9-26-2011

Berkshires Investments, LLC v. Taylor Appellant's Reply 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,

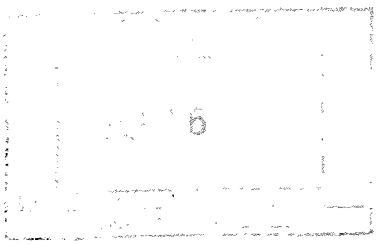
Appellants,

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' REPLY 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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I. STATEMENT OF THE CASE

A. STATEMENT OF ADDITIONAL FACTS

Connie Taylor, filed the original verified petition in the probate court on November 12, 2004, requesting the probate court to appoint her clients 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.*"

Earlier on September 9, 2004 Dallan Taylor in response to a question asking him to provide in his own words the effect of the Disclaimer Agreement, provided deposition testimony under oath, which recited, "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." (R. Vol 1. p. 000582).

Thirty-two days later after verifying his petition before the probate court, John Taylor provided deposition testimony on December 14, 2004 that his mother was to receive either the land or any dollar amount awarded as a result of the lawsuits (R. Vol 1. p. 2008).

On January 31, 2005 approximately 80 days after John Taylor executed the verified petition, Reed Taylor provided deposition testimony under oath, and in response to questioning about who would receive the benefits of the litigation, responded that his mother "probably gets

it all". In addition Reed Taylor further provided deposition testimony under oath regarding who would get the proceeds relating to the second lawsuit, by testifying, "My intent is -- I'm not going to say exactly how it's going to be disbursed. My intent would be for my mother.... 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" When asked directly about his brother's anticipated benefits from the litigation, Reed Taylor provided deposition testimony under oath by stating, "We're not looking for money out of it, if that's where you're going". (R. pp. 000566, 000567).

On May 2, 2005, John Taylor provided testimony before the Honorable Judge Beiter stating under oath, "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." (R. pp. 000348, 000350).

Judge Wilper entered his Memorandum Decision and Order on July 28, 2005 and held 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. p. 000649 ln. 10).

The Eagle real estate market underwent a huge increase in land valuations starting in 2005. The market 2006 was just full on fire. Almost out of control. You could just pretty much name your price for almost anything. (Tr. 2/3/11 pp. 212 ln. 21 thru 214 ln. 25).

During the course of the depositions of John Taylor and Dallan Taylor, the deponents were represented by Connie Taylor. No objections were interposed at the deposition of John Taylor regarding his answers relating to questions regarding who was entitled to any proceeds involving the litigation. The deposition was taken after the Disclaimer Agreement was executed (Tr. 2/3/11 pp. 375 ln. 15 thru 377 ln. 25). No corrections were made relating to any deposition answers of John Taylor or Dallan Taylor relating to questions and answers as to who was the beneficiary under the trust after the Disclaimer Agreement was executed (Tr. 2/3/11 pp. 378 ln. 1 thru 378 ln. 20).

There never was any supplementation of the Taylor brothers' discovery in the Judge Wilper case relating to any changes to the beneficiary status after the Disclaimer Agreement was executed. There were specific requests for discovery directed to the Taylor brothers in the Judge Wilper matter specifically relating to any amendments to the Johnson trust. During the course of litigation the Taylor brothers provided no discovery supplements indicating there were any amendments or changes to the trust which relating to the beneficiary status. ((Tr. 2/4/11 p. 63 ln. 7 thru ln. 25). The original trust Agreement provided Helen Taylor would only receive income from the corpus, which was discretionary, but under no circumstances was Helen Taylor to receive anything more than income from the trust.

On April 13, 2009, Connie Taylor representing her prior husband, John Taylor, and her prior brother-in-law Dallan Taylor, both individually and as trustees of the trust provided her

briefing before Judge Greenwood indicating "that petition contained a typographical error; it stated that Helen Taylor was "the sole remaining beneficiary of the Theodore Johnson Trust by virtue of the terms of a Disclaimer, Release and Indemnity Agreement," when it should have stated that she was the sole remaining direct beneficiary." (R. p. 001289).

II. ADDITIONAL ISSUES ON APPEAL

1. Are the Respondents entitled to their attorneys fees on appeal?

III. ARGUMENT

A. The Independent Action Requesting the Lower Court to Set Aside the Judgment on Beneficiaries' Claims Should Be Granted.

The litigants before the Court all agree that the Taylor brothers had standing to pursue claims in the consolidated cases captioned Taylor v. Maile 146 Id. 705, 201 P.3d 1282, (2009). The litigants are in serious disagreement over the effects of committing perjury and obtaining money by false pretenses during the course of litigation before Judge Wilper.

The Respondents have failed to address the authority cited by Appellants contained in Vol 12 Moore's Federal Practice § 60-21(4)(b), which provides that as officers of the court the commission of perjury in obtaining a judgment is another species of "fraud upon the court". The Respondents point to the amended petition before the probate court as a correction of the earlier verified petition. The amended petition before the probate court was filed without leave of court and was done as a unilateral undertaking immediately prior to the hearing. (R. p. 001361). The Respondents allege the amended petition before the probate court acts to nullify the prior verified

petition by John Taylor, and the sworn deposition testimony of all of the Taylor brothers some six months earlier. The filing of the amended petition was the first example of the Taylor brothers and their counsel playing loose and fast with the judicial system.

The amended petition filed in the probate court executed on April 18, 2005 as a verified pleading by John Taylor, described the interests of the Taylor brothers as "persons who are sought to be appointed are contingent beneficiaries of the Theodore L. Johnson Revocable Trust". (R. 000840). The Taylor brothers had prior to the execution of the Disclaimer Agreement, described themselves in January 2004, as "plaintiffs are residual beneficiaries of the Theodore L. Johnson Trust". (trial exhibit 110 p. 380). Before the execution of the Disclaimer Agreement, the Taylor brothers were residual beneficiaries destined to share in the corpus. This is the status they disclaimed. However, and this is crucial, there was nothing contingent about their status under the terms of the trust. If anything was contingent it was Helen Taylor's potential income interest which was solely discretionary with the trustee(s) under the terms of the trust. The Taylor brothers, under the trust, were guaranteed to receive corpus of the trust, unless of course they disclaimed their interest, which is exactly what the paper trail establishes.

Respondents point out that the Honorable Judge Greenwood believed the core of the appellants' case was centered on the misrepresentation by the Taylor brothers before Judge Beiter in the proceeding to obtain their judicial appointment as trustees. (Clark & Feeney Reply Brief p. 1). The Taylor brothers in all likelihood would have been appointed successor trustees regardless

of the initial verified petition or the amended petition. The verified petition of November 2004 is relevant to our understanding of the Taylor brothers' state of mind as to whether they considered themselves beneficiaries of the trust after the execution of Disclaimer Agreement.

