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Estate of Cornell v. Johnson Appellant's Brief Dckt. 42822

IN THE SUPREME COURT OF THE STATE OF IDAHO

In the Matter of: THE REVOCABLE FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL.	)	SUPREME COURT DOCKET NO. 42822

APPELLANT'S BRIEF

Appeal from the Magistrate Division of the District Court
of the Second Judicial District for Clearwater County

Honorable Randall W. Robinson, Magistrate Judge, Presiding

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INTRODUCTORY STATEMENT

The issue before the Court is whether an estate may recover against a defendant for property of the decedent that was held in trust, where the decedent was deprived of the distribution of such property solely through the wrongful acts of the defendant. More particularly, the Court must determine whether its opinion of *Bishop v. Owens* established an absolute and universal bar to recovery for any claim that could be characterized as a tort claim when the injured party dies before judgment. If the *Bishop v. Owens* opinion did establish such an absolute and universal rule of law, then the defendant in this case will have succeeded in not only depriving her brother of his property, but also taking it as her own. If, however, the Court finds that the *Bishop v. Owens* opinion did not eliminate the well-recognized exceptions to the rule of abatement, then this matter should be remanded and the estate should be allowed to pursue recovery of the property that the defendant wrongfully withheld from the decedent.

This case is about the actions of Toni C. Johnson while she served as the successor trustee for her parents of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("Trust"). Ms. Johnson had one duty when she became the successor trustee of her parents' trust: distribute the assets to her and her brother, John Cornell. Instead of fulfilling her duty, Ms. Johnson refused to distribute the assets over two and a half years. She repeatedly made improper use of the assets for her own benefit and engaged in inequitable conduct in order to deprive her brother of his property. Finally, having failed in his attempts to persuade his sister to act in accordance with her duties, John Cornell petitioned the court for relief in July of 2012. Tragically, he died the following month before he could obtain a judgment for relief.

In response to her brother's death, Ms. Johnson filed a motion to dismiss. She did not argue that she had acted properly. She did not argue that her brother was not entitled to the

property under the terms of the Trust. She did not argue that she had honored the instructions of the Trust or her duties to her brother. Instead, Ms. Johnson argued that because she was the sole surviving child, she acquired all of the property that was intended for her brother. She reasoned that her brother's estate could only pursue his property through a tort claim and that such claim abated at his death under the Supreme Court case of *Bishop v. Owens*. In sum, she reasoned that because she succeeded in depriving her brother of his property until his death, she had the right to retain his property after his death.

This Court must determine whether Idaho law permits Ms. Johnson to deprive the Estate of John Cornell ("Estate") of property that was wrongfully withheld and wrongfully diminished only through the misdeeds of Ms. Johnson.

STATEMENT OF THE CASE

A. Nature of the Case

The Estate appeals from dismissal of its Petition for supervised administration and court-ordered distribution of *The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell.* The magistrate court dismissed the Petition on the grounds that the Estate's claims did not survive the death of John Henry Cornell. The District Court affirmed. Petitioner appeals.

B. Course of Proceedings

The case identified by case number CV 2012-277 in Clearwater County was initiated through a Petition filed by John Henry Cornell on July 11, 2012. John Cornell died from an apparent suicide on August 20, 2012. Ms. Johnson filed a Motion to Dismiss on September 17, 2012, arguing that the claims in John Cornell's Petition abated upon his death. Ms. Johnson also argued that because John died, there existed no legitimate party in interest unless and until the Estate was substituted into the action pursuant to Idaho Rule of Civil Procedure 25(a)(1).

Kareen Cornell is the widow of John Cornell and the Personal Representative of the Estate. The attorney who represented John Cornell when he was living continued to prosecute the Petition in John Cornell's name, personally. In late November 2012, Ms. Cornell appeared before the magistrate court and notified the court that she objected to any other person acting on behalf of her late husband. While the magistrate court invited Ms. Cornell to submit briefing on the pending action, it did not bring her or the Estate into the litigation. Thus, Ms. Cornell's briefing was, in effect, *amici* briefing. On February 15, 2013, the magistrate court dismissed the Petition filed by John Cornell, personally, but expressly invited Ms. Cornell to file claims on behalf of the Estate.

Ms. Cornell responded to the Court's invitation by filing the Estate's Petition on February 28, 2013. While many of the Estate's claims were identical to those raised by John Cornell in his August 2012 petition, the Estate also raised additional claims. The Estate's Petition alleged that Ms. Johnson (1) failed to act in conformity with the terms of the Trust; (2) breached her fiduciary duties when acting in her capacity as Trustee; (3) engaged in equitable conversion of the property belonging to John Cornell by refusing to distribute the property; and (4) was unjustly enriched by misusing Trust assets for personal desires and refusing to comply with the terms of the Trust and her fiduciary duties in order to effect a distribution in her favor. The Estate sought supervised administration, court-ordered distribution of the Trust, and a judgment against Ms. Johnson for injuries caused to the Estate. The Petition set forth the following legal and equitable causes of action: (A) breach of fiduciary duty; (B) constructive trust; (C) breach of contract; (D) conversion; and (E) unjust enrichment.

No Answer has ever been filed to those allegations. Instead, Ms. Johnson filed a Motion to Dismiss the Estate's Petition on March 1, 2013. The magistrate court granted Ms. Johnson's

motion on June 21, 2013. The magistrate court based its ruling upon the following conclusions of law: (1) the Idaho Supreme Court Opinion of *Bishop v. Owens*, 152 Idaho 616, 619 (2012) stands for the universal and absolute rule that all claims sounding in tort abate at common law upon the death of the claimant; and (2) the Idaho legislature did not abrogate that rule with the amendment of Idaho Code § 5-327, except for claims for recovery of medical expenses, out-of-pocket expenses, and lost wages.

The Estate appealed to the district court, and the matter was remanded with instructions that the magistrate court to first determine whether Toni Johnson ought to be removed as trustee. On remand, the magistrate court ruled that there were no persons with standing to request removal, because John Cornell's claims abated when he died. The court's abatement ruling was substantially identical to its earlier dismissal. The district court affirmed.

