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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,

Plaintiffs/Counterdefendants/ Appellants,

vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants/Counterclaimants/ Respondents.

Supreme Court No. 38599

District Case No. CV OC 07-23232

RESPONDENTS' BRIEF

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

The Honorable Richard D. Greenwood, District Judge presiding

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TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. ADDITIONAL ISSUES ON APPEAL 2

III. ARGUMENT 2

A. The District Court Properly Granted Defendants' Motion for Summary Judgment Based Upon *Res Judicata* 2

B. Privity. 4

C. Claim Preclusion. 5

D. There Was No Basis for the Fraud Claim. 8

E. The Fraud Claims Were Time-Barred. 10

F. The District Court Properly Awarded Attorney Fees to Defendants. 13

IV. ATTORNEY FEES ON APPEAL 14

V. CONCLUSION 15

TABLE OF CASES AND AUTHORITIES

Page

Cases

Aldape v. Akins,
105 Idaho 254, 668 P.2d 130 (Ct. App. 1983) 7

Appel v. LePage,
135 Idaho 133, 15 P.3d 1141 (2000) 13

B & K Fabricators, Inc. v. Sutton,
126 Idaho 934, 894 P.2d 167 (1995) 12

Berg v. Kendall,
147 Idaho 571, 212 P.3d 1001 (2009) 14

Campbell v. Kildew,
141 Idaho 640, 115 P.3d 731 (2005) 10

Compton v. Compton,
101 Idaho 328, 612 P.2d 1175 (1980) 10

Eliopulos v. Idaho State Bank,
129 Idaho 104, 922 P.2d 401 (Ct. App. 1996) 11

Flood v. Katz,
143 Idaho 454, 147 P.3d 86 (2006) 10

Foster v. City of St. Anthony,
122 Idaho 883, 841 P.2d 413 (1992) 4

Heinze v. Bauer,
145 Idaho 232, 178 P.3d 597 (2008) 9

Henry v. Farmer City State Bank,
808 F.2d 1228 (7th Cir. 1986) 5

Kootenai Elec. Coop., Inc. v. Lamar Corp.,
148 Idaho 116, 219 P.3d 440 (2009) 2, 4, 6, 7

Lee v. Nickerson,
146 Idaho 5, 189 P.3d 467 (2008) 13

McCall v. Buxton,
146 Idaho 656, 201 P.3d 629 (2009)........ 12

Plotner v. AT&T Corp.,
224 F.3d 1161 (10th Cir. 2000)........ 5

Rae v. Bunce,
145 Idaho 798, 186 P.3d 654 (2008)........ 9

Taylor v. Maile,
142 Idaho 253, 127 P.3d 156 (2005) ("*Taylor v. Maile I*")........ 1

Taylor v. Maile,
146 Idaho 705, 201 P.3d 1282 (2009) ("*Taylor v. Maile II*")........ 1

Taylor v. McNichols,
149 Idaho 826, 243 P.3d 642 (2010)........ 12, 13

Ticor Title Co. v. Stanion,
144 Idaho 119, 157 P.3d 613 (2007)........ 2, 4, 7

Waller v. State,
146 Idaho 234, 192 P.3d 1058 (2008)........ 12

Statutes

IDAHO APP. R. 41........ 14

IDAHO CODE § 12-121........ 13, 14

IDAHO CODE § 12-123........ 13, 14

IDAHO R. CIV. P. 54........ 13

IDAHO R. CIV. P. 60(b)........ 8, 9, 11

I. STATEMENT OF THE CASE

Respondents, Clark and Feeney, Connie Wright Taylor, and Paul T. Clark (hereinafter, "Clark and Feeney"), were sued by Berkshire Investments, LLC, Thomas G. Maile IV, and Colleen Birch-Maile (hereinafter, the "Mailes") as a result of Clark and Feeney's representation as attorneys for Dallan Taylor, R. John Taylor (hereinafter, the "Taylors"), and the Theodore L. Johnson Revocable Trust. Clark and Feeney represented the Taylors in the disputes concerning the real estate transaction between the Taylors and the Mailes, which is the subject of two prior appeals to this Court. *Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005) ("*Taylor v. Maile I*") and *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009) ("*Taylor v. Maile II*"). While the second appeal was pending a decision, the Mailes filed this lawsuit against the Taylors and their attorneys, Clark and Feeney. Although multiple claims were asserted against all the defendants, all of the claims involve the same operative facts. Judge Greenwood summarized those facts as follows:

> The core fact upon which Berkshire's cases is built is an alleged misrepresentation made to Judge Bieter in the application to appoint new trustees. The Taylors filed a verified petition for appointment as trustees. The petition contained a statement to the effect that "Helen Taylor is the sole remaining beneficiary of the Trust." The petition was later amended to reflect that she was not the sole beneficiary. In Berkshire's view, the first allegation was true and the second false.