Judge Greenwood apparently believed that the appellants' case centered upon the misrepresentations in Judge Beiter's court.

> Although the argument is not always easy to follow, Berkshire's claims presented here all hinge on the assertion that the Taylors and their counsel committed a fraud on Judge Beiter by filing a petition for appointment as Trustees that contained a false statement. This statement somehow led Judge Beiter to appoint the Taylors as Trustees, giving them standing to bring the suit which ultimately led to Judge Wilper's determination that the underlying real estate transaction was void. This led to the loss of the property. (R. 001373).

In fact Judge Greenwood should have realized, that the Appellants' case centered upon the fact that the Taylor brothers alleged to **Judge Wilper** to be something they were not. They misrepresented themselves to Judge Wilper's Court, as beneficiaries. The only significant event in the probate proceedings was the November 2004 verified petition drafted by Connie Taylor and executed under oath by her husband John Taylor. The verified petition, together with other evidence establishes that the Taylor brothers were no longer beneficiaries after their execution of the Disclaimer Agreement, yet they represented to Judge Wilper that they were beneficiaries. Judge Beiter's appointment of the Taylor brothers, as trustees, in May 2005 did not afford the Taylor brothers the right to commit perjury in Judge Wilper's Court regarding their status as beneficiaries in 2006. The admission under oath in probate court is important because it

establishes the Taylor brothers' reversal of position when they falsely claimed to be beneficiaries in January 2006 before Judge Wilper. That fraud upon the court led to the entry of the Judgment on Beneficiaries' Claims. Neither the Taylor brothers nor their counsel ever advised Judge Wilper that they previously admitted to disclaiming their status as residual beneficiaries. This reversal set the stage for the fraud upon the court. As a result of the Judgment on Beneficiaries' Claims, the Appellants were not able to present their case against the trust.

The amended petition filed in probate court in April 2005, does not alter the sworn testimony of Dallan Taylor, Reed Taylor and John Taylor stating that they knew they were no longer beneficiaries after the execution of the Disclaimer Agreement. Their counsel also knew that the Taylor brothers were no longer beneficiaries of the trust as a result of the Disclaimer, Release and Indemnity Agreement. When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission. It nevertheless exists as an utterance once seriously made by a party, and when admitted in evidence may be properly considered by the court or jury as an item of evidence in the case. Swanson v. State of Idaho 83 Id. 126, 358 P.2d 387 (1960) citing Shurtliff v. Extension Ditch Co., 14 Idaho 416, 94 P. 574; *Anderson v. Hoops,* 52 Idaho 757, 19 P.2d 908; *C. I. T. Corp. v. Elliott,* 66 Idaho 384, 159 P.2d 891; *Stout v. McNary,* 75 Idaho 99, 267 P.2d 625.

The recent case of Allied Bail Bonds, Inc. v. County of Kootenai, --- P.3d ----, 2011 WL 2652475 (2011), cited by the Respondents does not alter the established case law cited in

Swanson, supra. An amendment to the pleadings serves to replace the prior pleading as to matters involved in those proceedings. The probate proceedings had nothing to do with possession or title to the Linder Road property. It was a proceeding for the appointment of the Taylor brothers as successor trustees only. However, once a statement is made under oath it can be properly considered in all future legal proceedings to establish the intention of the party making such a statement under oath. The amended petition clearly was inconsistent with the prior verified petition and the Taylor brothers' deposition testimony. Clearly inconsistent sworn statements by John Taylor are relevant to the court's understanding of who was the beneficiary after the Disclaimer Agreement. John Taylor signed the original probate petition under oath and 32 days later provided similar deposition testimony that his mother would receive the benefits of the litigation. The filing of the amended probate petition demonstrates playing loose and fast with the judicial system as the Taylor brothers and their counsel made a determination in April 2005 to change course and assert that they remained **contingent** beneficiaries so they might benefit from that status and take advantage of their pending appeal.

There is considerably more evidence of the commission of perjury than the initial verified petition in the probate proceeding. As early as March 2003, Connie Taylor, representing the Taylor brothers knew that her clients were considering disclaiming any remainder interest in their Uncle Ted's trust in favor of their mother. She wrote the letter to Thomas Maile, that provided, "....children are all considering disclaiming any remainder interest in their uncle Ted's trust so

that the trust proceeds can be distributed to their mothers without delay....I just want to be certain that there won't be a situation down the line where someone claims that they would not have disclaimed their interest if they had a better idea of the amount of money that was involved." (R. 000535).

The Taylor Brothers in their successful attempt to gain control of the trust, after their initial complaint brought as beneficiaries was dismissed, provided additional evidence that they were planning to disclaim their interests in the trust. On April 14, 2004, Connie Taylor drafted a letter to Beth Rogers' attorney 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 trustee, Beth Rogers' cooperation and surrender of her trustee status, which would allow the Taylor brothers to gain control of the trust (R. 000561). The combination of the two letters demonstrates that the Taylor brothers were intending to disclaim their interest in the trust as early as March 2003. Such a declaration against interest made in the April 2004 letter was more than just a warning that Beth Rogers, as trustee, could be released from liability if she provided an affidavit, as argued by the Taylor brothers in their reply brief (Taylor brothers' Reply Brief p. 21). The April 2004 letter is consistent with the March 2003 letter and consistent with the sworn deposition testimony of the Taylor brothers as well as the original verified probate petition, in that it indicates their intent to disclaim beneficiary status.

The record has ample evidence through deposition testimony that the Taylor brothers

treated the Disclaimer Agreement as extinguishing their beneficiary interests in the trust. All three brothers provided testimony that demonstrated their intention and understanding of the Disclaimer Agreement (see appendix 1 to the Appellants' Opening Brief).

Connie Taylor, as an officer of the court, engineered the process for her clients to gain control of the trust and knew her clients' intentions of disclaiming their interest in the trust. Connie Taylor as counsel for the Taylor Brothers sat through deposition testimony as her clients admitted that Helen Taylor was to receive the full benefits of any litigation. Connie Taylor further knew that prior to the Disclaimer Agreement, Helen Taylor had no right under the trust to receive any portion of the trust corpus (R. 000432 ln.9 thru 25). The trust specifically provided that after the death of Ted Johnson, the trustee could pay to, or apply for the benefit of Helen Taylor, Hazel Fisher, Betty Farnworth, and Joyce Selley, such sums from the income of their 20% share of the corpus of the trust, as the Trustee deems reasonable for the maintenance, education, support and health of the said beneficiary during their lifetime. Helen Taylor had no right to obtain any principal or corpus of the trust, a fact well known to the officers of the court. Ultimately the Taylor brothers, aided by their attorneys, perpetrated perjury upon the district court in filing their amended complaint representing that they were beneficiaries in January 2006 after the Supreme Court ruled that beneficiaries have a right to sue.