C. Statement of Facts

Michael and Arlie Cornell established the Trust on November 1, 1996.[1] The Trust provided for Michael and Arlie during their lifetimes, with the remainder to be distributed equally to their two children: Toni Johnson and John Cornell.[2] Arlie Cornell died on November 9, 2008.[3] Michael Cornell died on December 15, 2009.[4] Ms. Johnson has been the sole Trustee since that time.[5]

As a successor trustee, Ms. Johnson's sole duty was to distribute the trust assets; half to her and half to her brother:

> On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and

[1] R. Vol. I, pp. 29-52 (Trust documents).
[2] *Id.* at p. 35.
[3] *Id.* at p. 100.
[4] *Id.*
[5] *Id.* at p. 51 (First Amendment to Trust naming Ms. Johnson successor trustee).

> principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON and JOHN H. CORNELL.

Trust § 4.03.[6] It is undisputed that Ms. Johnson never made any such distribution.

The magistrate court found that Ms. Johnson "egregiously wronged her brother during his lifetime."[7] Over the years she served as successor trustee, John Cornell repeatedly requested information regarding the Trust and requested its distribution.[8] "Mr. Cornell contacted Ms. Johnson and her attorney, a different attorney than her present attorney, several times for accountings and for word on the status of the trust. He never received a response."[9] He "waited in vain" for any sort of distribution that could help "pay for necessary medical care that he could not obtain without money from the trust."[10] Meanwhile, Ms. Johnson was living in the Trust home rent free.[11] "Ms. Johnson used funds from the trust for her personal expenses while Mr. Cornell was making his requests for information regarding distribution of the trust."[12] She commingled Trust cash with her own, and then spent all the cash assets she commingled for her living expenses and expenses incurred maintaining and paying for the property on which she lived.[13] "Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not shar[ing] one cent with her brother."[14] John Cornell was never able to compel distribution before his death on August 20, 2012.

Ms. Johnson has argued that because Mr. Cornell died before he was able to compel

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[6] *Id.* at 35.
[7] *Id.* at p. 603 (Magistrate Court's September 2013 Memorandum Opinion re: Attorney Fees and Costs).
[8] *Id.* at pp. 116-17, 126-38.
[9] *Id.* at pp. 602-03.
[10] *Id.* at pp. 602-03.
[11] *Id.*
[12] *Id.* at p. 603.
[13] *Id.* at p. 429.
[14] *Id.* at p. 603.

distribution of the Trust, he held no property interest in the Trust assets. She bases this argument upon the following distribution language found in the Trust document:

> If any child . . . should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share to his or her surviving issue in equal shares. . . . If there is no surviving issue, then all of the deceased child's share of the Trust Estate shall be added to the shares set aside for the . . . other living child . . . ."

Trust § 4.03(a).[15] It is undisputed that John Cornell died without issue; the Personal Representative of his Estate is his widow.

ISSUE PRESENTED ON APPEAL

1. May the Estate pursue the property wrongfully withheld from John Cornell during his life by Toni Johnson?

ARGUMENT

A. Standard of Review

The magistrate court dismissed this action on a summary judgment standard, because it considered affidavits filed by the parties. *See* Idaho R. Civ. P. 56(c). An appellate court exercises *de novo* review over a grant of summary judgment. *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001).

Summary judgment is only appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). In reviewing a motion for summary judgment, the "Court will liberally construe all disputed facts in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record will be drawn in favor of the nonmoving party." *Porter v. Bassett,* 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008). "Summary judgment must be denied if reasonable

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[15] *Id.* at p. 35

persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *McPheters v. Maile,* 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

B. The Estate's Causes of Action Did Not Abate at Common Law.

The Estate's Petition sets forth several causes of action in law and in equity. This Court has long held that, as a general rule at common law, tort claims abate upon the death of the injured party. *See Kloepfer v. Forch*, 32 Idaho 415, 418, 184 P. 477, 477 (1919). This Court has also long held that this general rule is subject to several well-recognized exceptions. *Id.* Four such exceptions provide for the survival of the Estate's claim in this case. First, tort claims survive where the claim is one for injury to property. Second, tort claims survive where the action is founded in contract. Third, the tort claims survive where the claim is based upon breach of a duty established by a remedial statute. Fourth, tort claims survive where the action exists in equity.

The test for determining whether a claim survives "is, not so much the form of the action, as the nature of the cause of action." *Id.* (quoting *Lee's Administrator v. Hill*, 87 Va. 497, 12 S.E. 1052 (1891)). Claims for injuries "which affect[] the person only, and not the estate," generally abate. *Id.* Examples of such claims are assault, libel, slander, malicious prosecution, false imprisonment, and the like. *See id. See also MacLeod v. Stelle*, 43 Idaho 64, 75, 249 P. 254, 257 (1926).

1. The Estate's tort claims did not abate because the claims seek redress for injury to property.

The first applicable exception to the general rule of abatement is that "an injury which lessens the estate of the injured party does survive . . . ." *MacLeod*, 43 Idaho at 75, 249 P. at 257. In *MacLeod*, the Court considered whether claims for fraudulent representation of the value of a business were assignable. 43 Idaho at 69, 249 P. at 255. The Court looked to the law of

survival, because "[t]he assignability of a cause of action is . . . intimately associated with, and in most cases held to depend upon, the same principle as the survival of a cause of action." *Id.* at 75, 249 P. at 257. The Court adopted the rule that a claim for injury that "result[s] in the diminution of the estate of the injured party, survives and is assignable." *Id.* In *MacLeod*, the Court found that claims for injury as a result of paying too much for a business based upon false representations by the defendant were claims for injury to property and, therefore, survived. *Id.* at 76, 249 P. at 257. The rule and reasoning of *MacLeod* were recently reaffirmed and commended as reliable precedent in this Court's 2013 opinion of *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

Nor is Idaho alone in holding injury to property is an exception to abatement. *American Jurisprudence* states that: "At common law survivable actions are those in which the wrong complained of affects primarily property and property rights, and in which any injury to the person is incidental, while nonsurvivable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 51.

