6-26-2014

Minnick v. Hawley Troxell Ennis and Hawley Appellant's Reply Brief Dckt. 41663

IN THE SUPREME COURT OF THE STATE OF IDAHO

WALTER C. MINNICK and A.K. LIENHART MINNICK, husband and wife, Plaintiffs-Appellants, vs. HAWLEY TROXELL ENNIS AND HAWLEY, LLP, an Idaho limited liability partnership, GEOFFREY M. WARDLE, individually, and DOES A through F, individually, Defendants-Respondents.	Supreme Court No. 41663

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, Honorable Ronald J. Wilper, presiding

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I. STATEMENT OF CASE AND RELEVANT FACTS

Under various subheadings, Respondents' Brief presents a summary and characterization of what they rely upon as the most pertinent underlying facts and proceedings. Several of these representations warrant clarification, context and/or correction.

First, while paragraph 56 of the Complaint contains, in part, a general statement regarding the Respondents' failure "to analyze, understand, appreciate, address, and resolve the tax implications of the charitable conservation easement gift to the land trust," (R.p. 15-16, ¶ 56), a thorough reading of the paragraph, as well as numerous other paragraphs of the Complaint makes clear that Appellants' malpractice claim was narrowly drawn. As expressly averred, the Respondents' alleged malpractice related to non-compliance with two specific tax regulations pertaining to charitable deductions. These are expressly identified in paragraph 56 as the mortgage subrogation requirement found in 26 C.F.R. § 1.170A-14(g)(2) and the proceeds requirement[1] in 26 C.F.R. § 1.170A-14(g)(6). (*Id.*) Moreover, the following averments – omitted from mention in the Respondents' Brief or in the District Court's opinion – make abundantly clear that this is the focus of the negligence cause of action.

> 26. Wardle and/or other attorneys at Hawley Troxell knew, or should have known, that as a condition affecting the validity of the conservation easement and qualifying for the tax benefits the Plaintiffs were seeking form the charitable gift of the easement, any mortgage, lien or encumbrance on the property had to be expressly subordinated to the conservation easement and such subordination had to be recorded properly in the chain of title so the affected real property.
>
> 27. Wardle and/or other attorneys at Hawley Troxell also knew, or should have known, that as a condition affecting the conservation easement and the tax benefits the Plaintiffs were seeking from the charitable gift of the easement, that the easement must provide that the

[1] The "proceeds requirement" was not given any attention in Appellants' Opening Brief because the controlling reason for disallowance of the Minnicks' charitable deduction was Respondents' failure to timely subordinate a mortgage. However, as we discuss in more detail below, the proceeds requirement, like the subrogation requirement was a latent reason, not identified by the IRS until after June 10, 2010.

Land Trust would receive its proportionate share of the proceeds if the easement were ever to the extinguished (the "proceeds requirement").

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31. At the time of the recording of the Conservation Easement Agreement, Title 26 of the Code of Federal Regulations, Section 1.170A-14(g)(2) required as a condition precedent to obtaining a federal income tax charitable deduction that any mortgage on the affected real property be subordinated to the conservation easement granted the Land Trust.

32. At the time of the recording of the Conservation Easement Agreement, nothing had been prepared or recorded subordinating the mortgage on the affected real property to the conservation easement granted the Land Trust.

33. At the time of executing the Conservation Easement Agreement and granting the tax charitable gift to the Land Trust, Title 26 of the Code of Federal Regulations, Section 1.170-14(g)(6)(ii) provided that for a charitable deduction to be allowed the gift must give rise to a property right, immediately vested in the Land Trust, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction bears to the value of the property as a whole at the time of the gift.

34. At the time the Conservation Easement Agreement was granted it did not, according to the United States Internal Revenue Service ('IRS"), comply with the proceeds requirement, 26 CFR 1.170-14(g)(6)(ii), in the event the easement is extinguished.

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57. To the extent Defendants knew of the legal and regulatory requirements of the gift of a conservation easement to qualify as a charitable tax deduction, including the aforesaid Treasury Regulations, they failed and neglected to inform Plaintiffs of such requirements, specifically failed and neglected to apprise them of the need to subordinate the mortgage on the Showy Phlox Estates, failed and neglected to see that the mortgage was properly and timely subordinated, failed and neglected to include a provision in the easement satisfying the proceeds requirement, and by their conduct indelibly impaired Plaintiffs' ability to satisfy such requirements independent of Defendants.