Memorandum Decision and Order 10, R. at 1372.

Because Judge Greenwood believed that any issues arising from the alleged fraud could have been raised or were actually raised and litigated in the cases that were the subject of

the previous appeals, he granted defendants' motions for summary judgment because they were barred by principles of *res judicata*. *Id.* at 15, R. at 1377.

The Mailes filed a motion to reconsider the decision granting summary judgment. The motion to reconsider was denied. Tr., Motion Hearing 10/29/10, p. 13.

II. ADDITIONAL ISSUES ON APPEAL

Whether Clark and Feeney are entitled to attorney fees on appeal.

III. ARGUMENT

A. The District Court Properly Granted Defendants' Motion for Summary Judgment Based Upon *Res Judicata.*

Judge Greenwood granted defendants a summary judgment based upon both aspects of *res judicata*: issue preclusion and claim preclusion. This Court exercises free review over the question of whether an action is barred by *res judicata*. *Kootenai Elec. Coop., Inc. v. Lamar Corp.*, 148 Idaho 116, 119, 219 P.3d 440, 442 (2009). Issue preclusion prevents the relitigation of an issue previously determined if five factors are present:

> (1) The party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the present action; (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 of the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with the party to the litigation.

Id. at 120, 219 P.3d at 443 (citing *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007)). Judge Greenwood found that many of the claims brought by the Mailes in this case were identical to counterclaims they had raised in the prior case before Judge Wilper. Judge

Wilper decided the claims when he granted summary judgment. A final judgment was entered and was sustained on appeal. Judge Greenwood properly decided that those claims were barred by the doctrine of issue preclusion. R. at 1371. The Mailes have not addressed those claims in their appellate brief. Rather, they focus upon a statement made by the Taylors in a verified petition for appointment of the trustees, filed with Magistrate Bieter. Judge Greenwood described the Mailes' claims regarding the alleged misrepresentation as follows:

> Plaintiffs' remaining claims are abuse of process, negligence, negligence per se, gross negligence, and violation of the title 78, chapter 18 of Idaho Code. A comparison of the facts alleged in the present case to the facts alleged in the prior consolidated cases leaves no doubt that these claims relate to the same transaction that gave rise to the first cases. Berkshire makes much of the supposed fraud perpetrated by defendants. The core fact upon which Berkshire's case is built is an alleged misrepresentation made to Judge Beiter in the application to appoint new Trustees. The Taylors filed a verified petition for appointment as Trustees. The petition contained a statement to the effect that "Helen Taylor is the sole remaining beneficiary of the Trust." The petition was later amended to reflect that she was not the sole beneficiary. In Berkshire's view, the first allegation was true and the second false. Consequently, when the Taylors later caused the Trust to file suit against Berkshire alleging they were beneficiaries of the Trust, this was a false statement under oath. Likewise, the amended complaint filed in the consolidated cases after the first appeal contained this same false statement. Not only could any issues arising from this alleged fraud have been raised in the earlier case, the opinion of the Supreme Court in Maile II reflects this issue was argued in the most recent appeal and rejected.

Memorandum Decision and Order 10-11, R. at 1372-73.

The Mailes' claim that the Taylors made a false statement concerning their status as beneficiaries was argued by the Mailes in the previous litigation. In their reply brief on appeal

of Taylor v. Maile II, they argued that the Taylors should not be entitled to attorney fees because they had falsely claimed their status as beneficiaries and misled Judge Wilper in obtaining the "Judgment on Beneficiaries' Claims." R. Exh. 12 at 38-39. In that same brief, the Mailes argued that the verified petition stating that Helen Taylor was the sole remaining beneficiary was a judicial admission made by R. John Taylor and his wife, Connie Taylor. The Mailes argued that the judicial admission was binding upon them and the Taylors' misrepresentation regarding their status as beneficiaries constituted grounds for setting aside the "Judgment on Beneficiaries' Claim entered on June 7, 2006." R. Exh. 12 at 7-8.