Therefore, if the Estate's claims are for an injury to property, then the claims survive and the matter should be remanded. The Defendant has argued that the Estate cannot be claiming an injury to property, because John Cornell had no right to the Trust assets unless he survived distribution. However, while John Cornell may not have had a vested interest in the Trust immediately upon his parents' death, his interest vested when the Defendant engaged in inequitable conduct to delay distribution.

"Unless contrary to settled principles of law, the intentions of a trust's settlors must control in actions involving the trust." *Carl H. Christensen Family Trust v. Christensen*, 133

Idaho 866, 873, 993 P.2d 1197, 1204 (1999). If the settlors' intent is ambiguous, then the issue of the settlors' intent is an issue of fact, which focuses on the intent of the settlors, and may not be resolvable at summary judgment. *Id.* at 873-74, 993 P.2d at 1204-05. "In determining whether a document is ambiguous, the Court seeks to determine whether it is 'reasonably subject to conflicting interpretation.' *Id.* (quoting *Bondy v. Levy,* 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992)).

Here, settlors Michael and Arlie Cornell directed the Trust to terminate immediately upon the death of the surviving spouse. R. Vol. I, p. 35. The settlors directed the successor trustee to, "as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON and JOHN H. CORNELL." *Id.* The following paragraph then contains a distribution survivorship clause. If a beneficiary failed to survive distribution, then that beneficiary's share was to be distributed to his or her issue. *Id.* If the pre-deceasing beneficiary left no issue, then the beneficiary's share was to be distributed to the surviving beneficiary. *Id.* It is undisputed that John Cornell died before distribution and that he left no issue. This forms the basis of Defendant's argument in this case and her claim to the entirety of the Trust assets.

Idaho courts have addressed the validity of distribution survivorship clauses in the context of will interpretations. *See Allen v. Shea*, 105 Idaho 31, 665 P.2d 1041 (1983); *Hintze v. Black*, 125 Idaho 655, 873 P.2d 909 (Ct. App. 1994). In *Allen*, the testator's distribution to his wife was conditioned upon her survival of the distribution of his estate. 105 Idaho at 32, 665 P.2d at 1042. The wife served as personal representative of the testator's estate, but died before she could accomplish distribution of the estate. *Id.* The Supreme Court held that the testator had clearly expressed his intent that his wife's interest in the estate did not vest until distribution had

been completed. *Id.* at 33, 665 P.2d at 1041. The Court of Appeals followed this precedent in *Hintze*, holding that a husband's gift failed to vest where the testator included a distribution survivorship clause and the husband failed to survive distribution. *Hintze*, 125 Idaho at 658, 873 P.2d at 912.

The Estate discovered no case where the Idaho courts have been presented with the facts where a personal representative or trustee unreasonably delays distribution. However, both *Allen* and *Hintze* suggest that vesting should be found where the personal representative or trustee does unreasonably delay distribution. Both the *Allen* Court and the *Hintze* Court consider California case law that sets forth the rule that vesting cannot be postponed by the unreasonable delay in distribution. *See Allen*, 105 Idaho at 34, 665 P.2d at 1044; *Hintze*, 125 Idaho at 659, 873 P.2d at 913 (analyzing *In re Estate of Taylor*, 66 Cal.2d 855, 428 P.2d 301 (1967). Neither the *Allen* Court nor the *Hintze* Court reject the rule of law that vesting should be found where there is unreasonable delay; they implicitly recognize the validity of that rule of law. *Id.* Instead, the *Allen* Court and the *Hintze* Court explain that the facts of the case before those courts did not include evidence of undue delay. *See Allen*, 105 Idaho at 34-35, 665 P.2d at 1044-45 (finding "substantial and competent evidence to support the magistrate's finding that [there was no unreasonable delay]"); *Hintze*, 125 Idaho at 659, 873 P.2d at 913 ("the authority on which the personal representatives rely for this policy argument, [*In re Estate of Taylor*] involved unreasonable delay by the administratrix in distributing the estate, a factor clearly not present here").

Here, the Court is presented with clear facts of unreasonable delay and an opportunity to expressly adopt the rule which *Allen* and *Hintze* assume: that contingent interests will be deemed to vest where there is unreasonable delay. Such a rule does not frustrate the purpose of the

settlor, but rather carries out the presumed intent—that the desired beneficiary would receive his or her distribution so long as she survived the time reasonably necessary to make distribution. *See In re Estate of Taylor*, 66 Cal.2d at 858, 428 P.2d at 303.[16] Furthermore, the rule encourages prompt distribution upon instruction by a trust and discourages the sort of dilatory conduct that occurred here. In this case, the Magistrate Court actually found that the Defendant's conduct frustrated the clear intent of the settlors:

> Ms. Johnson used funds from the trust for her personal expenses while Mr. Cornell was making his requests for information regarding distribution of the trust. Ms. Johnson lived rent free in the home that is included in the Trust. Ms. Johnson entirely thwarted the intentions of her parents in establishing the trust for her brother to receive half the estate. Ms. Johnson dishonored the trust her father placed in her when he named her as the sole person responsible for distribution of the trust. Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not share one cent with her brother.
>
> Ms. Johnson egregiously wronged her brother during his lifetime. Now she wishes to continue wronging her brother after his death by not only keeping the assets that were intended for Mr. Cornell, but also raiding his estate for her attorney fees. Certainly, this is not the result that the parents of Mr. Cornell and Ms. Johnson intended when they created the trust.

R. Vol. I, p. 603.

Finally, even if John Cornell's interest had never vested, he still held a property interest that was damaged by the conduct of the Defendant. "A trust is not itself a separate legal entity that can own property; rather, it is a relationship having certain attributes." *In re Thompson*, 454 B.R. 486, 492 (Bankr. D. Idaho 2011). "A trust creates a fiduciary relationship in which the trustee is the holder of legal title to the property subject to the beneficial interest of the beneficiary." *DBSI/TRI V v. Bender*, 130 Idaho 796, 808, 948 P.2d 151, 163 (1997). Here, the Defendant sought to totally deprive the decedent of his beneficial interest in the Trust assets.

