states, "Come Now Plaintiffs Reed, Dallan, and John Taylor (hereafter referred to as "***the Beneficiary Plaintiffs***") (Affidavit of Thomas Maile Part Two Exhibit "L"- R. Vol 1. p. 000655)(emphasis added).

X. The Taylors again referring to themselves as Plaintiff Beneficiaries filed the Plaintiffs' Memorandum in Support of Motion for Summary Judgment on Beneficiaries' Claim on February 13, 2006. On page 5 of the Memorandum the Taylor Brothers state, "The Plaintiff Beneficiaries are entitled to summary judgment on their constructive trust claim against the Defendants pursuant to the Idaho Supreme Court decision dated December 23, 2005." (Affidavit of Thomas Maile Part Two Exhibit "M"- R. Vol 1. p. 000660).

XI. The district court entered the "Judgment on ***Beneficiaries***' Claim" on June 7, 2006 (The Judgment is annexed to Verified Amended Complaint and Demand for Jury Trial as Exhibit "C"- R. Vol 1. p. 000192) (emphasis added).

3. Release of Trustees – Estimated Expenses. The undersigned hereby release and discharge Andrew T. Rogers and Beth J. Rogers from all claims or causes of action, whether known or unknown, he/she may have against them (i) in their capacity as trustees of the Trust, or (ii) arising in any way out of their service as trustees of the Trust. The undersigned further acknowledge that the trustees have distributed, and he/she has received, all of the property, money and benefits to which he/she is entitled under the terms of the Trust, except an amount which shall not exceed Five Thousand Dollars ($5,000), which has been retained for the sole purpose of paying accounting, legal and other expenses associated with the Trust. Any surplus in such retainage will be distributed to the beneficiaries proportionately. The undersigned acknowledge the financial information he/she has received will constitute a final accounting; and he/she waives any right to a court-approved formal final accounting.

4. Resignation of Trustees. The undersigned understand Andrew T. Rogers and Beth J. Rogers intend to resign as trustees of the Trust, leaving in the Trust the Claims described in Section 1.1 above; and the undersigned approve of such resignation. The undersigned further understand and agree that the successor trustee, Garth Fisher, will decline to serve as trustee, and that Reed J. Taylor, Dallan J. Taylor and R. John Taylor will be nominated and appointed to serve as successor co-trustees of the Trust.

5. Indemnification. Taylors, jointly and severally, agree to defend, indemnify and hold harmless (i) Andrew T. Rogers and Beth J. Rogers, and (ii) all of the other beneficiaries of the Trust against all suits, claims, expenses, costs, attorney's fees, losses or monies that they may incur or be required to pay as a result of any lawsuit by Taylors, or any of them, or their successors, based upon the Claims, including, without limitation, any third-party claim or counterclaim advanced by the defendants.

6. Enumeration of Beneficiaries. This will certify the twenty-five (25) individuals identified below as signators constitute all of the beneficiaries of the Trust. ***Exhibit A*** attached is a graphical depiction of the relationship of the signators and grantor Theodore L. Johnson. Blair Johnson predeceased the Grantor, Theodore Johnson, leaving no issue; and the beneficial interest of Blair Johnson therefore lapsed.

7. Binding Effect. This instrument shall be effective as of the latest signature by all, and not less than all, of the signators indicated below; and this instrument shall be binding upon the heirs and successors of the parties.

8. Attorney's Fees. If any party commences legal proceedings for any relief against the other party(ies) arising out of this agreement, the prevailing party(ies) shall be entitled to an award of his/her/their legal costs and expenses, including, but not limited to, reasonable attorney's fees as determined by the court. The prevailing party(ies) shall be that party receiving substantially the relief sought in the proceeding, whether brought to final judgment or not.

9. Counterparts and Facsimile. This instrument may be executed in several counterparts and all so executed shall constitute one instrument, binding on all the parties hereto, even though all the parties are not signatories to the original or the same counterpart. A signed document transmitted by fax shall be the equivalent of execution and delivery of an original signed document.