(Emphasis added) (R.pp. 11, 12 &16) No other specific tax regulations or requirements, and no other reasons for disallowance of the charitable deduction, are discussed in the negligence allegations of the Complaint.

Second, Respondents' Brief presents four statements which they characterize as "both undisputed and material to a decision applying the statute of limitations." (Resp. Brief, at 2-3) In significant part, we disagree. To begin with, in support of these purportedly "undisputed" facts Respondents cite this Court to the Memorandum in Support of Plaintiffs' Partial Summary Judgment. (Resp. Brief, at 3) However, Plaintiff's Memorandum does not contain the statements represented in the Respondents' Brief, and in almost every instance, the facts are in material dispute.

There is a factual dispute whether Respondents ever reviewed the conservation easement for tax purposes or provided tax advice. We understand it is Respondents' position they provided no tax advice. However, the Complaint alleges in various ways that Respondents knew a significant feature of this hopeful development project was a conservation easement to a not-for-profit trust. (R.pp. 9-10, ¶¶ 17-20), that the Minnicks wanted tax advantages from the gift of the easement to the trust (*Id.* ¶19), that Respondents never advised they lacked tax expertise and Minnick recalls a conversation with Respondent Geoff Wardle where he informed Minnick he would engage the law firm's attorneys with tax law expertise to assist. (R.p. 10, ¶¶ 22-24)

It is also an overly broad, if not misleading statement that the Minnicks hired tax counsel "to help them address the I.R.S.'s concerns about the deductions." (Resp. Brief, at 3) The unrebutted factual evidence on this point comes from the sworn affidavit of the Minnicks' tax attorney, Tim A. Tarter, which unfortunately the District Court never mentioned in its decision and Respondents now ignore. In his affidavit, Mr. Tarter explains that when he was initially engaged by the Minnicks it was only on "questions then being raised by the IRS relating to a charitable donation in their 2006, 2007 and 2008 tax returns for a conservation easement granted to the Land Trust of Treasure Valley." (R.p. 338, ¶4) These issues are identified with

particularity in the IRS Examiner's Report. (R.pp. 338-339 ¶¶ 8, 9 & 10. *See also,* R.pp. 350-373, Exh. F1 and G1) They do not include failure to subordinate the U.S. Bank mortgage or the "proceeds issue," discussed further below.

Not until June 10, 2010 did the IRS raise any question about subordination as a potential reason for disallowance of the charitable deduction. (R.p. 340, ¶¶14-15, Exh. K) Not until September 19, 2011 did the IRS claim the subordination requirement of Trea. Reg. § 1.170A-14(g)(2) had not been met. (*Id.* ¶19; Exh. L) Not until October 4, 2011 did the IRS seek to amend its Tax Court pleadings to add the subordination and proceeds issues. (*Id.* ¶ 20, Exh. M) And, not until January 5, 2012 did the Tax Court grant the IRS's motion adding these issues to the tax case as reasons for disallowance. (R.p. 341 ¶ 22, Exh. O)

Once again, we urge this Court to read Mr. Tarter's affidavit and the attached exhibits – particularly the Examiner's Report – in full. (R.pp. 337-342 and 344 - 505) On summary judgment, Respondents offered nothing to contradict Mr. Tarter's sworn affidavit.. **There is no objectively ascertainable evidence the Minnicks incurred any legal expenses for Tim Tarter's services on any matter which implicates Respondents' malpractice, in particular on the subordination and proceeds issues, prior to June 10, 2010 at the earliest.**

Finally, there has always been a significant, material dispute in this case regarding the scope of Respondents' representation. Both the District Court and Respondents here on appeal minimize and effectively disregard Respondents' vigorous, repeated contention that they were only hired by Mr. Minnick on "discrete projects and specific tasks and requests, consistently limiting the scope of attorneys (sic) work" (R.pp. 34) In answer to paragraphs 22 through 24 of the Complaint, Defendants aver that "Plaintiff Walter Minnick never approached said Defendants about tax implications or advice concerning the conservation easement or

development project." (R.p. 22 ¶ 14) These contentions, contradicting the finding of the District Court, are further supported by the affidavits of the two, principal lawyers who attended to Appellants' legal needs. (R.pp. 649 – 652 and 653 – 657) Much of these affidavits is discussed in Appellants' Opening Brief at 27-29 relating to attorney fees, but these affidavits clearly affect the statute of limitations issue, as well.