49 CJS § 672. (2011) Collusion, perjury, or other misconduct—Perjury and subornation of perjury provides:

> Perjury or false swearing is a species of intrinsic, not extrinsic, fraud, and hence the rule against granting relief for perjury is in accordance with the general rule that relief in equity ordinarily cannot be had for intrinsic fraud. However, if the perjury prevents a full adversarial trial of the issues, or improperly procures the court's jurisdiction and judgment, then such perjury is extrinsic and relief against a judgment so obtained may be had in equity....
> it has been held that where a lawyer engages in a conspiracy to commit a fraud on the court by the production of fabricated evidence, and by such means obtains a judgment, a court of equity may grant relief against the judgment. Similarly, it has been held that subornation of perjury by an attorney or the intentional concealment of documents by an attorney constitute "extrinsic fraud," and allows a judgment to be set aside due to fraud upon the court.

The underlying case before Judge Wilper involved two consolidated matters. The first action was filed by the Taylor brothers while they were still beneficiaries of the trust, in January 2004. The second of the consolidated matters was the suit filed by the Taylor brothers as trustees of the trust in July 2004 after the execution of the Disclaimer Agreement. Ultimately, based upon the perjury by the Taylor brothers that they remained beneficiaries of the trust, Judge Wilper entered his Order Granting Plaintiffs' Motion for Summary Judgment on **Beneficiaries' Claim** on May 15, 2006. The Order led to the Judgment on Beneficiaries' Claims which was entered on July 2006. The Judgment provided:

> This cause came on before the Honorable Ronald J. Wilper for hearing on a Motion for Summary Judgment on the Beneficiaries' Claim. Based upon the findings of fact and conclusions of law contained within this Court's May 15, 2006 Order Granting Plaintiffs' Motion for Summary Judgment on Beneficiaries' Claim,
> NOW, THEREFORE, IT HEREBY ORDERED, ADJUDGED, AND DECREED as follows,
> ...The title to the property commonly referred to as "the Linder Road property" and more particularly described in Paragraph 3 of this Judgment shall be quieted

to the Theodore L. Johnson Revocable Trust, in fee simple...
The Defendants' remaining counterclaims and affirmative defenses, all of which were based on either equitable claims or the assertion that the Plaintiffs were wrongfully interfering with the Defendants' right to possess the Linder Road Property, are hereby dismissed. Specifically, those claims are as follows:
A. Counterclaim I (tortuous interference with contract between Defendants and their lending institution)
B. Counterclaims VII and VIII (equitable estoppel and Quasi-Estoppel)....
(R. 000119) .

Thereafter the Appellants attempted before Judge Wilper to have their claims to the title against the trust adjudicated upon equitable principles. Judge Wilper entered his Memorandum Decision and Order on July 25, 2006 again reiterating his position set forth in the Judgment on Beneficiaries' Claims. The Memorandum Decision and Order of July 25, 2006 recited:

> 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. See Klein v. Shaw, 109 Idaho 237, 240, 706 P.2d 1348, 1351 (Ct. App. 1985) (holding that a party upon who a constructive trust is imposed "is treated as if he or she had been an express trustee from the date of the wrongful holding and is required to reconvey the property to the plaintiff"); see also I.C. § 6-410 (describing an action to quiet title as that "brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim"). (R. 000119).

The taking of the real property without any consideration of any of the equitable positions between the trust and appellants before Judge Wilper was solely a result of the perjury committed by the Taylor brothers in falsely asserting their role as residual beneficiaries of the trust in 2006. As stated by Justice Eismann in Taylor v. Maile II, "Mailes have not argued on appeal that the appropriate remedy for closing the sale without court approval would be to set aside only the

closing, rather than also setting aside the contract of sale. Thus, we have not addressed the appropriate scope of the remedy for a violation of Idaho Code § 68-108(b)". The Mailes lost their opportunity to address before Judge Wilper any issues between the trust and the Appellants. The Taylor brothers' perjury prevented a full adversarial trial of the issues before Judge Wilper, CJS § 672, supra. The above authority does not require that one losing rights to a fair and full adjudication as a result of perjury must attempt to correct the same by appeal. Respondents argue that the Mailes filed their notice of appeal and raised this concept in Taylor v. Maile II (Taylor brothers' Reply Brief p. 4). Only standing was argued as being affected by the Taylor brothers' misconduct, however, no issue was raised relating to any cause of action related to the criminal activity of Taylor brothers or their attorneys. The merits of the claims were never presented nor determined. Standing is focused 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).

The appellants were assured by the grantor of the trust and the successor trustees, the Rogers, that the trust would stand by the transaction (R. 000539). The Motion for Summary Judgment in February 2006 was based solely upon the Taylor brothers' criminal conduct in committing perjury and obtaining money by false pretenses based upon the assertion that they were residual beneficiaries in 2006. (R. pp. 000655, 000660).

The Respondents have argued this matter is analogist to the case of Rae v. Bunce 145 Id. 798, 186 P.3d 654 (2008). (Clark & Feeney Reply Brief p. 9). The Rae matter involved

a claim of a fraud upon the court, based upon opposing counsel's submission of a proposed order by mail not by motion. The present matter involves a complaint against officers of the court who are alleged to have acted in the following manner:

> That all defendants, acted with oppressive, fraudulent, wanton, malicious or outrageous conduct as alleged above. That defendants acted in a manner that was"an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendants with an understanding of or disregard for its likely consequences" and that the defendants acted with an extremely harmful state of mind, whether that be termed "malice, oppression, fraud or gross negligence", "malice, oppression, wantonness;" or simply "deliberate and willful." That defendants well knew that the above conduct would be oppressive as to the plaintiffs and others. (R. 000080).

The present matter deals with perjury, subordination of perjury and obtaining money by false pretenses. The two matters are as different as day and night. The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense. Rae, supra.

The burden is on the claimant to prove sufficient facts to set aside a judgment, by clear and convincing evidence. I.R.C.P., Rule 60(b)(3). Kuhn v. Caldwell Banker Landmark, Inc. 150 Id. 240, 245 P.3d 992 (2010). The records clearly establishes the Respondents actively engaged in conduct that played loose and fast with the judicial system which ultimately amounted to criminal conduct. The crimninal conduct of the respondents is clearly established in the record.