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[16] The *In re Taylor's Estate* Opinion also sets for the historic and widespread adoption of the rule that vesting occurs upon the occurrence of undue delay. 66 Cal.2d at 859, 428 P.2d at 303.

2. The Estate's tort claims did not abate because the claims are founded in contract.

The second applicable exception to the general rule of abatement is that the tort claim is not "unconnected with contract" but rather "is founded on a contract" such that it is "virtually *ex contractu*, although nominally in tort, and there it survives." *Kloepfer*, 32 Idaho at 418, 184 P. at 477. Here, the tort claims are based upon a relationship that is founded in contract. The relationship between a trustee and a beneficiary is contractual in nature. *See In re Thompson*, 454 B.R. 486, 492 (Bankr. D. Idaho 2011); *and DBSI/TRI V v. Bender*, 130 Idaho 796, 808, 948 P.2d 151, 163 (1997). The scope and nature of that relationship is defined by the terms of the trust, i.e., the contract.

The Estate has identified specific provisions within the Trust that Defendant breached.

4.03 & 4.04: The Trust terminates automatically upon the death of the surviving Trustor and the successor Trustee is to distribute the property "as soon as reasonably possible."

5.01: The only property which may be retained in the Trust after the death of the surviving Trustor is property productive of income.

8.02: The successor Trustee shall render an accounting from time to time.

The Magistrate Court dismissed these claims, interpreting *Bishop* as standing for the rule that where claims for recovery existed in tort, all such claims should be characterized as tort claims and found to abate upon the death of the injured party. R. Vol. I, p. 493-94. However, as set forth above, the *Kloepfer* opinion expressly recognizes that some tort claims may be contractual in nature and, therefore, survive.

In fact, the *Bishop* opinion also recognizes this possibility. Furthermore, the contract claims identified by the Estate in this matter are far different than those pursued in *Bishop*. The question before the Court in *Bishop* was whether the decedent could pursue a legal malpractice

action through breach of contract claims. *Bishop*, 152 Idaho at 620, 272 P.3d at 1251. The plaintiff argued that it could either sue for legal malpractice or for breach of the legal representation agreement. *Id.* The *Bishop* Court actually held this theory correct. *See id.* The Court rejected the plaintiff's breach of contract claims, however, because the plaintiff had not alleged breach of a specific term within the contract, but instead alleged breach of the term referencing the common law duties owed by every attorney to that attorney's clients. *Id.* at 621, 272 P.3d at 1252. The *Bishop* Court explained that if such a provision were enough to transform the pure tort action of legal malpractice into a breach of contract action, there would exist "a per se breach of contract action in every legal malpractice action." *Id.* The relationship between attorney and client is not contractual in nature. *Id.* at 620, 272 P.3d at 1251. Here, the Estate's claims are far different; the Estate has identified clear and distinct terms in the Trust that the Defendant wholly and willfully breached.

3. The Estate's tort claims did not abate because the claims are founded upon a remedial statute.

A third exception to the general rule of abatement is that claims based upon protections granted by remedial statutes survive the death of the injured party. "A cause of action that is founded on a remedial statute, as opposed to one that is penal in nature, survives the death of the party possessing the cause of action." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 59. Because the Estate's claims are for protections recognized by remedial statutes, the claims survive under this exception.

Chapter 7 of Title 15 of the Idaho Code sets forth the standards governing the administration of trusts. Chapter 8, the Idaho Trust and Estate Dispute Resolution Act ("Act"), sets forth the manner of resolving disputes regarding trust administration. The Idaho legislature expressly set forth the remedial nature of the Act. Its stated intent was to grant the courts "full

and ample power and authority" to settle "[a]ll trusts and trust matters." Idaho Code § 15-8-102. The legislature provided that, in the case of doubt, "the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper . . . ." *Id.* Further, the Act grants broad standing to interested parties, so that they might obtain judicial relief. *See* Idaho Code § 15-8-201. The facts of this case call for the courts to exercise the power, authority, and broad discretion given them by these remedial statutes to effect a result that is right and proper—a result that gives the heirs of John Cornell those assets which were wrongfully withheld and diminished by the wrongful conduct of the Defendant when she served as successor Trustee.

4. The Estate's equitable claims did not abate.

A fourth exception to the general rule of abatement is that claims in equity survive the death of the injured party. "In equity, abatement signifies a present, temporary suspension of further proceedings in a suit because of want of proper parties. It is an interruption or suspension of a suit, the equivalent of a stay of proceedings, and the suit may be revived and proceed to its regular determination." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 1 (footnotes omitted).

> The principle that a cause of action expires with the death or disability of a party generally does not apply to suits in equity; **equitable remedies exist to the same extent in favor of and against executors and administrators** as they do against the decedent, as long as the court can continue to grant effective relief in spite of the death. **One of the main reasons for this stance for suits in equity is that such suits primarily pertain to property rights.**

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 60 (emphases added) (footnotes omitted).[17] The Estate has raised several equitable claims entitling it to relief.

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[17] *See also Barnes Coal Corp. v. Retail Coal Merch. Ass'n*, 128 F.2d 645, 649 (4th Cir. 1942); *Glojek v. Glojek*, 254 Wis. 109, 115, 35 N.W.2d 203, 206 (1948); *Hughey v. Mooney*, 282 S.C. 597, 602, 320 S.E.2d 475, 477 (Ct. App. 1984); *Miller v. Hayman*, 766 So. 2d 1116, 1118 n.1 (Fla. Dist. Ct. App. 2000)

Conversion. "At common law, the right to bring an action for the conversion of goods in the lifetime of the decedent owner generally survived to the personal representative . . . ." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 76. Idaho law defines conversion as "[t]he act of wrongfully and permanently depriving someone of his property." *In re Pangburn*, 154 Idaho 233, 296 P.3d 1080, 1085 (2013). These are the exact elements alleged by the Estate.

