12-23-2015

# Eagle Equity Fund, LLC v. Titleone Corp Respondent's Brief 1 Dckt. 42850

IN THE SUPREME COURT OF THE STATE OF IDAHO

EAGLE EQUITY FUND, LLC, an Idaho Limited Liability Company,

Plaintiff-Appellant,

v.

TITLEONE CORPORATION, an Idaho Corporation; and COREY BARTON HOMES, INC., an Idaho Corporation,

Defendants-Respondents,

and

FIDELITY NATIONAL TITLE COMPANY (*fka* Land America Transnation *aka* Transnation Title & Escrow, Inc.), a Delaware Corporation; CHICAGO TITLE INSURANCE COMPANY, a Nebraska or Florida Corporation (fka Ticor Title Insurance Company, a California Corporation); RBC REAL ESTATE FINANCE, INC.; ALLIANCE TITLE & ESCROW CORP., a Delaware Corporation; DAS INVESTMENTS, LLC, an Idaho Limited Liability Company; and JOHN DOES III-X, unknown individuals and/or Companies,

Defendants.

**Supreme Court No. 42850-2015**



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# RESPONDENT'S BRIEF

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Appeal from the District Court of the Fourth Judicial District for Ada County

Honorable Jason Scott, District Judge Presiding

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### A. Nature of the Case.

In granting TitleOne Corporation's ("TitleOne") motion for summary judgment, the district court correctly summarized Eagle Equity Fund, LLC's ("EEF") case, as "plaintiffs cast much too broad a net, suing too many defendants on too many theories, armed with too few supporting facts." R. at 3808. Now, on appeal, EEF rehashes the same inadequate arguments that go unsupported by the record.

At the center of EEF's case is the allegation that TitleOne negligently reconveyed a deed of trust in favor of EEF. Using the reconveyance as a springboard, EEF launched a case claiming widespread collusion between TitleOne and eight other named defendants who allegedly conspired to deprive EEF of the value of its second position deed of trust. EEF's pleadings argue that defendants conducted a series of fraudulent conveyances all as part of a plan to intentionally interfere with EEF's right to security for payment on a promissory note. EEF's theory, however, has no factual support.

More importantly, from the onset of the proceedings below, it was apparent that EEF's second position deed of trust was so underwater that no cognizable proof of damage or loss to EEF could be shown despite the allegedly negligent reconveyance. Simply put, this case involves whether EEF failed to show that the loss of its second position deed of trust in real property caused EEF damage in light of the fact that the real property lacked even enough value to pay the first position.

The district court's judgment in favor of TitleOne should be affirmed because: (1) EEF failed to offer cognizable proof of any damages, an essential element of its claims against TitleOne; (2) EEF's I.C. § 45-1205 claim is barred by the applicable three year statute of limitations; (3) EEF's common law negligence claim is barred by the economic loss doctrine and alternatively is precluded by the exclusive statutory remedy of I.C. § 45-1205; and (4) EEF failed to offer evidence on the essential elements of its tortiuous interference with a prospective economic advantage claim.

This appeal can and should be resolved on EEF's failure to offer evidence of damages with reasonable certainty. However, if the Court proceeds beyond the initial dispositive question of damages, the same result is warranted because EEF failed to meet its burden on essential elements of its claims against TitleOne.

**B. Course of Proceedings.**[1]

On June 5, 2013, EEF initiated this matter by filing its Complaint, which pled nine counts against all defendants: (1) breach of contract; (2) bad faith; (3) negligence; (4) violations of the Idaho Consumer Protection Act; (5) fraud and fraudulent conveyance; (6) collusion to defraud; (7) conversion; (8) unjust enrichment; and (9) tortious interference with a prospective economic advantage. R. at 21–68.

On September 6, 2013, TitleOne filed a motion to dismiss EEF's complaint and a supporting memorandum. R. at 98–123. The district court issued its Memorandum Decision and

[1] The procedural history of this case is complex and voluminous, primarily because of the high number of claims EEF pled against numerous defendants. With this Respondent's Brief, TitleOne will endeavor to recite to the Court only the germane procedural history.

Order on Various Motions ("First Decision") addressing TitleOne's motion to dismiss on December 2, 2013. R. at 526–67. As to TitleOne, the district court dismissed each count in the Complaint except: (1) fraud and fraudulent conveyance; (2) unjust enrichment; and (3) tortious interference with a prospective economic advantage. R. at 526–67.