The deposition testimony of Dallan Taylor is entirely consistent with the verified petition

before the probate court as executed in November 2004. The deposition testimony of John Taylor is entirely consistent with the verified petition before the probate court as executed in November 2004. The deposition testimony of Reed Taylor is entirely consistent with the verified petition before the probate court as executed in November 2004. The testimony of John Taylor before the probate court in May 2005 is entirely consistent with the verified petition before the probate court as executed in November 2004. The letter of March 2003 authored by Connie Taylor is entirely consistent with the verified petition before the probate court as executed in November 2004. The letter of April 2004 authored by Connie Taylor is entirely consistent with the verified petition before the probate court as executed in November 2004. However, if that verified petition of November 2004 contained a typo as argued by the Taylor brothers, all the other testimony, and all the letters are in error. The recent case of NC-D.H., Inc. v. Garner, 218 P.3d 853 (Nev. 2009) provides:

> The most widely accepted definition, which we adopt, holds that the concept embraces only that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases ... and relief should be denied in the absence of such conduct. In addition to his duties to his clients, a lawyer also owes a duty of " loyalty to the court, as an officer thereof, that demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon the court." We lawyers, judges, and practitioners alike are very ... concerned about how our profession is perceived. We're very proud of what we believe is an honorable profession and-we're very concerned when something like this happens. It hurts us all. It really does.

If a party establishes that an unconscionable plan or scheme was used to improperly

influence the court's decision, and that such acts prevented the losing party from fully and fairly presenting his case or defense, then "fraud on the court" exists. In re Paternity of Tomiki, 518 N.E.2d 500 (Ind. App. 1988). The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense. 47 Am.Jur. 2d, Judgments § 728 (2006). As stated in the case of Hartford v. Hartford 53 Ohio App.2d 79, 371 N.E.2d 591 (Ohio App. 1977):

> While no precise definition of fraud upon the court is possible, we believe, like most courts considering the matter, that the term as used in regard to obtaining relief from judgment must be narrowly construed to embrace only that type of conduct which defiles the court itself, or fraud which is perpetrated by officers of the court so as to prevent the judicial system from functioning in the customary manner of deciding the cases presented in an impartial manner.

The Appellants' independent action to set aside the Judgment on Beneficiaries' Claim should be granted, as officers of the court actively conspired to commit perjury to obtain a judgment that precluded the appellants from presenting their full case in the consolidated matter before Judge Wilper.

B. The Appellants Did Act in a Prudent Manner in Asserting the Taylor Brothers Lacked Standing and Did Act Within a Reasonable Time in Filing Their Independent Action to Set Aside the Judgment on Beneficiaries' Claim.

In Idaho our court's have ruled that an independent action under I.R.C.P. 60(b) may be brought within a reasonable time. The question of reasonableness is ordinarily a question of fact to be resolved by the trier of fact. 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 Davis v. Parish, 131 Id. 595, 961 P.2d 119 (1998).

An independent action to set aside a judgment can be based upon the doctrine of "fraud on the court". 7 Moore's Federal Practice ¶ 60.33. However, unlike an action for extrinsic fraud, an action for "fraud on the court" is not limited by laches and may be brought at anytime. 7 Moore's Federal Practice ¶ 60.33. See In re Paternity of Tomiki, supra. " 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. 12 James We. Moore et al., Moore's Federal Practice § 60.21[4][g] & n. 52 (3d ed.2009) (citing Lacewood v. Bowls, 46 FRAT 625, 634 (D.D.C.1969).

The appellants discovered the impact of the respondents' criminal activity while preparing their appellants' opening brief in Taylor v. Maile II. Six months had expired since Judge Wilper entered the Judgment on Beneficiaries' Claim. Consequently, the only way for the Appellants to bring the misconduct to the Court's attention was to present an argument relating to issues of standing. The issue of standing is jurisdictional, and it may be raised at any time. Tungsten Holdings Inc., v. Drake, 143 Id. 69, 72, 137 P.3d 456, 459 (2006).

Respondents argue that the appellants are simply attempting to take another bite at the apple. This is untrue, fraud upon the court as an issue or claim has never been tried or determined, only standing was discussed and determined. There is no dispute that the Taylor brothers had standing to sue under Taylor v. Maile II. Standing does not confer a benefit upon a

litigant to commit perjury, suborn perjury or obtain money by false pretenses. Standing doe not confer a benefit upon a litigant which results in the opposing party from fairly and fully having an adjudication of all claims, including the claims in the Judge Wilper matter that may have existed between the appellants and the trust.

Appellants argument that the Taylor brothers committed misconduct was advanced to defeat their standing. The Supreme Court in Taylor v. Maile found the Taylors had standing. The appellants filed this action in December 2007 while the appeal was still pending.

Although the Judgment on Beneficiaries' Claims was entered by Judge Wilper in July 2006, there remained the question of unjust enrichment which was tried in October 2006. That trial involved a claim of unjust enrichment to the trust's right to title, it had nothing to do with the balancing of equities between the parties. The Appellants filed the independent action while the appeal was pending, mindful of the requirement that Rule 60 (B) requires a "reasonable time" for the filing of the independent action. Given the fact that there remained issues to be tried before Judge Wilper and the appellants had to prepare for such a trial, raising the matter as an issue of standing and almost simultaneously filing an independent action to set aside the judgment was reasonable. Rule 60(b) is silent as to when an independent action can be maintained based upon criminal activity. To hold otherwise would be tantamount to concluding that all matters involving fraud and/or criminal conduct would have to be filed within six months of the date of Judgment.

C. The Criminal Activity of the Respondents Defeats Any Application of the Doctrine of Res Judicata.

47 Am. Our. 2d Judgments § 537, provides the appropriate standard in determining if res judicata should apply under the facts of this case. The Appellants were denied the opportunity to present their case against the trust, before Judge Wilper. The perjury by the Taylor brothers gave Judge Wilper the wrongful impression that the Taylor brothers had a financial interest in the corpus of the trust in 2006. However, in truth and fact, the Taylor brothers bargained away their interests in the trust to gain control of the trust, as trustees in July 2004. This was done to advance a lawsuit by the trust when their own lawsuit was dismissed.