Constructive Trust. It is "the fundamental rule of equity that equity regards that as done which ought to be done." *See First Sec. Bank of Idaho*, 91 Idaho 654, 657, 429 P.2d 386, 389 (1967) (discussing basis of doctrine of equitable conversion). When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." TRUST, Black's Law Dictionary (9th ed. 2009) (internal quotation marks and citation omitted); *see also Hanger v. Hess*, 49 Idaho 325, 328, 288 P. 160, 161 (1930). Thus, the doctrine of constructive trust is a description of the nature by which a wrongdoer holds the property of another; the court deems that property as already belonging to the injured party at some earlier point in time. While the Idaho Supreme Court has not expressly addressed the issue of survival of constructive trust claims at common law, it presumed their survival in *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676, 678 (1935).

Under the equitable doctrine of constructive trust, the express trust was terminated on the date at which the assets should have been distributed, and a separate constructive trust arose. The terms of that constructive trust were solely that the property belonged to John Cornell and that the Defendant was nothing more than a trustee over that property. It is undisputed that Ms. Johnson engaged in inequitable conduct by retaining legal title to the assets of the Trust in the name of the Trust. Certainly, reasonable persons could find that a constructive trust arose prior to John Cornell's death, based upon (i) the extended period of time between the death of Michael

Cornell and the death of John Cornell; and (ii) the undisputed inequitable conduct by Ms. Johnson.

Unjust Enrichment. "Unjust enrichment occurs where [the offending party] receives a benefit which would be inequitable to retain without compensating the [injured party] to the extent that retention is unjust." *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007). The damages available to the claimant on an unjust enrichment claim is the value of the amount by which the offending party was unjustly enriched. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). Like constructive trust, unjust enrichment is an equitable doctrine that seeks to return to the injured party those amounts which were due to him or her in equity; amounts which equity deems property of the injured party.

5. *Bishop v. Owens* did not establish a universal and absolute rule of abatement.

The magistrate court granted judgment against the Estate based upon its interpretation of *Bishop v. Owens* as establishing precedent that, at common law, every cause of action sounding in tort abates upon the death of the injured party. R. Vol. I, p. 490. The magistrate court found the following language dispositive: "Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate." 152 Idaho 616, 619, 272 P.3d 1247, 1250 (2012). While the quoted language from *Bishop* establishes the general rule, the *Bishop* Opinion does not—either by its language or its facts—stand for the proposition that the rule of abatement is universal and absolute. First, the very language of the *Bishop* Opinion states that the Court is reciting the general rule governing survival. *Id.* Second, the *Bishop* Court supported that general rule by citation to *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919). *Kloepfer* makes express that which *Bishop* assumes: "As a general rule, in the absence of a statute providing otherwise, causes of action *ex contractu* survive, while causes *ex*

delicto do not. **However, there are well-recognized exceptions to both branches of the rule.**" *Id.* (emphasis added).

Furthermore, the post-*Bishop* opinion of *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 293 P.3d 661 (2013) does not support an interpretation that *Bishop* established an absolute and universal rule of abatement. In *Luciani*, the Court addressed whether a universal and absolute prohibition to assigning legal malpractice claims exists at common law. *Id.* at 41-43, 293 P.3d at 665-67. The Court held that while the general rule was one of non-assignability, it was not an absolute prohibition. *Id.* The Court based its holding, in large part, upon the survival analysis set forth in *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254 (1926). *Id.* As set forth above, *MacLeod* recognizes the exception language of *Kleopfer* and expressly holds exceptions exist to the general rule of abatement. *MacLeod*, 43 Idaho at 75, 249 P. at 257. Of particular note, the *Luciani* Court considered and reaffirmed *MacLeod* while considering arguments from the defendant which were based upon the language of the *Bishop* Opinion. *Id.* at 43, 293 P3d at 667.

C. The Estate's Causes of Action Did Not Abate Under Idaho Code § 5-327(2).

The magistrate court held that Idaho Code § 5-327 applies to all claims of the Estate arising after July 1, 2010. The court interpreted the statute as barring all damages potentially recoverable to the Estate and, therefore, abating the claims. The magistrate court erred because (1) Idaho Code § 5-327 does not apply to the claims raised by the Estate in the case; and (2) even if Idaho Code § 5-327 were to apply, it would not bar the Estate from recovery for the property damage inflicted by the Defendant in this case.

Up until its latest amendment, Idaho Code § 5-327 did not address survival of a claim upon the death of the injured party. On July 1, 2010, the Idaho legislature adopted amendments

to the statute, providing for survival of certain claims upon the death of the injured party and adding subsection designations. Idaho Code § 5-327 *statutory note*. Idaho Code § 5-327(2) now states:

> A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

Idaho Code § 5-327(2). The magistrate court reasoned that because the first sentence included the term "property damage" and because the limitation of the second sentence is not expressly limited to the antecedent of "personal injury" claims, the Estate could only seek "medical expense," "out-of-pocket expenses," or "loss of earnings" for claims arising after July 1, 2010. Because it found that the Estate was not seeking such damages, it ruled that the Estate's claims abated under the statute.

When interpreting statutes, Idaho courts look to the intent of the legislature, and apply common sense and reason. *See Smith v. Dep't of Employment*, 100 Idaho 520, 522, 602 P.2d 18, 20 (1979). A review of legislative history and the language of the statute reveals that the Idaho legislature never intended for Idaho Code § 5-327(2) to apply to cases unrelated to personal injury actions. The discussion of the amendment before the Senate Judiciary and Rules Committee and the House Judiciary, Rules and Administration Committee centered around preserving the right of an estate to pursue "medical expenses and other actual economic losses" against the liability insurer of the tortfeasor. *See Appendix – Idaho App. R. 35(f).* The Statement

of Purpose associated with the bill explains that the amendment "will require liability insurance companies to pay for economic losses they have insured instead of requiring the children and other heirs . . . to pay the medical bills and other expenses that were incurred because of the carelessness of another person." *Id.* The statute only mentions property damage in the context of economic injuries attributable to a personal injury action, such as a motor vehicle collision.