Although the Supreme Court did not agree that the judgment must be set aside, the Mailes cannot deny that they raised the issue in *Taylor v. Maile II*. Issue preclusion should protect the Taylors or those in privity with the Taylors from having to relitigate the identical issue with the Mailes. *Kootenai Elec. Coop., Inc. v. Lamar Corp.*, 148 Idaho 116, 120, 219 P.3d 440, 444 (2009); *Ticor Title v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

B. Privity.

Res judicata applies to bar subsequent litigation between parties or those in privity with the parties to the previous litigation. *Ticor, supra,* at 618 (citing *Foster v. City of St. Anthony*, 122 Idaho 883, 888, 841 P.2d 413, 418 (1992)). Clark and Feeney was not a party to the former action, but acted as counsel for the Taylors in the former action. For an individual or entity not a party to a former action to be in privity with a party to the former action, the individual or entity "must derive his interest from one who is a part to it, that is, . . . he [must be] in privity with the party to that judgment." *Id.* Idaho courts have not specifically addressed the

issue of privity between attorneys and their clients for purposes of *res judicata*. The Tenth Circuit Court of Appeals, however, has provided that when law firms or attorneys appear as defendants in subsequent litigation "by virtue of their activities as representatives" of named parties to prior litigation, such attorneys or law firms are in privity with their clients for purposes of *res judicata*. *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1169 (10th Cir. 2000) (citing *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235, n.6 (7th Cir. 1986) (holding that for purposes of *res judicata*, privity exists between a party and its attorneys)).

Clark and Feeney's interest in this proceeding is derived entirely from its participation in prior related proceedings as legal counsel for the Taylors. The Mailes' fraud-based allegations against Clark and Feeney are based upon the preparation of pleadings submitted by Clark and Feeney on behalf of the Taylors. The Mailes also allege that Clark and Feeney's alleged misrepresentations in the prior litigation were an abuse of its position as officers of the court. Thus, Clark and Feeney clearly derives its interest in this matter from its representation as counsel for the Taylors, and they are in privity with the Taylors for purposes of *res judicata*. The Mailes do not seem to contest privity in their Appellants' Brief.

C. Claim Preclusion.

The Mailes' attempts to refer to the same issue by a different name does not change the application of *res judicata*. The Mailes raised the issue concerning the alleged misrepresentation about the status of the beneficiaries as a standing issue in Judge Wilper's court. Standing was the primary issue involved in the first *Taylor v. Maile* appeal. In fact, the Mailes have admitted that the "central issue" of the *Taylor v. Maile* case was the issue of the

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"standing or the beneficiary status of the Taylors as it allegedly affected the Taylors' claim of being deprived notice of the sale of the real property by a successor trustee who had a conflict of interest." Supplemental Brief In Response to Supreme Court Opinion, filed September 4, 2009, R. at 876. The Mailes argued that the "central issue" concerning the status of the beneficiaries was never adjudicated, but the truth is that the issue was simply not adjudicated in the Mailes' favor. The Mailes admitted:

> The plaintiffs [the Mailes] brought the facts surrounding the misrepresentation to the Idaho Supreme Court in their briefing as they alleged that the Taylors had insufficient standing as beneficiaries to rescind the transaction as the Taylors acknowledged under oath that they were no longer beneficiaries and that their mother was the sole beneficiary. Plaintiffs had a right to have that determined as an issue of standing. Standing is an issue that can be raised at any time at either the District Court level or at the appellate level. The plaintiffs legitimately raised that issue and the Idaho Supreme Court chose not to address that issue and that issue remains unresolved to this date. *Id.*, R. pp. 880-81.

Thus, the Mailes have admitted that they raised the issue in the earlier litigation, at least before the Idaho Supreme Court. In their own briefing, the Mailes admitted that the issue of standing could have been litigated at either the district court or appellate court level and that they attempted to do. Therefore, the issue concerning the alleged misrepresentation about the beneficiaries' status was a matter "which might and should have been litigated" or could have been brought in the earlier litigation. Thus, the claim preclusion component of *res judicata* applies. *Kootenai Elec. Coop., Inc., v. Lamar Corp.*, 148 Idaho 116, 120, 219 P.3d 440, 444 (2009). Unsatisfied with the results of the earlier litigation, the Mailes are simply trying to

"obtain a further bite at the apple" by re-characterizing the claims they made in the earlier litigation. A primary purpose of the *res judicata* doctrine is to prevent just such an occurrence. *Id.* at 122, 219 P.3d at 446.