The case of Living Designs, Inc. v. E.I. Dupont de Numbers and Co., 431 F.3d 353 C.A.9 (Hawaii 2005) provides law which explains that once fraud has been demonstrated in prior litigation, other non-fraud claims are permissible. The Living Design, supra, relied upon certification responses from the Hawaii Supreme Court, and held at 373 of 431 F. 3d:

> The district court also erroneously dismissed Plaintiffs' non-fraud claims on the grounds of the litigation privilege. Matsuura III, 330 F. Supp.2d at 1128. In Matsuura II, the Hawaii Supreme Court stated that "Hawaii courts have applied an absolute litigation privilege in defamation actions for words and writings that are material and pertinent to judicial proceedings." 73 P.3d at 692. The court examined the policy considerations behind the privilege and decided not to expand the protection of the privilege to claims outside of defamation actions, holding that "under Hawaii law, a party is not immune from liability for civil damages based upon that party's fraud engaged in during prior litigation proceedings." Id. at 700, 706. The court appears to emphasize that many of the policies weighing against the application of the privilege do so only when fraud was committed in the prior proceedings. Id. at 693-99. In accordance with the Hawaii'I Supreme Court's analysis, so long as a cause of action for fraud is

> asserted, the litigation privilege does not protect subsequent litigation asserting other causes of action stemming from the fraud allegedly committed in prior proceedings. Thus, we hold that Plaintiffs' non-fraud claims are not barred by the litigation privilege under Hawaii law.

The action of the Respondents in misrepresenting their status as beneficiaries of the trust in 2006 amounted to criminal conduct. Criminal behavior as alleged in this case is more severe than fraud. The actions of the Respondents should not be tolerated as they demonstrate tampering with the administration of justice in Idaho and should be a clear exception to any defense of res judicata. The non fraud claims set forth in the amended complaint need to be resolved by the trier of fact and cannot be barred by res judicata.

D. The Doctrine of Res Judicata Does Not Apply.

Neither issue preclusion nor claim preclusion apply. Five factors are required in order for issue preclusion to bar the re-litigation of an issue determined in a prior 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. Ticor Title Co. v. Stanion 144 Id. 119, 157 P.3d 613, (2007). Justice Eismann's concurring opinion establishes that not all the issues were resolved in Taylor v. Maile II. As Justice Eismann indicated, the appropriate scope of the remedy for a violation of Idaho Code §

68-108(b) was not litigated nor determined as an issue on Taylor v. Maile II. The Respondents' criminal behavior and/or the effects thereof were not issues which were actually decided. Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by the appellate court. Taylor v. AIA Services Corp. WL 3904754 (Idaho 2011), Liponis v. Bach, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010). Issue preclusion does not apply to the present matter.

Idaho uses a transactional approach to claim preclusion. U.S. Bank Natl. Assn. v. Kuenzli, 134 Id. 222, 226, 999 P.2d 877, 881 (2000). "The doctrine of claim preclusion bars not only subsequent re-litigation of a claim previously asserted, but also subsequent re-litigation of any claims relating to the same cause of action which were actually made or which might have been made." Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion has three elements: (1) same parties or their privies; (2) same claim; and (3) final judgment. Tacker Title Co. v. Station, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). Watkins v. Peacock 145 Id. 704, 184 P.3d 210 (2008). The Appellants had no cause of action or claim until Judge Wilper entered the Judgment on Beneficiaries' Claim. Moreover, the Decision in Taylor v. McNichols, 149 Id. 826, 243 P.3d 642 (2010), holds that a valid claim against an opposing attorney must wait until the conclusion of the underlying litigation.

The Respondents argue that the appellants' claims are barred because the appellants

arguably incurred "some damages" during the proceedings before Judge Wilper. The existence of objectively ascertainable injury is simply an analytical tool to be used in determining, as basis for the accrual of a professional malpractice action, when "some damage" has occurred. Stuard v. Jorgenson, 150 Id. 701, 249 P.3d 1156 (2011). The "some damage" rule has been used to determine if an applicable statute of limitations applies in a professional malpractice case. The case of Taylor v. McNichols, supra, establishes that because of the complexity of modern litigation, one cannot determine the scope of an opposing counsel's wrongful conduct until the underlying case is concluded. This reasoning is applicable to the present matter in determining that neither claim preclusion nor "some damage" rule applies in this case. Even through the Respondents committed perjury in March 2006, there was no definitive amount of attorneys fees relating solely to that point. The case continued through trial in October 2006 on the Maile's counter-claim. One cannot objectively determine when some damages were incurred relating to attorney fees and as such there is no res judicata defense.

The Respondents have argued that the Appellants claims for legal malpractice were frivolous. (Taylor brothers' Reply Brief p. 23). This is a fallacious argument on the part of the Taylors, because the Appellants never alleged attorney malpractice.

In the present matter the appellants claim among other things, the respondents were negligent in misrepresenting to the court their clients' status as beneficiaries under the trust, when in prior sworn pleadings and prior testimony it was established that the Taylor brothers'

mother was the sole beneficiary of the trust as a result of the Disclaimer Agreement. The attorneys prepared the documentation containing the perjured testimony, had previously prepared documents containing the true facts, filed pleadings asserting facts the attorneys knew were not true, and had participated in deposition and court proceedings establishing the true fact that the Taylor brothers' mother was the sole beneficiary of the trust.

The allegations of the amended complaint allege conduct and an agreement between the Respondents to accomplish an unlawful objective. (R. 000257). Such a civil conspiracy is not, by itself, a claim for relief. The essence of a cause of action for civil conspiracy is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself. Mannos v. Moss, 143 Id. 927, 931, 155 P.3d 1166, 1170 (2007). Such wrongful conduct give rise to a number of civil remedies, to wit: (1) the Taylor brothers and the attorney Respondents committed wrongful acts that are prohibited under the Idaho Racketeering Statue (Count Eleven); (2) the Respondents committed acts that constitute abuse of process (Count Five); (3) the Respondents committed a fraud upon the court (Count One); (4) the Respondents committed wrongful conduct in filing a verified pleading which was diametrically opposite to an earlier verified pleading previously submitted by the Respondents before another tribunal, requiring an imposition of a constructive trust (Count Two); (5) the Respondents committed acts constituting negligence and/or gross negligence (Count Six and Eight); (6) the Respondents committed acts which constitute equitable estoppel, quasi estoppel and/or judicial estoppel, (Counts Nine, Ten, and Twelve).