This legislative history explains why an application of the language of the statute to the claims of this case is so unworkable. The limitation on recoverable damages in the second sentence begins with "medical expenses," a category that applies to personal injury claims, not property damage claims. "In determining legislative intent, this Court applies the maxim *noscitur a sociis,* which means 'a word is known by the company it keeps.'" *State v. Schulz*, 151 Idaho 863, 867, 264 P.3d 970, 974 (2011). The maxim of *noscitur a sociis* requires that the category of recoverable damages be interpreted in like category to medical expenses. An interpretation in accordance with that maxim makes clear that the intent of the legislature was to preserve economic damages for personal injury claims, not to limit recovery for such claims solely to economic harm suffered.

Even if the Court were to hold that Idaho Code § 5-327(2) applies to the claims in this case, the intent of the legislature compels an interpretation that permits recovery in this matter. The legislature intended to preserve claims for economic damages, not to prohibit them. As set forth in the Statement of Purpose, the legislature sought to protect estates and heirs from paying for economic damages caused by another. If the magistrate court is correct in its application and interpretation of the statute, then the legislature established the survival of property damage claims in the first sentence of the subsection, only to eliminate recovery for the large majority of those claims through the second sentence. Such an interpretation does not make sense either with

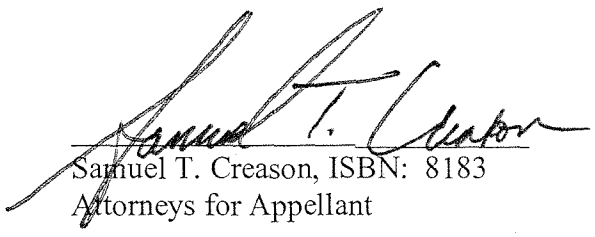
the clear intent of the legislature or with the language of the statute. If the statute truly applied and if the second sentence truly limits recovery on property damage claims, then legislative intent would dictate an interpretation that finds property claims fully-recoverable as "other out-of-pocket expenses."

CONCLUSION

The issue before the Court is whether Idaho courts will permit the Defendant to retain all the assets of the Trust and avoid any responsibility for her misuse of the Trust assets, simply because her brother died before he could have her brought to account. That result cannot be approved at law or at equity. Idaho courts have long recognized that the doctrine of abatement does not preclude an estate from pursuing the type of claims raised in this case. The Estate appeals to this Court to reverse the ruling of the magistrate court and remand this matter for further proceedings.

DATED this 28th day of April, 2015.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Samuel T. Creason, ISBN: 8183
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing APPELLANT'S BRIEF were served by the method indicated below and addressed to the following:

Karin Seubert	_____	FIRST-CLASS MAIL
Jones, Brower & Callery, P.L.L.C.	____X____	HAND DELIVERED
1304 Idaho Street	_____	OVERNIGHT MAIL
P.O. Box 854	_____	FAX TRANSMISSION
Lewiston, ID 83501		

DATED this 28th day of April, 2015.

Samuel T. Creason

APPENDIX

Idaho Appellate Rule 35(f)

Senate Judiciary & Rules Committee

Minutes
2010

MINUTES

SENATE JUDICIARY AND RULES COMMITTEE

DATE:	February 10, 2010
TIME:	1:30 p.m.
PLACE:	Room WW54
MEMBERS PRESENT:	Chairman Darrington, Vice Chairman Jorgenson, Senators Lodge, Hill, McKague, Mortimer, Kelly, and Bock
MEMBERS ABSENT/ EXCUSED:	Senator Davis
GUESTS:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
CONVENED:	**Chairman Darrington** called the meeting to order at 1:30 p.m.
MINUTES:	**Senator Kelly** made a motion to approve the minutes of February 3, 2010 as written. **Senator Hill** seconded the motion and the motion carried by **voice vote.** **Senator Bock** made a motion to approve the minutes of February 8, 2010 as written. **Senator Mortimer** seconded the motion and the motion carried by **voice vote.**
RS 19442C1	**Relating to Civil Actions. Barbara Jordan**, explained this fixes a problem in the law. Under current law if an unmarried person suffers an injury caused by another person and thereby incurs medical expenses and other actual economic losses but later dies from an unrelated cause prior to the responsible person paying for the expenses, the person or insurance company that caused the problem is no longer responsible to pay. However, when a married person in the same situation dies, the spouse is allowed to continue the claim. This change in the law will require liability insurance companies to pay for economic losses they have insured instead of requiring the children or other heirs of the unmarried person to pay the medical bills and other expense that were incurred because of the carelessness of another person.
MOTION:	**Senator Jorgenson** made a motion to send RS 19442C1 to print. **Senator Kelly** seconded the motion. The motion carried by **voice vote.**
RS 19537C1	**Relating to Injury to Children. Senator Broadsword** explained this legislation would change section 18-501, Idaho Code, relating to felony injury to a child. By adding an aggravated circumstance and increasing the maximum penalty to 20 years in cases where there is great bodily harm, permanent disability or permanent disfigurement to the child, the judges will have the flexibility to award stiffer penalties when the situation