In determining whether the Mailes' claims in this action should be precluded, their legal theories do not control. Instead, this Court applies a "transactional concept . . . giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the party's expectations or business understanding or usage." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 126, 157 P.3d 613, 620 (2007) (quoting *Aldape v. Akins*, 105 Idaho 254, 259, 668 P.2d 130, 135 (Ct. App. 1983)). The facts concerning whether Helen Taylor was the sole beneficiary of the Trust, or whether the other Taylors were beneficiaries, are all related in time, space, origin and motivation, whether they were pertinent to issues concerning standing or the current claim of "fraud on the court." Counsel for the Mailes admitted that "The same facts give rise" to both the standing claim made in the earlier litigation and the current claim of misconduct by the Taylors and their attorneys. Tr., Hearings held 10/29/10, 11/30/10, 1/18/11, p. 9, LL. 23-24. At the trial held on February 2, 2011, Mrs. Maile also admitted that her husband knew the facts regarding the status of the beneficiaries in 2004, but they were not "looking for misrepresentation." Tr. Vol. I, p. 345, LL. 6-16.

In *Ticor, supra,* the court held that the "operative underlying facts of the prior motions" and the claim made by Ticor were the same. 144 Idaho at 126, 157 P.3d at 620. Similarly, the operative underlying facts concerning the Mailes' claim that the Taylors lacked

standing as beneficiaries were the same facts that they are using to support their claims of fraud on the court in this case. Judge Greenwood correctly applied the transactional analysis and granted summary judgment on the basis of claim preclusion.

D. There Was No Basis for the Fraud Claim.

The Mailes devote a significant portion of their initial brief to their argument that a fraud on the court avoids the application of *res judicata*. As Judge Greenwood succinctly held, the conduct of which the Mailes complain is not sufficient to set aside the judgment of Judge Wilper. The Mailes seize upon the language of Idaho Rule of Civil Procedure 60(b) and Idaho case law allowing the court to overturn a judgment on the basis of fraud. There are two simple reasons why Rule 60(b) does not apply to this case, the first of which was noted by Judge Greenwood in his Memorandum Decision granting summary judgment: First, a Rule 60(b) motion should have been made in Judge Wilper's court; and second, Rule 60(b) requires that the motion on the basis of fraud be made not more than six months after the judgment was entered. The "Judgment on Beneficiaries' Claims" of which the Mailes complain was entered on June 7, 2006 (R. Vol. 1, p. 119). No motion based upon Rule 60(b) was ever made in Judge Wilper's court. The complaint in this case, even if it was construed as a Rule 60(b) motion, was not filed within six months of that judgment.

A third reason for dismissing the Mailes' claim of fraud on the court, which was also noted by Judge Greenwood, is that the conduct in this case does not amount to fraud on the court. The Mailes complain that the Taylors first filed a petition stating that Helen Taylor was the sole beneficiary of the Trust and that the Taylors are bound by that petition. The alleged

misrepresentation or fraud upon the court is contained in an amended petition by the Taylors, in which they claimed they were residual beneficiaries of the Trust and therefore had standing to sue. This Court recently held that a similar claim of fraud upon the court was "ridiculous." *Rae v. Bunce*, 145 Idaho 798, 803, 186 P.3d 654, 659 (2008). The Mailes are simply dissatisfied with the outcome of their litigation and are attempting to bring an independent action, rather than file a Rule 60(b) motion in Judge Wilper's court. "An independent action to set aside a judgment based upon an alleged fraud upon the court is not a substitute for actions that could have been taken in the trial court to correct the prejudice from allegedly wrongful conduct." *Id.* at 805, 186 P.3d at 661. The Mailes knew the terms of the Trust. Mr. Maile prepared it. He should have known what the Trust specified regarding the beneficiaries. Mrs. Maile admitted they knew of the petition and amended petition concerning the beneficiaries in 2004. They should have litigated those issues before Judge Wilper, rather than attempt to have another judge overturn Judge Wilper's decision. *Id.*

Allegations in pleadings are merely allegations or arguments that provide notice to the other parties and are admitted or denied by the other parties, often amended, omitted or even rejected by a judge or jury. Allegations in pleadings are statements of an advocate and should not be used as personal admissions against the attorneys advocating the position for their clients. *See Heinze v. Bauer*, 145 Idaho 232, 238, 178 P.3d 597, 603 (2008). If allegations of pleadings could form the basis of a claim for fraud on the court, "every losing defendant would then have a cause of action against the successful and the winning plaintiff's counsel." Memorandum Decision and Order 12, R. at 1374.