Prior to the district court's First Decision, EEF moved to amend its Complaint (R. at 204–12), which was granted. R. at 554–60. On December 10, 2013, EEF filed its First Amended Complaint, which pled six causes of action against TitleOne: (1) fraud and fraudulent conveyance; (2) collusion to defraud; (3) conversion; (4) tortious interference with a prospective economic advantage; (5) breach of fiduciary duty; and (6) violation of I.C. § 45-1205. R. at 568–86. On January 2, 2014, TitleOne filed a motion for summary judgment and supporting memorandum with respect to the remaining live counts in the case. R. at 620–23, 628–52.

While TitleOne's motion for summary judgment was pending, EEF filed another motion to amend its complaint and memorandum in support. R. at 877–85. Thereafter, on February 6, 2014, EEF filed its Second Amended Complaint (R. at 963–79) and shortly thereafter a Revised Second Amended Complaint. R. at 980–97. The Revised Second Amended Complaint was EEF's final pleading and the operative complaint that was finally dismissed by the district court in its Memorandum Decision on September 19, 2014. R. at 3052–64. As to TitleOne, the Revised Second Amended Complaint pleads five causes of action: (1) fraud and fraudulent conveyance; (2) collusion to defraud; (3) tortious interference with a prospective economic advantage; (4) breach of fiduciary duty; and (5) violation of I.C. § 45-1205. R. at 980–97.

On February 26, 2014, the district court issued its Memorandum Decision and Order on Various Motions ("Second Decision"). R. at 1054–81. The Second Decision dismissed EEF's breach of fiduciary duty claim against TitleOne. R. at 1072. The Second Decision also addressed EEF's claim under I.C. § 45-1205 and held that the claim was time barred by I.C. § 5-218(1)'s three-year limitations period but, instead of dismissing the claim outright, granted EEF additional time to establish that equitable estoppel prevented TitleOne from raising the statute of limitations as a defense. R. at 1063–66.

On July 1, 2014, TitleOne filed its second motion for summary judgment and memorandum in support. R. at 2364–66, 2388–2413. Again, following TitleOne's second motion for summary judgment, EEF motioned to amend its complaint (R. at 2741–45, 2746–48), which was denied. R. at 3120–36. EEF filed a motion and memorandum asking the district court to reconsider its decision that the three-year limitations period from I.C. § 5-218(1) applied to its cause of action under I.C. § 45-1205, arguing instead that a twenty-year limitations period applied from I.C. § 5-204. R. at 2734–40.

On September 19, 2014, the district court issued its Memorandum Decision and Order Granting Defendant TitleOne Corporation's Second Motion for Summary Judgment ("Order Granting Summary Judgment"), wherein all remaining claims asserted by EEF against TitleOne were dismissed. R. at 3052–64.[2] At this point in the case, the only pending claims against

[2] The Order Granting Summary Judgment did not resolve all the claims pending against other parties in the action. Accordingly, TitleOne filed a motion and memorandum seeking a Rule 54(b) certificate. R. at 3140–51. The district court addressed this motion in its Memorandum Decision and Order, wherein, instead of issuing a Rule 54(b) certificate, the court severed EEF's

TitleOne were (1) tortious interference with prospective economic advantage and (2) violation of I.C. § 45-1205. R. at 3052–53.[3] The Order Granting Summary Judgment dismissed both counts for the same reason, EEF failed to offer competent evidence of damages. R. at 3061.

The Order Granting Summary Judgment denied as moot EEF's motion to reconsider the statute of limitations issue because the I.C. § 45-1205 claim was dismissed due to EEF's failure to establish damage, not based on the statute of limitations had run. R. at 3062. On December 1, 2014, the district court issued a Judgment dismissing all of EEF's claims against TitleOne with prejudice. R. at 3222–25.

Following the court's judgment, the parties engaged in extensive litigation over attorney fees and costs, which culminated in the district court issuing its Memorandum Decision and Order Awarding Costs and Attorney Fees and Imposing Rule 11 Sanctions. R. at 3807–41. Therein, the district court concluded that defendants were prevailing parties and granted TitleOne an award of costs in the amount of $2,878.69 and attorney fees in the amount of $38,000 pursuant to I.C. § 12-121. R. at 3814, 3833. The district court sanctioned EEF's counsel, Aaron Tribble and David M. Fogg, pursuant to I.R.C.P. 11(a)(1) for making frivolous filings and ordered each to pay $1,500 to the court. R. at 3836–39. On February 23, 2015, the

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remaining debt collection claims against other defendants pursuant to I.R.C.P. 21 and assigned a new case number designation to these claims, i.e., treating these as a separate action entirely. R. at 3217-19. The court's severance of the pending claims from the resolved claims resulted in a full adjudication of the original action, permitting it to proceed to judgment without a Rule 54(b) certificate. R. at 3217.