MINUTES

SENATE JUDICIARY AND RULES COMMITTEE

DATE:	February 24, 2010
TIME:	1:30 p.m.
PLACE:	Room WW54
MEMBERS PRESENT:	Chairman Darrington, Vice Chairman Jorgenson, Senators Davis, Lodge, Hill, McKague, Mortimer, Kelly, and Bock
MEMBERS ABSENT/ EXCUSED:	
GUESTS:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
CONVENED:	**Chairman Darrington** called the meeting to order at 1:31 p.m.
MINUTES:	**Senator Lodge** made a motion to approve the minutes of February 10, 2010 as written. **Senator Mortimer** seconded the motion and the motion carried by **voice vote.** **Senator Hill** made a motion to approve the minutes of February 17, 2010 as written. **Senator Kelly** seconded the motion and the motion carried by **voice vote.**
RS 19695	**Relating to Rape; To Revise the Circumstances that Constitute Rape. Senator Hill** explained this legislation changes the definition of what is commonly known as "statutory rape" as defined at 18-6101. Under current law, sexual relations (as defined) with a girl who has not reached the age of 18 is considered rape, even if both parties participate willingly. This bill amends the definition of statutory rape to include such acts when the offender is age 18 or older and the victim is under age 16 (rather than 18), or the victim is 16 or 17 and the offender is 3 or more years older than the victim. Changes are also made to the male rape statute at 18-6108 to bring it into conformity with the provisions of the female rape statue at 18-6101. This does not protect anyone over the age of 20.
MOTION:	**Senator Mortimer** made a motion to send RS 19695 to print. **Senator Jorgenson** seconded the motion. The motion carried by **voice vote.**
S 1371	**Relating to Producer Licensing. Roy Eiguren** explained this legislation clarifies that the Director of the Idaho Department of Insurance has the exclusive authority to license bail bond agents in Idaho. The legislation further provides that the Director shall also regulate bail agent transactions subject to the inherent authority of the Idaho Supreme Court to regulate the procedural aspects of bail transactions in the Idaho court system.

Senator Jorgenson questioned if all seven judicial districts must accept this rule as a uniform rule? **Mr. Eiguren** replied yes, this legislation will clarify that all seven judicial districts will be subject to the uniform licensing provisions of statutory law.

Michael Henderson, Attorney of the Court, spoke in favor of the legislation, and reviewed the details of bail guidelines and statutory guidelines.

Senator McKague asked what precipitated this legislation? **Mr. Henderson** replied this makes clear the authority of when the courts take action when there is misconduct and this shows communication between the department and the courts. **Senator McKague** questioned if they are currently required to have a background check? **Mr. Henderson** stated they are, but only by their initial licensing.

MOTION: **Senator Jorgenson** made a motion to send S 1371 to the floor with a do pass recommendation. **Senator Lodge** seconded the motion. The motion carried by **voice vote**.

S 1340 **Relating to Civil Actions. Barbara Jordan** explained that this fixes a problem in the law. Under current law if an unmarried person suffers an injury caused by another person and thereby incurs medical expenses and other actual economic losses but later dies from an unrelated cause prior to the responsible person paying for the expenses, the person or insurance company that caused the problem is no longer responsible to pay. However, when a married person in the same situation dies, the spouse is allowed to continue the claim. This change in the law will require liability insurance companies to pay for economic losses they have insured instead of requiring the children or other heirs of the unmarried person to pay the medical bills and other expense that were incurred because of the carelessness of another person.

After reviewing the legislation, **Ms. Jordan** requested that the committee would send S 1340 to the fourteenth order for amendment because in the drafting of the legislation they neglected to make sure that the reference on page 2, line 35, actually should say "section 5-311(2) (a). Currently the (a) is missing from the legislation.

Senator Mortimer inquired if the language on page 2, line 33, where it states "if there be no personal representative appointed, then by those persons who would be entitled to succeed." Would this include a health and welfare claim, or an estate? **Ms. Jordan** replied, yes, if the subrogated interest currently have a rate to be reimbursed for those expenses and they can place things on the estate. This means the heirs have to pay or the estate then has to reimburse the subrogated interest for that and including the State of Idaho. This would then allow those heirs or the estate to proceed against the individual that actually caused the injury. **Senator Mortimer** stated, assuming there are no heirs, the State would then have the right to bring the action and to follow through with any claims in order to satisfy the obligation. **Ms. Jordan** responded that was correct, the state has the right to place a lien on the estate.

David Luker, Idaho Trial Lawyers Association, went to the podium to discuss subrogated rights. He also stated that they support sending S **1340** to the fourteenth order for amendment.

Senator Jorgenson questioned page 1, line 27, when it states, "those persons who would be entitled," would that exclude an estate if there are no persons? **Mr. Luker** stated the referenced would include everyone that is in Section 15-1-201, which is in the probate section, which is defined as heirs.

Phil Barber, American Attorney's Association, stated that they agreed with the Idaho Trial Lawyers Association.

MOTION: **Senator Bock** made a motion to send S 1340 to the fourteenth order for amendment. **Senator Hill** seconded the motion. The motion carried by **voice vote.**

S 1341 **Relating to Injury to Children. Senator Broadsword** explained this legislation would change section 18-501, Idaho Code, relating to felony injury to a child. By adding an aggravated circumstance and increasing the maximum penalty to 20 years in cases where there is great bodily harm, permanent disability or permanent disfigurement to the child, the judges will have the flexibility to award stiffer penalties when the situation warrants such action. There would likely be no increase to the general fund in the first few years, but if longer sentences are handed down it could in future years add additional costs to the Department of Corrections. There are currently 176 incarcerated inmates who have been convicted of felony injury to a child. Of those, approximately one third or 58 inmates received the maximum sentence. There is no way we can know a definite number of increased costs. The department estimates those increased costs two years after implementation could be as low as $68,000 per year and as high as $236,000 depending upon how many convictions and how many of those convicted receive the maximum penalty.

Holly Koole, Idaho Prosecuting Attorney's Association, spoke in favor of this legislation. Since it is difficult for children to protect themselves, actions against them warrants stiffer penalties for offenders.

Senator Kelly inquired if this legislation had been reviewed by the Supreme Court. **Patti Tobias**, Administrative Director for the Courts, stated that the district judges review team was fine with the legislation.

MOTION: **Senator Jorgenson** made a motion to send S 1341 to the floor with a do pass recommendation. **Senator Mortimer** seconded the motion. The motion carried by **voice vote.**

S 1312 **Relating to the Child Protective Act. Senator Broadsword** explained this legislation relates to the Child Protective Act by amending section 16-1619, Idaho Code, to include felony injury to a child on the list of offenses where the Department of Health and Welfare need not seek reunification with the parent. By adding felony injury to a child and serious bodily injury to a child to this list, the department can seek foster care and avoid going through a lengthy and costly judicial process which is not in the best

House Judiciary, Rules & Administration Committee

Minutes
2010

MINUTES

HOUSE JUDICIARY, RULES AND ADMINISTRATION COMMITTEE

DATE: March 19, 2010

TIME: 1:30 p.m.