The following statement from *Compton v. Compton* has been repeated often by this Court: "The independent action in equity is a most unusual remedy, available only rarely and under the most exceptional circumstances. It is most certainly not its function to relitigate issues determined in another action between the same parties or to remedy the inadvertence or oversight of one of the parties to the original action. It will lie only in the presence of an extreme degree of fraud." *Compton v. Compton*, 101 Idaho 328, 335, 612 P.2d 1175, 1182 (1980). Mr. Maile was not "prevented by trick, artifice, or other fraudulent conduct from fairly presenting his claims or defenses or introducing relevant and material evidence." *Flood v. Katz*, 143 Idaho 454, 457, 147 P.3d 86, 89 (2006) (quoting *Campbell v. Kildew*, 141 Idaho 640, 649, 115 P.3d 731, 740 (2005), and citing *Compton, supra,* at 334, 612 P.2d at 1181). The claims by the Taylors that they were beneficiaries of the Trust were no different than routine claims made in thousands of pleadings that parties had standing or the court had jurisdiction. They were simply allegations that Judge Wilper, and presumably this Court, believed, not because of any fraud on the courts, but because they were true. The Mailes' fraud claims deserve to be dismissed.

E. The Fraud Claims Were Time-Barred.

The Mailes contend that they discovered "the fraudulent/criminal behavior while preparing their opening brief in *Taylor v. Maile 2.*" Appellants' Opening Brief 20. They provide no authority or explanation for this statement. In particular, they provide no explanation for why they did not discover the inconsistency concerning the status of the beneficiaries when they

received the pertinent pleadings. Mr. Maile drafted the trust agreement and should have been aware of the status of the beneficiaries to that Trust.

The Mailes ignore the time requirements of Rule 60(b). The rule permits a motion for relief of a final judgment on the basis of fraud. Although the rule does state that the motion shall be made "within a reasonable time," it specifically states that a motion made on the basis of fraud must be made no more than six months after the judgment. The Mailes have clearly exceeded the time limits of the rule.

The Mailes are correct that Rule 60(b) "does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." *See Eliopulos v. Idaho State Bank*, 129 Idaho 104, 108, 922 P.2d 401, 404 (Ct. App. 1996). The Court of Appeals in *Eliopulos* stated that although an independent action for equitable relief from a fraudulent judgment may be brought in any court of competent jurisdiction, the normal procedure should be by motion in the court that rendered the judgment. Because the remedy Eliopulos sought was available in the courts that rendered judgments, the Court of Appeals held that it was not an abuse of discretion to decline jurisdiction over the independent action under Rule 60(b). *Id.* at 109. Similarly, it was not an abuse of discretion for Judge Greenwood to decline jurisdiction over an independent action for fraud on the court when a remedy was still available in the case pending before Judge Wilper. The court further held that an independent action should not be allowed when there is no bar to bringing the action in the rendering court. *Id.* at 110. The Mailes were not barred from bringing the action in Judge Wilper's court. Rather, they apparently decided that Judge Wilper was not likely to agree with their arguments. The

equitable relief of an independent action based upon fraud on the court should not be an excuse for forum shopping.

The Mailes also contend that their action for fraud upon the court was not ripe until the Taylors obtained the "Judgment on Beneficiaries' Claims." Once again, however, the Mailes confuse the concept of whether they had an opportunity to raise the claim with the fact that they raised the claim, but the court ruled against them. The claim would have been ripe for adjudication immediately after the allegedly inconsistent verified amended complaint was filed on January 13, 2006, claiming that the Taylors were beneficiaries. The Mailes would have sustained some damages, and the cause of action would have accrued immediately upon expending attorney fees in an attempt to correct the alleged misrepresentation. *See B & K Fabricators, Inc. v. Sutton*, 126 Idaho 934, 894 P.2d 167 (1995). The Mailes' failure to raise the question as something other than a standing issue is their own fault. An independent action to set aside a judgment should not be a remedy for inadvertence or oversight by a party to the original action. *Waller v. State*, 146 Idaho 234, 240, 192 P.3d 1058, 1064 (2008). In *Waller*, the Supreme Court affirmed the district court's determination that an 11-year delay was unreasonable. *Id.*

The Mailes also cite *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010), for a proposition that is inconsistent with its holding. The court, citing *McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009), stated that the statute of limitations for a legal malpractice case does not begin to run until the litigation forming the basis for that claim has concluded. The court, however, was discussing a claim for malicious prosecution as a tactic against opposing

counsel and clearly did not intend to overrule precedents such *B & K Fabricators, supra*. The court held that Reid Taylor's claims were not only premature, but they were baseless and should be dismissed. 149 Idaho at 846, 243 P.3d at 662. *Taylor v. McNichols* actually supports the dismissal of the Mailes' fraud claim.