10. Entire Agreement. This agreement, together with all exhibits attached hereto and other agreements and written materials and documents expressly referred to herein, constitutes the entire agreement between the parties with respect to the matters set forth herein. All prior or contemporaneous agreements, understandings, representations, warranties and statements, oral or written, are superseded.

11. Further Assurances. The parties agree to perform such further acts and to execute and deliver such additional documents and instruments as may be reasonably required in order to carry out the provisions of this instrument and the intention of the parties. Each of the signators warrants and represents that in executing this instrument he/she is dealing with his/her sole and separate property.

12. Governing Law. This agreement shall be governed, construed and enforced in accordance with the laws of the State of Idaho.

13. Modification/Waiver. No modification, waiver, amendment or discharge of this instrument shall be valid unless the same is in writing and signed by all parties.

_____

HAZEL FISHER Dated

_____

GORDON E FISHER Dated

_____

GARTH J. FISHER Dated

_____

JUDITH F CRAWFORD Dated

_____

JOYCE SEELY Dated

_____

DOROTHY S DAYTON Dated

_____

J DAVID SEELY Dated

_____

DISCLAIMER, RELEASE & INDEMNITY AGREEMENT

1. Disclaimers.

1.1 Disclaimer of Claims by Certain Beneficiaries. Except for those individuals identified in the last sentence of this Section 1.1, each of the beneficiaries of the Theodore L. Johnson Trust, UTD November 4, 1997 (hereafter referred to as the "Trust"), hereby disclaims, in favor of the Trust, any ownership interest he/she may now or in the future have in any claims or causes of action by the Trust or the trustees of the Trust against attorney Thomas G. Maile, or his successors or affiliates, including, without limitation, Thomas Maile, IV, Colleen Maile, Thomas Maile Real Estate Company and Berkshire Investments, LLC, in connection with the purchase of real property from the Trust ("Claims"); and by this Disclaimer, the same individuals confirm in the Trust complete ownership and control of any such Claims. No warranty or representation is made as to the existence or efficacy of such Claims. The following beneficiaries do not join in this disclaimer: Helen Taylor, Reed J. Taylor, Dallan J. Taylor, Mark J. Taylor, Gloria Rydalch, Virginia Porter and R. John Taylor.

1.2 Disclaimer of All Other Interests.

1.2.1 Fisher. Gordon E. Fisher, Garth J. Fisher and Judith F. Crawford, comprising all of the children of Hazel Fisher, hereby disclaim all interests whatsoever in the Trust, not previously disclaimed in Section 1.1 above, in favor of their mother, Hazel Fisher, and hereby approve immediate distribution to Hazel Fisher.

1.2.2 Seely. J. David Seely, Karl J. Seely, Dorothy S. Dayton, Janet S. Denison and Nathan L. Seely, comprising all of the children of Joyce Seely, hereby disclaim all interests whatsoever in the Trust, not previously disclaimed in Section 1.1 above, in favor of their mother, Joyce Seely, and hereby approve immediate distribution to Joyce Seely.

1.2.3 Taylor. Reed J. Taylor, Dallan J. Taylor, Mark J. Taylor, Gloria Rydalch, Virginia Porter and R. John Taylor, comprising all of the children of Helen Taylor, hereby disclaim all interests whatsoever in the Trust, in favor of their mother, Helen Taylor, and hereby approve immediate distribution to Helen Taylor. All of the individuals identified in this Section 1.2.3 are sometimes hereafter referred to as "Taylors".

2. Receipt in Full - Income Tax. The undersigned acknowledge receipt in full of all property, money and benefits which he/she is entitled to receive from Andrew T. Rogers and Beth J. Rogers, in their capacity as trustees of the Trust. This includes a full share of the final payment received in 2004 from the sale to Thomas G. Maile/Berkshire Investments, LLC, in 2002, of the real estate located in Ada County. (Except for the Taylors, to the extent they are retaining a beneficial interest in the Claims), the undersigned have no further expectation of receiving anything from the Trust. The undersigned further understand that the trustees have not paid income tax on the final payment received in 2004 and that he/she will receive an IRS form K-1 indicating his/her share of such tax, which is to be included on the beneficiary's own federal and state income tax returns for 2004.