PLACE: Room EW42

MEMBERS: Chairman Clark, Vice Chairman Smith(24), Representatives Nielsen, Shirley, Wills, Hart, McGeachin, Bolz, Labrador, Luker, Kren, Boe, Burgoyne, Jaquet, Killen

ABSENT/ EXCUSED: Representatives Shirley, Wills, Labrador and Kren

GUESTS: Bob Aldridge, Attorney; Sue Stadler; Daniel Lake; Michael Dennard, Judiciary; Tracee Crawford, Treasure Valley Grandparents as Parents; Marisa Mackley, Citizen; Georgia Mackley, Kincare Coalition; Patti Tobias, Courts; John Watts, Voices for Children; Vikki Miller, Idaho Voices for Children; Paul Panther, Attorney General's office; Barbara Jorden, Idaho Trial Lawyers Assn., Brandon Philips, Idaho Department of Correction, Diane Schwarz, Idaho Voices for Children; Fairy Hitchcock, Advocate; Director Brent Reinke, Idaho Department of Correction

Chairman Clark called the meeting to order at 1:30 p.m.

MOTION: **Representative Bolz** moved to approve the minutes of the meeting held on March 17, 2010, as written. Motion carried by voice vote.

S 1340a: The Chairman recognized **Barbara Jorden,** Idaho Trial Lawyers Association to explain the bill. This bill fixes a loophole in the law. Under current law, if an unmarried person suffers an injury caused by another person and incurs medical expenses and other actual economic losses, but later dies from an unrelated cause prior to the responsible person paying for the expenses, the person or insurance company that caused the problem is no longer responsible to pay. However, when a married person in the same situation dies, the spouse is allowed to continue the claim.

This change in the law will require liability insurance companies to pay for economic losses they have insured instead of requiring the children or other heirs of the unmarried person to pay the medical bills and other expenses that were incurred because of the carelessness of another person.

The amendment simply adds an "(a)" on page 2 of the bill in line 35 which was inadvertently left out when the bill was crafted.

MOTION: **Representative Smith** moved to send **S 1340a** to the floor with a **DO PASS** recommendation. **Motion carried by voice vote**. Representative Smith will carry the bill on the floor.

STATEMENT OF PURPOSE

RS19442C1

This fixes a problem in law. Under current law if an unmarried person suffers an injury caused by another person and thereby incurs medical expenses and other actual economic losses but later dies from an unrelated cause prior to the responsible person paying for the expenses, the person or insurance company that caused the problem is no longer responsible to pay. However, when a married person in the same situation dies, the spouse is allowed to continue the claim.

This change in the law will require liability insurance companies to pay for economic losses they have insured instead of requiring the children or other heirs of the unmarried person to pay the medical bills and other expenses that were incurred because of the carelessness of another person.

FISCAL NOTE

None

Contact:
Name: Senator Joe Stegner
Office: Rm. 430
Phone: (208) 332-1308

LEGISLATURE OF THE STATE OF IDAHO

Sixtieth Legislature Second Regular Session - 2010

IN THE SENATE

SENATE BILL NO. 1340

BY JUDICIARY AND RULES COMMITTEE

AN ACT

RELATING TO CIVIL ACTIONS; AMENDING SECTION 5-311, IDAHO CODE, TO REFERENCE A CODE SECTION IN RELATION TO THE DEFINITION OF A TERM, TO PROVIDE A CORRECT CODE REFERENCE AND TO MAKE TECHNICAL CORRECTIONS; AND AMENDING SECTION 5-327, IDAHO CODE, TO PROVIDE FOR THE CONTINUATION OF CERTAIN CAUSES OF ACTION RELATING TO PERSONAL INJURY OR PROPERTY DAMAGE UPON THE DEATH OF THE INJURED PERSON, TO LIMIT DAMAGES AND TO PROVIDE FOR THE COMMENCEMENT OR CONTINUATION OF SUCH ACTIONS BY THE DECEDENT'S PERSONAL REPRESENTATIVE OR HEIRS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 5-311, Idaho Code, be, and the same is hereby amended to read as follows:

5-311. SUIT FOR WRONGFUL DEATH BY OR AGAINST HEIRS OR PERSONAL REPRESENTATIVES -- DAMAGES. (1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

(2) For the purposes of subsection (1) of this section, and subsection (2) of section 5-327, Idaho Code, "heirs" means:

(a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (2~~1~~2) of section 15-1-201, Idaho Code.

(b) Whether or not qualified under subsection (2)(a) of this section, the decedent's spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

1. "Support" includes contributions in kind as well as money.

2. "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the heirs of the decedent. These services may vary according to the identity of the decedent and heir and shall be determined under the particular facts of each case.

(c) Whether or not qualified under subsection (2)(a) or (2)(b) of this section, the putative spouse of the decedent, if he or she was dependent on the decedent for support or services. As used in this subsection, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(d) Nothing in this section shall be construed to change or modify the definition of "heirs" under any other provision of law.

SECTION 2. That Section 5-327, Idaho Code, be, and the same is hereby amended to read as follows:

5-327. PERSONAL INJURIES -- PROPERTY DAMAGE -- DEATH OF WRONGDOER -- DEATH OF INJURED PARTY -- SURVIVAL OF ACTION. (1) Causes of action arising out of injury to the person or property, or death, caused by the wrongful act or negligence of another, except actions for slander or libel, shall not abate upon the death of the wrongdoer, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded nor penalties adjudged in any such action; provided, however, that the injured person shall not recover judgment except upon some competent, satisfactory evidence corroborating the testimony of said injured person regarding negligence and proximate cause.

(2) A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2), Idaho Code.