II. ARGUMENT

A. Appellants' Malpractice Suit is Not Barred by Idaho Code, Section 5-219(4)

The parties seem to agree that the central question presented on the statute of limitation defense is when the Minnicks incurred some damage that they could recover from the Respondents in an action for malpractice. However, there remains substantial disagreement over the controlling legal principles, as fully articulated in the case law, and over the prevailing facts to which these principles apply.

By Respondents' analysis, in defense of the reasoning of the District Court, "some damage" was incurred as soon as the Minnicks hired tax counsel to address any issues whatsoever raised by the IRS's disallowance of the conservation easement as a charitable deduction. This is so, they argue, because "the Minnicks relied upon Respondents for everything association with obtaining a tax deduction for the easement" and, thus, "any problems association with the conservation easement would be fairly attributable to the Respondents." (Resp. Brief, at 23)

This is a gross exaggeration of the facts and the realities of the case. It is also a distortion of the legal principle which demands evidence of objectively ascertainable (actual) damage that proximately resulted from the wrongful act or omission that forms the basis of the malpractice action. The conclusion Respondents ask this Court to embrace is founded on assumption,

speculation and embellishment and, for the reasons discussed below – as well as those argued in prior briefing - must be rejected.

1. *Elliott v. Parsons* is Not Controlling

As Appellants have already noted in our Opening Brief, there are several similarities between *Elliott v. Parsons*, 128 Idaho 723, 918, P2d 592 (1996) and the instant action. Respondents argue that the decision in that case is "entirely dispositive of this appeal." (Resp. Brief, at 18) However, as we have previously discussed this is a clearly distinguishable case, both on the facts and when considered in conjunction with the entire body of applicable case law. There is no need to reiterate what we have argued before. (*See* App. Brief, at 17-19) But, there are two points that warrant additional emphasis given Respondents' argument.

First and foremost, Respondents' analysis of *Elliott* is overly simplistic and ignores consideration of the other case law applying the "some damage" principle, which *Elliott* does not distinguish or overrule, expressly or implicitly. By Respondents' reading of *Elliott* the some damage requirement is fulfilled in a tax malpractice case, as soon as the plaintiff "retains new counsel to resolve the dispute with the IRS." (Resp. Brief at 18) What is missing from this analysis is any discussion of the well-established case law that mandates a causal nexus between incurring legal fees for newly retained counsel and the wrongful act or omission that forms the basis of the malpractice action. *See, City of McCall v. Buxton*, 146 Idaho 656, 659, 201 P3d 629, 632 (2009) (The damage that triggers the running of the statute "must be damage that the client could recover from the professional in an action for malpractice."); *Conway v. Sonntag,* 141 Idaho 144, 147 106 P3d 470, 473 (2005) ("For the cause of action to have accrued, the damage must have resulted from the act of malpractice ('the occurrence, act or omission complained of')"); *McCabe v. Cravens*, 145 Idaho 954, 957, 188 P3d 896 (2008) (The action does not

accrue until the plaintiff "has a completed and present cause of action, i.e. when he can file suit and obtain relief."); *Lapham v. Stewart*, 137 Idaho 582, 586, 51 P3d 396, 400 (2002) ("[I]t would be nonsensical to hold that a cause of action is barred by the statute of limitations before the cause of action even accrues.").

Secondly, it is argued that "[i]f the Respondents had performed the services the Minnicks contend they expected and had reviewed the conservation easement to ensure that it complied with applicable law, then the Minnicks would not have to address any of the Tax Court issues." (Emphasis added) (Resp. Brief at 19-20) That may be true with regard to the two latent issues added by the IRS within the statute of limitations (subordination and proceeds). But, it is pure speculation with regard to all the other issues raised by the IRS, none of which implicated malpractice and none of which form the basis of the Minnicks' negligence claim.

If Respondents had properly addressed the subordination and proceeds issues, the IRS would still have challenged the charitable deduction on grounds disconnected from Respondents' negligence. Indeed, that is precisely what the IRS did. But, as we discuss next, none of the legal services incurred by tax counsel on those other grounds was alleged or could be shown to have resulted from Respondents' malpractice. Ultimately, this is what distinguishes the instant action from *Elliott*.

Finally, Respondents are wrong in arguing that "[t]o overturn the district court, the Idaho Supreme Court must reconsider and overturn its own precedents." All we are asking this Court to do is read and apply *Elliott* in harmony with the other decisions of this Court which the District Court failed to do and Respondents wish to disregard.