[3] EEF voluntarily conceded that summary judgment on its claims of fraud and collusion to defraud was appropriate. R. at 3052–53.

district court issued an Amended Judgment, reflecting the fee awards it granted defendants and the sanctions imposed on Mr. Tribble and Mr. Fogg. R. at 3842–44.

On January 9, 2015, after the district court's entry of judgment on all claims, but prior to a resolution on fees, EEF filed a notice of appeal designating seventeen issues on appeal. R. at 3588-3609. On March 17, 2015, EEF submitted an Amended Notice of Appeal that severely curtailed the issues on appeal. R. at 3856–81.

## C. Statement of Facts.[4]

### i. The Development Loans and EEF's Agreement to Subordinate.

In 2006, Galiano, LLC ("Galiano"), was developing a 29.63 acre parcel of real property in Kuna, Idaho (the "Property"). R. at 527. The plan was to subdivide and plat the Property into sixty separate residential lots, which did occur. R. at 1056. To finance the development, Galiano, through its managing member, Edward I. Mason, engaged two separate creditors. R. at 527, 1056.

First, on November 17, 2006, RBC Centura Bank ("RBC") loaned Galiano $6,063,300 under two separate promissory notes (collectively, the "RBC Loan"). R. at 1056. The RBC Loan was secured by a deed of trust in the Property recorded as Instrument No. 106181858 in the real property records of Ada County, Idaho on November 17, 2006 (the "RBC Deed of Trust"). R. at 1056. RBC was the beneficiary and Alliance Title & Escrow Corp. ("Alliance Title") was the original trustee under the RBC Deed of Trust. R. at 1057.

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[4] As with the above procedural history, this statement of facts endeavors to only present to the Court those facts relevant to the Court's determination of the issues raised on appeal by EEF.

Second, and contemporaneously with the RBC Loan, Galiano executed a promissory note in the amount of $725,500 in favor of EEF (the "EEF Loan"). R. at 1057. The EEF Loan was secured by a deed of trust in the Property, which was recorded in the real property records of Ada County, Idaho on November 17, 2006, as Instrument No. 106181859 (the "EEF Deed of Trust"). R. at 1057. EEF was the beneficiary and Alliance Title Co. was the original trustee of the EEF Deed of Trust. R. at 1057.

A Subordination Agreement between Galiano, RBC, and EEF expressly made the EEF Loan and EEF Deed of Trust junior to the RBC Loan and Deed of Trust. R. at 1057. The EEF Deed of Trust conspicuously reflected the subordination on its face stating: "*** THIS DEED OF TRUST IS JUNIOR AND SUBORDINATE TO SAID DEED OF TRUST RECORDING CONCURRENTLY HEREWITH ***" R. at 283.

**ii. The Reconveyance of the EEF Deed of Trust.**

On January 25, 2010, TitleOne received a Reconveyance of Deed of Trust from a third-party servicer, Post-Closing Department, Inc. ("PCD"). R. at 1057. At that time, PCD provided recordation and other reconveyance services to TitleOne. R. at 1057. Upon receiving the Reconveyance of Deed of Trust from PCD, TitleOne employees signed the reconveyance and returned it to PDC who then recorded the reconveyance in the real property records of Ada County on February 11, 2010 as Instrument No. 110012858 (the "Reconveyance"). R. 1057–58. EEF claims it did not receive notice of the Reconveyance or satisfaction of the debt secured by the EEF Deed of Trust, although there was testimony from PCD that it had sent notice 60 days

before reconveyance occurred. R. at 691, 1058, 1768 and 1769[5]. EEF discovered the Reconveyance in early March of 2013. R. at 3810.

**iii. Galiano's Default and Sale of the Property.**

In 2011, Galiano become unable to make payments on the RBC Loan as they came due. R. at 1058. On May 17, 2012, Galiano, by General Warranty Deed, sold the remainder of the lots on the Property to DAS Investments, LLC ("DAS") for $860,000. R. at 3810. RBC consented to the DAS sale despite the approximately $2.5 million deficiency. R. at 3810. On November 1, 2012, RBC entered into a stipulated judgment with Galiano, Ted Mason Signature Homes, Inc., and Edward and Sherry Mason in the principal amount of $2,601,541.37 plus costs, fees and interest. R. at 1058. EEF was unaware of the sale to DAS and the settlement.