F. The District Court Properly Awarded Attorney Fees to Defendants.

Judge Greenwood determined that the Mailes' case was brought frivolously, as defined by Idaho Code Section 12-123 and Idaho Rule of Civil Procedure 54. Order on Motions for Costs and Fees, R. at 2525. His order states that he considered the factors outlined in the statute and rule, considered the history of the case, the testimony at the trial of the counterclaim, reviewed the briefs, and held a hearing. R. at 2525. The Mailes did not request a transcript of that hearing for this appeal.

This Court applies an abuse of discretion standard when reviewing a district court's award of attorney fees. *Taylor v. McNichols*, 149 Idaho 826, 848, 243 P.3d 642, 664 (2010). The district court must consider the factors identified in Rule 54 and must indicate that in writing, but it need not address each of those factors in writing. *Lee v. Nickerson*, 146 Idaho 5, 10-11, 189 P.3d 467, 472-73 (2008). Judge Greenwood's order clearly complied with this standard. It also states that he considered the history of the case, the trial testimony, the briefs, and the argument at the hearing. The party appealing an award of statutory attorney fees bears the burden of demonstrating a clear abuse of the district court's discretion. *Appel v. LePage*, 135 Idaho 133, 138, 15 P.3d 1141, 1146 (2000) (applying IDAHO CODE § 12-121). Judge Greenwood identified the factors he considered and exercised his discretion in determining that the case was

brought frivolously. He clearly saw that the Mailes were simply attempting to relitigate issues that had been decided previously. The Mailes have not demonstrated any abuse of that discretion.

IV. ATTORNEY FEES ON APPEAL

The district court awarded attorney fees to Clark and Feeney under the authority provided in Idaho Code Section 12-123. Idaho Code Section 12-123 does not apply to appellate cases, but an appellate court may award attorney fees under Idaho Code Section 12-121 if it determines that the appeal was brought frivolously, unreasonably, or without foundation. *Berg v. Kendall*, 147 Idaho 571, 579, 212 P.3d 1001, 1009 (2009). The Mailes raised the issue of whether the Taylors had standing to sue in two prior appeals to this Court. On both appeals, the Court ruled against the Mailes. On this appeal, even though the Mailes sued new parties, the Taylors' attorneys, and raised new legal theories, the appeal involves nothing more than a third attempt by the Mailes to again argue that Helen Taylor was the only person with standing to sue. The lawsuit and this appeal are nothing more than an attempt by the Mailes to once again litigate the issue of standing, which has been decided against them. Therefore, the appeal was pursued

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brought frivolously. He clearly saw that the Mailes were simply attempting to relitigate issues that had been decided previously. The Mailes have not demonstrated any abuse of that discretion.

IV. ATTORNEY FEES ON APPEAL

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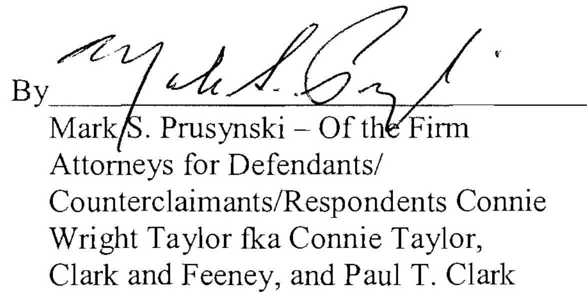
V. CONCLUSION

For the reasons stated above, this court should affirm the summary judgment for defendants and the award of costs and fees to defendants. The court should also award defendants their costs and attorney fees on appeal.

DATED this 19th day of August, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED



By______________________________
Mark S. Prusynski – Of the Firm
Attorneys for Defendants/
Counterclaimants/Respondents Connie
Wright Taylor fka Connie Taylor,
Clark and Feeney, and Paul T. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August, 2011, I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF** to be served by the method indicated below, and addressed to the following:

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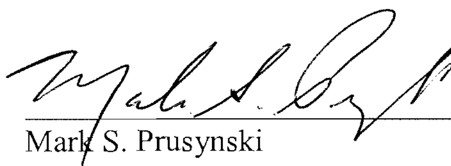

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