The elements of negligence are well established: (1) duty; (2) breach; (3) causation; and (4) damages. Estate of Becker v. Callahan, 140 Id. 522, 526, 96 P.3d 623, 627 (2004). As a general rule, an attorney will be held liable for negligence only to his or her client and not to someone with whom the attorney does not have an attorney-client relationship. Harrigfeld v. Hancock, 140 Id. 134, 90 P.3d 884 (2004), Wick v. Eastman, 122 Id. 698, 838 P.2d 301 (1992). However, our Supreme Court has indicated that a claim can exist between a non-client and an attorney for a claim of negligence. See McPheters v. Maile, 138 Id. 391, 395, 64 P.3d 317, 321 (2003).

A party is not immune from liability for civil damages based upon that party's fraud engaged in during prior litigation proceedings. Matsuura v. E.I. Du Pont De Numbers, 102 Hawaii 149, 73 P.3d 687 (2003). A third party can hold a lawyer liable if the attorney exceeds the scope of his employment or acts for personal gain or substantially assisting in a client's breach of fiduciary duty. Attorneys must not knowingly counsel or assist a client in committing a crime or fraud. Taylor v. McNichols, supra. The Appellants have alleged sufficient facts against the attorneys indicating the attorneys actively participated in perpetrating a fraud upon the court which created damages to the Appellants.

The Appellants were denied the opportunity to present their case against the trust before Judge Wilper. The perjury by the Taylor brothers gave Judge Wilper the wrongful impression that the Taylor brothers were beneficiaries and had a financial interest in the corpus of the trust in

2006. In truth, the Taylor brothers bargained away their interests in the trust to gain control of the trust in 2004 to advance a lawsuit by the trust when their own lawsuit was dismissed. The Appellants have alleged valid claims against the respondents which are not barred by the doctrine of res judicata.

E. A Application of Law of the Case Does Not Apply Because of Respondents' Criminal Behavior.

Fraud vitiates everything it touches. Tusch Enterprises v. Coffin 113 Id. 37, 740 P.2d 1022 (1987). Fraud upon the court makes void the orders and judgments of that court. An attempt to commit "fraud upon the court" vitiates the entire proceeding and deprives the court of subject matter jurisdiction. 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).

The Respondents' criminal behavior constitutes a fraud upon the court and deprives the court of subject matter jurisdiction. There can be no law of case under these facts. Under the law of the case doctrine, when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the district court and upon subsequent appeal." The rule is well established and long adhered to in this state that

where, upon an appeal, the Supreme Court, in deciding a case states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. . . ." In re Barker v. Fischbach & Moore, Inc., 110 Id. 871, 872, 719 P.2d 1131, 1132 (1986)(citing Suitts v. First Security Bank of Idaho, 110 Id. 15, 713 P.2d 1374 (1985)).

The present action is an independent action under I.R.C.P. Rule 60 to set aside a judgment based upon fraud upon the court and for claims for damages as a result of litigation misconduct by the Respondents. The law of the case doctrine has no application to the current proceedings. The Respondents argued that the standing of the Taylor was "law of the case" before the district court (Taylor brothers' Reply Brief p. 9). However, under the "law of the case" principle, on a second or subsequent appeal the courts generally will not consider errors which arose prior to the first appeal and which might have been raised as issues in the earlier appeal. See 5 Am. Jur.2d Appeal and Error § 752 (1962). The doctrine discourages piecemeal appeals and is consistent with the broad scope of claim preclusion under the analogous doctrine of res judicata. Jarman v. Hale, 122 Id. 952, 842 P.2d 288 (C.A. 1992).

Respondents' contention that "law of the case" applies, is erroneous, because this case is not about standing but rather the effects of criminal behavior in obtaining a judgment. If the law of the case is strictly applied there could never be a Rule 60(B) independent action filed when there are allegations of criminal conduct that amount to tampering with the administration of

justice. Fraud upon the court "will be found only in the presence of such tampering with the administration of justice as to suggest a wrong against the institutions set up to protect and safeguard the public. Compton v. Compton, 101 Id. 328, 334, 612 P.2d 1175, 1181 (1980), quoting Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246 (1944).

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. Scona Inc. v. Green Willow Trust, 133 Id. 283, 286, 985 P.2d 1145, 1148 (1999). There is no present issue raised by the Appellants concerning the standing of the Taylor Brothers. Simply because one has standing to sue, that does not afford the right or privilege to obtain a judgment based upon perjury that deprives an opposing party their right to an adjudication of their claims and defenses. There is no "law of the case" that applies to the present claims.

F. The Consideration of Extrinsic Evidence and Parol Evidence Is Permissible in Establishing That the Taylor Brothers Committed Perjury and Obtained Money by False Pretenses.

The Taylor brothers themselves knew what their beneficial interest in the trust was after they executed the Disclaimer Agreement in 2004. The Taylor brothers knew the truth of the misrepresentation as it was solely within their intention. There has been no judicial determination that the Taylor brothers remained beneficiaries after the 2004 Disclaimer Agreement. The Taylor brothers argue that the letter of April 2004 authored by Connie Taylor is inadmissible as parol evidence. (Taylor brothers' Reply Brief p.22). There is no merger under

these circumstances. The Respondents failed to strike the letter from consideration before the lower court and are precluded from arguing new matter at the appellate level.

A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist. Cool v. Mountainview Landowners Coop. Ass'n, 139 Id. 770, 772, 86 P.3d 484, 486 (2004). Although parol evidence generally cannot be submitted to contradict, vary, add or subtract from the terms of a written agreement that is deemed unambiguous on its face, there is an exception to this general rule where a latent ambiguity appears. Salfeety v. Seideman (In re Estate of Kirk), 127 Id. 817, 824, 907 P.2d 794, 801 (1995). Where the facts in existence reveal a latent ambiguity in a contract, the court seeks to determine the intent of the parties at the time they entered into the contract. Knipe Land Co. v. Robertson, 2011 WL 2039635 (Idaho 2011).

The two letters authored by Connie Taylor (R. 000535, 000561) like any other form of evidence can be used to demonstrate inconsistent statements and impeach the one who uttered such a statement. The letters, like the Taylor brothers' sworn testimony, contradict the Taylor brothers' and their counsels' allegation that a typographical error existed in the verified petition in November 2004. Connie Taylor's letter of April 14, 2004 is proximately related in time to the sworn statements under oath a few months later contained in the verified petition in the probate proceedings on November 12, 2004. The letters in the record are yet additional examples evidencing the Respondents' criminal conduct.

G. The Appellants Were Deprived of Their Fundamental Right to Fairly and Fully Adjudicate Their Claims Before Judge Wilper.