**iv. DAS' Sale of the Individual Lots.**

Upon purchasing the Property in May of 2012, DAS began to sell off the individual lots to Corey Barton Homes, Inc. ("CBH"). R. at 3810. Over the course of approximately one year, each lot was sold to CBH. R. at 3810. EEF presented some evidence that DAS sold the individual lots for a total of $1.13 million, allegedly resulting in a gross profit of approximately $270,000 and a net profit in some lesser amount after taking into account transaction costs, holding costs, and other expenses. R. at 3810.

## III. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether this Court need address any other issue on appeal besides the absence of cognizable proof of damage, when that issue is dispositive of all claims and was the sole basis of the district court's ultimate decision on summary judgment.

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[5] See also Note 8, *infra*.

B. Whether I.C. § 45-1205 is the exclusive remedy for "resulting damages" for negligent reconveyance of a deed of trust under I.C. § 15-501, *et seq.*

C. Whether EEF has waived, or is judicially estopped from asserting, that the district court erred in dismissing its common law negligence claim.

D. Whether TitleOne is entitled to attorney fees and costs on appeal pursuant to I.C. §§ 12-120(3) and/or 12-121.

## IV. ATTORNEY FEES ON APPEAL

Pursuant to I.R.C.P. 54(d)-(e) and I.C. §§ 12-121 and 12-120(3), TitleOne hereby requests its attorney fees and costs on appeal. TitleOne notes that pursuant to I.A.R. 41(a), TitleOne has designated the award of attorney fees on appeal as an issue on appeal. Further, pursuant to I.A.R. 35(b)(5), TitleOne will present its argument on the issue of appellate attorney fees supported by citation to authorities, statutes, and the record in Section VI herein.

## V. ARGUMENT

### A. Standard of Review.

"This Court reviews a ruling on summary judgment under the same standard as the trial court." *Hayes v. City of Plummer*, 159 Idaho 168, 357 P.3d 1276, 1278 (2015). "Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that 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.'" *Id.* (quoting I.R.C.P. 56(c)).

> Flimsy or transparent contentions, theoretical questions of fact which are not genuine, or disputes as to matters of form do not create genuine issues which will preclude summary judgment. Neither is a mere pleading allegation sufficient to create a genuine issue as against affidavits and other evidentiary materials which show the allegation to be false. A mere scintilla of evidence is not enough to create an issue; there must be evidence on which a jury might rely.

*Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 524, 272 P.3d 491, 496 (2012) (citation omitted). "Summary judgment is appropriate if the plaintiff fails to demonstrate the existence of a genuine issue of material fact as to causation and damages." *J-U-B Engineers, Inc. v. Sec. Ins. Co. of Hartford*, 146 Idaho 311, 317, 193 P.3d 858, 864 (2008) (quoting *McPheters v. Maile*, 138 Idaho 391, 396, 64 P.3d 317, 322 (2003)).

"The interpretation of a statute is a question of law that the Supreme Court reviews de novo." *Hayes*, 159 Idaho 168, 357 P.3d 1276, 1278 (2015) (quoting *State v. Schulz*, 151 Idaho 863, 865, 264 P.3d 970, 972 (2011)).

The Court's review of EEF's appeal potentially involves determining the applicable statute of limitations. "The determination of the applicable statute of limitation is a question of law over which this Court has free review." *Hayden Lake Fire Prot. Dist. v. Alcorn,* 141 Idaho 388, 403, 111 P.3d 73, 88 (2005) (citing *Oats v. Nissan Motor Corp. in the U.S.A.,* 126 Idaho 162, 164-72, 879 P.2d 1095, 1097-1105 (1994)). "The time when a cause of action accrues may be a question of law or a question of fact, depending upon whether any disputed issues of material fact exist." *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 140 Idaho 144, 148, 90 P.3d 894, 898 (2004) (quotation omitted). It is a question of law where there is no dispute over a material "fact regarding when the cause of action accrues" and it is a question fact where "there is conflicting evidence as to when the cause of action accrued." *Id.*

**B. The District Court Properly Dismissed EEF's I.C. § 45-1205 Claim because EEF Failed to Offer Competent Evidence to Establish its Damages, if any, with Reasonable Certainty.**

Based on the language of I.C. § 45-1205, the district court determined that proof of damages is an essential element of a claim under I.C. § 45-1205. R. at 3057. Idaho Code § 45-1205 provides:

> In the event that a trust deed is reconveyed by a title insurer or title agent purporting to act under the provisions of this chapter, but the obligation secured by the trust deed has not been fully paid, the title insurer or title agent effecting such reconveyance shall be liable to the beneficiary of the trust deed ***for the damages suffered as a result*** of such improper reconveyance only if the title insurer or title agent failed to substantially comply with the provisions of section 45-1203 or 45-1204, Idaho Code, or acted with negligence or in bad faith in reconveying the trust deed.