2. Appellants Have Never Claimed that Respondents Were Responsible for Any of the Issues on Which Tax Counsel Was Engaged Before June 10, 2010.

In an affidavit Mr. Minnick submitted to the Tax Court on a motion for reconsideration, the description of the scope of legal services he anticipated from Respondents is notably broad. And, as noted, on part of the Complaint, taken in isolation, includes a general allegation regarding Respondents negligent failure to resolve the tax implications of the conservation easement. But, it is an erroneous interpretation of the facts and fallacious to therefore find – as the District Court did, and as the Respondents now do argue – that Appellants have attributed every issue of concern or reason for disallowance raised by the IRS as attributable to Respondents' negligence.

As we have shown above, there are no averments in the Complaint that make such claims. The allegations of the Complaint when read as a whole are narrowly drawn and focused. (*See,* infra at 1-2) There is nothing averred suggesting that Respondents warranted the conservation easement was beyond question or dispute by the IRS, or that a charitable deduction was guaranteed by Respondents. There are only two specific grounds for disallowance that the Complaint repeatedly mentions; the subordination and proceeds requirements. These are the only issues Appellants have ever specifically attributed to the Respondents malpractice, and we defy them to show otherwise.

If it was Appellants' design and intent to accuse Respondents of legal responsibility for the four issues initially raised by the IRS Examiner in 2009 – the only issues which Tim Tarter addressed before June 10, 2010 – it could have done so. These issues were known and clearly identifiable in the IRS disallowance notices. But, they are not mentioned anywhere in the Complaint as part of the malpractice action.

In January 2011, as we have previously discussed, Tim Tarter contacted the Respondents to apprise them of the problem with the subordination agreement and to seek their assistance in

preparing and recording a proper and hopefully sufficient agreement. (*See,* R.p. 340, ¶16; R.p. 584, HTEH 5650) At the time, Appellants were well within the two years limitation for bringing an action against the firm based on the initial four disallowance concerns raised by the IRS Examiner. But they had no reason to do so. Although two attorneys from the Respondent law firm have filed affidavits on the summary judgment motions, neither has testified that Appellants ever expressed any blame attributable to them or their firm for any of the four initial reasons for disallowance of the charitable deduction addressed by Tim Tarter between June 1, 2009 and June 10, 2010.

Throughout their brief, Respondents attempt to make much of a phrase in paragraph 19 of the Complaint, which they have presented in bold type and underlined.

> Defendants negligently failed to analyze, understand, appreciate, address, and resolve the tax implication of the charitable conservation easement gift to the land Trust and the legal requirements for qualifying for a charitable deduction to the Plaintiffs from the grant of such easement, **including but not limited to** satisfying the requirements of 26 CFR, Section 1.170A-14(g)(2) and 26 CFR, Section 1.170A-14(g)(6).

By this emphasis, we surmise that Respondents wish to have this Court read this phrase as a veiled reference to the four IRS issues addressed by Mr. Tarter before June 10, 2010. But, this inference is wrong and clearly contradicted by all we have said above. Moreover, this common pleading phrase ("including but not limited to") is woefully insufficient to support a factual finding that "any problems associated with the conservation easement would be fairly attributable to the Respondent," as Respondents now contend. (Resp. Brief, at 23)

3. There is No Evidence the Minnicks' Incurred any Legal Fees on Tax Issues Relating to Respondents' Alleged Malpractice Prior to June 10, 2010.

If the Minnicks had filed suit in June or July 2009 after receiving notices that their charitable deduction was being disallowed for the reasons articulated by the IRS Examiner, and

having retained Tim Tarter to represent them on the "questions then being raised by the IRS" (R.p. 338, ¶4), what objective proof of damage could the Minnicks have been shown to have been proximately caused by Respondents' malpractice? None of the reasons for disallowance then being given by the IRS implicated malpractice[2]. The Appellants have not made such a claim. And, Respondents certainly do not offer any evidence accepting responsibility of any of the reasons given by the IRS, initially or a year later.