The Taylor brothers argue that there is no consequence, even if they committed perjury to obtain a judgment. The Taylor brothers argue the land transaction was declared void and rescission was not an issue for determination. (Taylor brothers' Reply Brief p. 11). The case of State v. Wolfrum, 145 Id. 44, 175 P.3d 206, (Ct. App. 2007), in defining the elements of a charge of perjury, explain that the test for materiality is whether the testimony probably could influence a court on the issue before it. The false statement need not bear directly upon the ultimate issue of fact. The degree of materiality is not important.... It is sufficient that it was material, and might have been used to affect such proceeding.

Although the Appellants requested Judge Wilper to balance the equities between the trust and themselves, Judge Wilper denied such a requests. All that remained in Judge Wilper's opinion was a trial on the unjust enrichment claim relating to the enhanced value of the forty acre parcel improved by the Appellants. The Respondents fail to address the established case law in Idaho which allows a claim to title and possession of real property when the Statute of Frauds is violated. The Appellants were led to believe by the Taylor brothers' predecessor, Beth Rogers that the trust would honor the real estate transaction. Based upon written assurances, the Appellants proceeded to incur building costs to their detriment. Because Judge Wilper believed the Taylor brothers were beneficiaries no determination was made involving the relationship between the trust and the Appellants. Judge Wilper's Court never resolved any of the issues

surrounding the detriment to the Mailes of investing monies to develop real property acquired in a transaction that the successor trustee Beth Rogers assured them the trust would honor. (R. 000539).

The case of Garner v. Bartschi, 139 Id. 430, 80 P.3d 1031 (2003) provides the elements of quasi-estoppel. The Garner, supra, case held:

> Quasi-estoppel prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. Lunders v. Estate of Snyder, 131 Id. 689, 695, 963 P.2d 372, 378 (1998). Quasi-estoppel, unlike equitable estoppel, does not require misrepresentation by one party or actual reliance by the other...
> The elements of quasi-estoppel have been defined as follows:
> [I]t precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position.

If a contract is illegal and void, the court will leave the parties as it finds them and refuse to enforce the contract. Wernecke v. St. Maries Joint School Dist. # 401, 147 Id. 277, 287, 207 P.3d 1008, 1018 (2009). If a land transaction is fully performed and all the obligations attempted to be done by such contract became accomplished facts, the manner in which the contract was first executed is no longer the controlling issue. Farrar v. Parish, 42 Id. 451, 245 P. 934 (1926).

The Appellants were denied their day in court relating to the remedies available with the trust, as referenced by Justice Eismann, in Taylor v. Maile II. Judge Wilper precluded such an

adjudication solely as a result of the criminal behavior of the Respondents.

H. the Jury Verdict Can Not Stand.

The Taylor brothers assert that the Appellants' filing of the perjury complaint was with no legitimate factual or legal basis and was a violation of I.R.C.P. Rule 11(a)(1), which is sanctionable under Idaho Code § 12-123, which demonstrates an improper use of the legal system. (Taylor brothers' Reply Brief p. 15). The appellants have never been sanctioned under Rule 11 either by Judge Wilper or Judge Greenwood. The Taylor brothers specifically requested sanctions against the appellants, for the filing of a motion to foreclose their vendee's lien in Judge Wilper's Court and at the same time proceeding with the current action before Judge Greenwood. Judge Wilper on March 10, 2010, entered his Order Denying Defendants' Motion for Foreclosure of Vendee's Lien and Denying Plaintiffs' Motion for Sanctions. (R. 001614). Being fully appraised of the record in both his case and Judge Greenwood's case, Judge Wilper stated, "the Court finds that Defendants' motion to foreclose the vendee's lien is not without a basis in law or fact and was reasonable under the circumstances. Plaintiffs' motion for sanctions is denied". (R. 001618). The very fact that the Judge Wilper found in March 2010, that there were no sanctionable offenses in proceeding with two cases in litigation, makes it even harder to understand how a jury could disagree. The point of Judge Wilper's determination shows that litigants, such as the Appellants, had a reasonable basis to pursue the exact course of action undertaken by the appellants. There can not be a finding that there was a willful improper use of

legal process in the regular course of the proceeding, and/or (2) the act was committed for an ulterior, improper purpose. If it were otherwise Judge Wilper would have sanctioned the actions of the Appellants in March 2010. The jury verdict undermined the prior ruling by Judge Wilper which was determined upon the same record which the jury considered. The Verdict therefore cannot stand.

The appellants voluntarily withdrew their Notice of Lis Pendens on July 13, 2009 in Judge Greenwood's proceedings some 10 days after Judge Greenwood's Memorandum Decision and Order dismissing the Appellants' complaint. Earlier, in Judge Wilper case, Judge Wilper had ordered that a lis pendens could be maintained during an appeal.

Judge Wilper ruled upon the Taylor brothers' motion to strike the Lis Pendens which was filed prior to the Judge Wilper appeal. The Taylors brothers in the litigation before Judge Wilper in 2007, requested that his court strike the Lis Pendens filed in May 2006 and/or requested that a bond be posted during the appeal. Judge Wilper entered his Order on March 1, 2007 denying the motion. Pursuant to that order the lis pendens was authorized to remain of record. (R. 001393-001409). As early as March 1, 2007 the Appellants knew that they had a right to maintain a lis pendens even during an appeal. The appellants voluntarily released the Notice of Lis Pendens long before the present appeal was filed. Under the prior judicial determination by Judge Wilper, litigants were entitled to maintain a lis pendens even during an appeal. Neither the Taylor brothers nor the trust could have been damaged by the filing of the lis pendens before Judge

Greenwood, because the appellants are entitled to maintain a lis pendens even during the appellate process.

Both lis pendens were properly recorded and reasonably connected to the litigation. Although, technically, the Appellants could have maintained the lis pendens through an appeal in the current case (as allowed by Judge Wilper during the appeal in Taylor v. Maile), the Appellants voluntarily removed the same. Likewise, the lis pendens was substituted with a Vendee's Lien in the Judge Wilper matter. (R. 001421, 001427-001429). Judge Wilper had approved the Vendee's Lien as a mechanism to protect the Appellants' right to payment. The Appellants filed their Verified Motion to Foreclosure the Vendee's Lien in November 2009. (R. 001445). Until the purchase price was returned, pursuant to I.C. § 45-1302, Appellants were entitled to maintain their lis pendens.