I.C. § 45-1205 (emphasis added).

The district court concluded that because EEF failed to introduce competent evidence of damages resulting from the Reconveyance, summary judgment was warranted. R. at 3061. In so holding, the district court carefully analyzed each of EEF's lackluster arguments that it suffered damage. R. at 3057–61.

The starting point of the district court's analysis is that EEF was a second position creditor secured by property with insufficient value to satisfy the first position creditor's loan. R. at 3058. The district court concluded that TitleOne, by advancing argument and authority that EEF's junior lien was worthless, "met its burden to show that there is no genuine issue of material fact as to damages" thereby shifting the burden to EEF to provide evidence of damage. R. at 3058. However, the court held that "EEF wholly fail[ed] to meet its burden." R. at 3059. The court stated:

> Without proof that the property's value ... exceeded the amount owning to RBC, there is no proof that EEF's deed of trust was worth anything at any material time. A party whose deed of trust is worthless is, for practical purposes, no worse off when the deed of trust is reconveyed.

R. at 3059.

Despite failing to offer sufficient evidence of the Property's value to demonstrate that EEF's second position deed of trust had any value, EEF argued below that "had it known about the short sale, it might have negotiated to purchase the property itself." R. at 3060. The district court found that EEF's representation that it "might" have purchased the property insufficient to establish any damages. This was because EEF offered no evidence of the price the Property would have commanded or that the value of the Property if purchased would have been greater than the hypothetical purchase price. R. at 3060. Ultimately, the court stated: "EEF does not show damages by simply presuming that, in the absence of the apparently wrongful reconveyance, it would have bought the property instead of DAS and resold it to Corey Barton Homes for a profit, just as DAS did." R. at 3060.

EEF now argues that the district court erred in concluding that it failed to present sufficient evidence of damages to survive TitleOne's motion for summary judgment. Appellant's Br. at 8. EEF raises the same "missed opportunity" argument that the district court rejected below. Specifically, EEF argues that it was damaged by the Reconveyance because it resulted in EEF not receiving notice of the sale of the Property to DAS, which resulted in "the loss of opportunity to participate" in the sale of the Property. *Id.* at 10. This missed opportunity, EEF argues, can be quantified based on the $270,000 gross profit that DAS allegedly realized from

the sale of the individual lots to CBH. *Id.* at 11. As the district court properly concluded, this argument is nothing more that speculation. Accordingly, EEF's argument lacks merit because the loss of the opportunity to participate alone is not damage. EEF cannot prove what could have or would have happened had it participated. Why, for instance, would it have spent more money on property that would not sustain its worth? Why, to put it in the vernacular, "throw good money after bad"? EEF has not demonstrated competent evidence of its damages with reasonable certainty. Indeed, EEF as much as admitted that its damages were speculative:

> Judge Scott: Do you intend to come forward with anything that would be relevant to the subject of damages?
>
> MR. TRIBBLE: At this point, Your Honor, the best thing that we've been able to figure out is that there is no answer, and there's really no way to calculate what this property would have been worth. And I think there was an enough turmoil in the market, and from people that we've talked to, it's really impossible to say one way or the other. And maybe there's an answer there in and of itself, but it's almost the same thing as asking an expert, is asking them to speculate about – I mean, they literally would have to speculate to try to draw a number.
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> . . .
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> MR. TRIBBLE: Now, the appraisal, we did contact a very reputable broker in the area and asked him to see what he could do with getting an appraisal. And the answer that we got back was is he has no way of knowing. There just simply aren't comps available. He said he could try to make guesses, but it would just be pure guesswork, and it would be literally just a stab in the dark is what we got.

Tr. at 306 and 435.

It is elemental that "[a] person asserting a claim of damages has the burden of proving not only a right to damages, but also the amount of damages." *Beare v. Stowe's Builders Supply, Inc.*, 104 Idaho 317, 321, 658 P.2d 988, 992 (Ct. App. 1983) (citations omitted).