Until there was "a complete and present cause of action," *McCabe*, supra, with "objective proof that would support the existence of some actual damage," *Chicoine v. Bignall*, 122 Idaho 482, 487, 835 P2d 1293, 1298 (1992), "damage (that) must have resulted from the act of malpractice," *Conway,* supra, the statute of limitations could not begin to run. "Simply being at increased risk for potential loss or damage is not sufficient." *Parsons Packing, Inc. v. Masingill*, Idaho 480, 483, 95, P3d 631, 633 (2004)

Respondents contend the Minnicks should have known by the time of the IRS Examiner's 30-day Notice (June 8, 2009) that the Respondents had committed malpractice on the mortgage subordination requirement. (Resp. Brief at 25) Their reasoning as we understand it, is as follows: Because the notice identifies failure to meet the "exclusively for conservation purposes" statutory requirement as a reason for disallowance, and because one of the six subsections of the statutory requirement includes a "perpetuity requirement," and because one of the subsections of the tax regulations on perpetuity includes the mortgage subordination requirement, the Minnicks "knew, or should have known" that failure to subordinate was a reason, if not the controlling reason, for disallowance. (*Id.*)

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[2] In Appellants' Opening Brief, we address each of the four reasons for disallowance initially given by the IRS and why none implicate malpractice. (App. Brief, at 20-21) Ironically, as our prior briefing explains, two of the reasons given by the IRS were embraced as affirmative defenses by Respondents. One relates to the "conservation" character of the affected real property and one involved a document the IRS mistakenly overlooked.

Our response is succinct, and can be captured by three rhetorical questions. If, by its 30-day Notice, the IRS intended to rely upon the subordination and proceeds requirements as reasons for disallowance, why is there no express mention of these specific requirements in the several pages of the Examiner's narrative report? (*See,* Exh. F1 and G1; R.pp. 350 – 373) If it should have been obvious to the Minnicks, and presumably their tax counsel, that these requirements were part of the IRS's reasons for disallowance, why was it necessary for the IRS to amend its pleading before the Tax Court in 2011, to add these additional reasons? More to the point, perhaps, where is their proof that Appellants incurred legal fees resulting from Respondents' malpractice before these latent issues were even identified as reasons by the IRS for disallowance?

4. Appellants Are Not Arguing a Discovery Rule

The Complaint avers factually that "Plaintiffs first discovered" that no subordination agreement had been prepared and recorded until after June 4, 2011 when the IRS requested a copy of the agreement. Because of this choice of words, Respondents accuse Appellants of "a thinly – veiled attempt to breathe a discovery rule into the discussion." (Resp. Brief, at 21) Nothing could be further from the truth. This argument is nothing but a red herring, and can be disposed of with dispatch.

Appellants have never argued that the statute of limitations did not commence until they were aware of the failed subordination. That is what we understand might be a "discovery rule" argument. Factually, the Minnicks and their tax counsel were unaware of this omission until the IRS's inquiry June 10, 2010, and that is represented in the Complaint. But, the dispositive question in this case has always been when did the Minnicks incur some objectively ascertainable damage resulting from the wrongful act or omission that forms the basis of the

malpractice action. That did not occur until the IRS injected a reason for disallowance that implicated Respondents' malpractice (June 10, 2010). Only then did the Minnicks incur some fees for their tax counsel addressing that concern. The important question here is not when Appellants discovered Respondents' malpractice, but when they incurred some damage resulting from the malpractice. Whether Appellants knew, should have known, or could have known of Respondents' malpractice earlier is not part of the equation, and we have never argued it is.

B. Respondents Are Not Entitled to an Attorney Fee Award Pursuant to Idaho Code, Section 12-120(3)

Consistently and repeatedly, this Court has described the legal standard for whether attorney fees are awardable under Idaho Code, Section 12-120(3) as a two-part test.

> First, the commercial transaction must be integral to the claim, and second, the commercial transaction must provide the actual basis for recovery.

Rahas v. Ver Mett, 141 Idaho 412, 415, 111 P3d 97(2005). *See also, Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 154 Idaho 21, 23, 293 P3d 645 (2013); *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728, 152 P3d 594, 599 (2007); *Lettunich v Key Bank Nat Ass'n*, 141 Idaho 362, 368, 109 P3d 1104, 1111 (2005); *Iron Eagle Development, LLC v Quality Design Systems, Inc.*, 138 Idaho 487, 493, 65 P3d 509, 515 (2003); *Bingham v. Montana Resource Associates*, 133 Idaho 420, 426, 987 P2d 1035, 1041 (1999).