54 C.J.S. Lis Pendens § 10 provides:

> § 10. Generally
> The doctrine of lis pendens applies to all suits or actions which directly affect real property. In some states, the cause of action must involve some legal interest in the challenged real property in order for lis pendens to apply. Similarly, in other states, a notice of lis pendens is authorized only as to a suit in which real property is "involved," which refers only to realty actually and directly brought into litigation by pleadings in a pending suit and as to which some relief is sought respecting that particular property. A classic example of a suit in which real property is "involved" is a suit which seeks to have a prior conveyance of the property set aside or declared null and void. Lis pendens applies to all claims affecting title to real property, use and occupation of property, and interest in property.
> However, lis pendens generally applies not only to those actions which involve the question of title or a possessory interest but also to litigation that does not seek

> to change the ownership of land in any way but does involve a determination of certain rights and liabilities incident to ownership. Thus, lis pendens applies to actions which are brought to enforce any lien, charge, or encumbrance against real property. Further, it is not improper to file a lis pendens pursuant to an action seeking equitable relief with respect to the property that is the subject of the lis pendens.

The claims before Judge Wilper related initially to title and thereafter to equitable rights affecting the Linder Road property. The Vendee's Lien certainly qualifies as a legal proceeding which involve a determination of certain rights and liabilities incident to ownership. I.C. § 45-1302 clearly establishes this proposition and as such there was no actionable wrong committed by any of the Appellants.

The Appellants asserted a variety of claims. The Appellants requested a constructive trust to be imposed based upon the fraudulent and criminal activity of the Respondents. In addition, the Appellants requested relief under the Idaho Racketeering Statute.

The language under I.C. § 18-7803 and § 18-7804 clearly provides that a claim only arises as a result of activity amounting to the specific statutory criminal activity that is precisely alleged to have occurred in the present matter. Specifically the Statutes provide:

> 18-7803 DEFINITIONS.
>
> As used in this chapter, (a) "Racketeering" means any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other jurisdiction:
>
> (10) Fraudulent practices, false pretenses, insurance fraud, financial transaction card crimes and fraud generally (sections 18-2403, 18-2706, 18-3002, 18-3101, 18-3124, 18-3125, 18-3126, 18-6713, 41-293, 41-294 and 41-1306,

Idaho Code);

(17) Perjury (sections 18-5401 and 18-5410, Idaho Code);

18-7804 PROHIBITED ACTIVITIES -- PENALTIES.

(a) It is unlawful for any person who has received any proceeds derived directly or indirectly from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property.

One of the remedies available under the §18-7804 is a return of real property obtained as a result of the racketeering activity. Clearly the present matter involved legitimate claims to real property which authorized the filing of the lis pendens. The jury verdict was improper under either count which the jury was allowed to consider and the verdict should be set aside.

I. The Respondents Are Not Entitled to Attorney Fees on Appeal.

The Respondents have requested attorney fees pursuant to I.C. § 12-121, and I.A.R. 41. An award of attorney fees on appeal is appropriate "if the law is well-settled and the appellants have made no substantial showing that the district court misapplied the law,'" Keller v. Rogstad, 112 Id. 484, 489, 733 P.2d 705, 710 (1987), quoting Davis v. Gage, 109 Id. 1029, 1031, 712 P.2d 730, 732 (Ct. App.1985). Under I.C. § 12-121, the Court may award reasonable attorney fees to the prevailing party in a civil action if the appellate court is left with the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation. Cramer v. Slater, 146 Id. 868, 881, 204 P.3d 508, 521 (2009). The Respondents have not met their burden for any award of attorney fees on appeal.

legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. Judge Greenwood never determined the action was frivolous, unreasonable, or without foundation at the trial level.

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), quoting Severson v. Hermann, 116 Id. 497, 777 P.2d 269 (1989). A misperception, by a party, of the law is not, by itself, unreasonable conduct. Automobile Club Ins. Co. v. Jackson, 124 Id. 874, 865 P.2d 965 (1993), Wing v. Amalgamated Sugar Co., 106 Id. 905, 911, 684 P.2d 307, 313 (Ct. App.1984).

It is of interest that none of the Respondents have requested sanctions against Appellants for an improper appeal. The current appellate involves the same principles of law that were argued before the lower court---- the application of res judicata, the affects of a fraud upon a court by officers of a court. Judge Greenwood allowed a trial on the merits relating to abuse of process and intentional interference with business advantage reasoning that the legal proceedings pursued by the Appellants were for improper purpose, to harass and to increase the course of

litigation. Not only were those legal principles advanced in good faith in the district court before Judge Greenwood, but the Appellants are advancing legitimate legal principles in pointing out the criminal conduct of the Respondents in obtaining the Judgment on Beneficiaries' Claims.

If an appeal does not meet the standards of I.A.R. 11.1 and "it is interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," then this Court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include ... the amount of reasonable expenses incurred because of the filing ... including a reasonable attorney's fee." Id.; Bowls v. Pro Indiviso, Inc., 132 Id. 371, 377, 973 P.2d 142, 148 (1999), Rodriguez v. Dept. of Correction, 136 Idaho 90, 94, 29 P.3d 401, 405 (2001). The Respondents have not requested sanctions pursuant to I.A.R. 11.1, as there exists no improper purposes at the appellate level just as there was no improper purposes at the trial level.

In the present matter, the Appellants properly made a record demonstrating criminal activity on the part of the Respondents in obtaining the Judgment on Beneficiaries' Claims. Such claims advanced by the Appellants consisted entirely of the Respondents' own sworn testimony, verified pleadings and statements against their interests. The Appellants properly alleged various tort claims in addition to the fraudulent-criminal conduct of the Respondents and attorneys fees and costs can not be assessed against the Appellants. The Appellants respectfully request that this Court deny the Respondents' request for fees on appeal.

IV. CONCLUSION

Let not any of us fear the consequences of standing up against criminal activity. Whether it be in the streets of Miami or a courthouse in Boise, Idaho, let each of us be duty-bound to pursue what is right and true.

DATED this 26th day of September, 2011.

THOMAS G. MAILE IV., pro se.

CHRIST T. TROUPIS, counsel, for Appellants, Berkshire Investments, Colleen Maile.

V.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of September, 2011, I mailed two (2) true and correct copies of the foregoing APPELLANTS' REPLY BRIEF, by placing the same in the United States Mail, postage prepaid, addressed as follows:

Connie W. Taylor & Paul Henderson Henderson Law Firm 900 Washington St. Suite 1020 Vancouver, Washington 98660 Facsimile: (360) 693-2911	(X) U. S. Mail ( ) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery
Mark Stephen Prusynski PO Box 829 Boise, ID 83701 Phone: (208) 345-2000 Facsimile: (208) 385-5384	(X) U. S. Mail ( ) Facsimile Transmission ( ) Hand Delivery ( ) Overnight Delivery

CHRIST T. TROUPIS, Counsel for Appellants.