As we have discussed in Appellant's Brief at 27-31, there are two related standards which also are implied, if not expressed from the pertinent law. First, by the legislature's choice of words the statute expressly requires a "commercial transaction," not something merely "commercial in nature," and certainly not "transactions for personal . . . purposes." I.C. § 12-120(3). Second, the commercial transaction must have occurred "between the prevailing party

and the party from whom the party seeks fees." *Soignier v. Fletcher*, 151 Idaho 322, 326, 256 P3d 730, 734 (2011).

Respondents' Brief does not squarely address any of these four requirements. Although challenged by Appellant's Brief to "identify any particular transaction of a commercial nature which was integral to and the basis of Appellant's malpractice claim" (App. Brief, at 27), no "transaction" is specified in their response. Moreover, no attempt is made to explain how whatever they might offer as a commercial transaction constituted the basis on which Appellants have sought recovery. Respondents also do not challenge the evidence discussed in Appellants' Brief from the affidavits of its attorneys repeatedly disclosing their legal services as limited, narrowly defined to "project specific tasks," and from every indication not at all "fundamentally related to a commercial transaction" between the parties.

Moreover, Respondents have altogether ignored the District Court's broadening of the legal standards articulated by this Court, to a single test; essentially, interpreting Section 12-120(3) to include any legal representation "to realize a commercial benefit." (*See,* App. Brief, at 30-32) They offer no defense for this simplistic mischaracterization of the case law. Instead, they appear to embrace it. (*See,* Resp. Brief at 28) Nonetheless, there remains a dispositive difference between a "commercial transaction" integral to the legal representation which provides the basis of the malpractice action, and a conservation easement, personal in nature, which has no direct commercial purpose, or a remote one at best.

Ultimately, Respondent's argument on attorney's fees relies upon the fact that the Appellants' Complaint also sought attorney fees under Section 12-120(3). There is certainly nothing unusual or improper in pleadings that preserve a potential claim, yet to be decided for or against either party by the Court. Indeed, given what some attorneys perceive as a lack of clarity

on what legal standards control in applying Section 12-120(3), alleging an attorney fees claim based on this Section seems very prudent. *See,* James Jacobson, "*Controlling Risk for Awards of Attorney Fees,*" 57 The Advocate 30-32 (Idaho State Bar, Jan. 2014).

To be clear the specific allegation of the Complaint on attorney fees is broader than Section 12-120(3). It state in full:

> By reason of the aforesaid, Plaintiffs have been required to retain legal counsel to protect and prosecute their interest, and have incurred, and in the future will occur, attendant costs and attorney fees which Plaintiffs are entitled to recover by law, including, but not limited to, Rule 54, I.R.C.P., Idaho Code, Sections 12-120(3), 12-121 and 12-123, and all other statutes, rules and principles of common law giving this court authority to award such costs and fees.

(R. pp. 16-17 ¶ 60) We are aware of no authority whereby such pleadings bar a litigant from objecting to a fees award following judgment to the opposing side. Perhaps more on point, such pleadings do not answer the questions presented by the statute and case law, e.g. was there a commercial transaction between the parties that is integral to the claim and provides the basis for recovery? Factual findings on these questions are a predicate to making any attorney fee award, and such pleadings do not modify the obligation of the District Court and of this Court to consider and decide those factual questions on either party's attorney fees claim.

C. Attorney Fees On Appeal

In the event this Court reverses the District Court and decides for the Appellants on the statute of limitations issue, and yet finds this action is of a character that warrants attorney fees under I.C. Section 12-120(c), Appellants seek their attorney fees and costs on this appeal, and will likewise seek them on remand to the District Court.

III. CONCLUSION

For the reasons argued here and in Appellants' Opening Brief, and for such further reasons as my appear at oral argument, Appellants seek reversal of the District Court's grant of summary judgment and a ruling on whether either party is entitled to an award of attorney fees at trial and/or on appeal.

Respectfully submitted this _____day of April, 2014

MAUK MILLER & BURGOYNE

_____
William L. Mauk, of the Firm
Attorneys for the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of March, 2014, I served true and correct copies of the foregoing document by delivering the same to the following persons, by the method indicated below, pursuant to I.R.C.P.5(f):

John J. Janis Hepworth Janis & Kluksdal, Chtd. 537 W. Bannock St., Ste. 200 P.O. Box 2582 Boise, ID 83701-2582 F: 208-342-2927 johnjanis@aol.com	[ ] [ ] [ ] [ ] [ ]	U.S. Mail, postage prepaid Hand-Delivered Overnight Mail Facsimile Email

_____

William L. Mauk