Evidence of damages "is sufficient if it proves the damages with reasonable certainty." *Griffith v. Clear Lakes Trout Co.*, 146 Idaho 613, 618, 200 P.3d 1162, 1167 (2009) (citation omitted). "Reasonable certainty requires neither absolute assurance nor mathematical exactitude; rather, the evidence need only be sufficient to *remove the existence of damages from the realm of speculation.*" *Id.* (emphasis added). *See also Pope v. Intermountain Gas*, 103 Idaho 217, 234, 646 P.2d 988, 1005 (1982) ("[T]he factfinder may not determine damages by mere speculation and guesswork, and there must be a reasonable foundation established by the evidence from which the factfinder can calculate the amount of damages."); *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 847, 172 P.3d 1119, 1122 (2007) (holding that "conclusory statements" of lost profits, without proof, are not sufficient to establish damages).

Here, the district court properly stated that "it is up to EEF to demonstrate that the junior deed of trust has real value that was lost as a result of the reconveyance" and that "EEF simply failed to do so." R. at 3059. Simply stated, EEF failed to offer evidence to establish its alleged damages with reasonable certainly.

The district court's holding as to damages stemming from a reconveyance is consistent with reported decisions from elsewhere in the country. In cases involving the loss of a security interest, like the instant case, the measure of damage is the fair market value of the real property *as of the date of conversion less prior liens* and taxes but no more than the amount due on the note. *See Stephans v. Herman*, 225 Cal. App.2d 671, 73-74 (Cal. D. Ct. App. 1964) (emphasis added) (applying foregoing formula where title company's negligence resulted in the wrongfully reconveyance of a deed of trust); *Howe v. City Title Ins. Co.,* 255 Cal. App.2d 85, 87 (1967)

(rejecting argument that face value of note fixed the amount of damages in a case where title company's failure to record a notice of default and sale of trust deed deprived junior lienholder of an opportunity to cure the default and holding that the so called *Stephans* rule was proper measure of damages.); *Rooz v. Kimmel*, 55 Cal. App.4th 573, 593 (Cal. D. Ct. App. 1997) (applying *Stephans* rule and finding that judgment against title company for failure to timely record deed of trust which should have been in second position—but was recorded in fourth position—was equal to the fair market value of the property at the time of the loss minus the amount due on the prior recorded deeds of trust).

Each of these cases essentially treated the claim against the title company as a substitute for the security that was lost as of the date of the allegedly wrongful conveyance. These cases did not attempt to predict what would have happened to a second position deed of trust had it not been extinguished and what "opportunity" may have been afforded an "underwater" second position lien holder. The very essence of a "short sale" of the type EEF is claiming it lost the right to participate in is that a first position lender holds all decision-making power. That lender can choose or not choose to sell and at what price. It is sheer speculation to say that there is any inherent "opportunity" in a second position at such sale, other than the "opportunity" to be foreclosed out by senior lien holders. Indeed, had EEF still had an unconveyed interest and therefore RBC could not cleanly sell its position, it is just as probably, if not more probable, that RBC would have simply foreclosed out EEF. In this case, EEF's argument that it "might" have purchased the Property and thereby gained some benefit by conducting prospective individual lot sales is precisely the type of speculative damages that Idaho courts prohibit.

In order to be entitled to any damages under the *Stephans* rule, EEF needed to offer evidence that there was enough value in the Property at the time of the Reconveyance to fully satisfy the RBC Loan. To date, the only evidence of value is that proffered by RBC in support of its earlier filed (and now decided) motion for summary judgment. The evidence introduced in the record by RBC shows that, in May of 2012, approximately two years after the Reconveyance, RBC approved a short sale of the Property from Galiano to DAS for $773,559.22. At the time of the short sale, Galiano owed RBC $3,260,656.14. Thus, if the Reconveyance had occurred in 2012, and the short sale price of $773,559.22 roughly approximated the fair market value of the Property, EEF's security interest, after deducting the amount RBC was owed under its note, would have been worthless. This is the only evidence of the Property's value in the record and EEF failed to offer competent evidence of its alleged damages in 2010. Accordingly, the district court's dismissal of EEF's I.C. § 45-1205 claim for failure to offer evidence of damages should be affirmed by this Court.

### C. The District Court Properly Dismissed EEF's Tortious Interference with Prospective Economic Advantage Claim because EEF Failed to Offer Competent Evidence to Establish its Damages, if any, with Reasonable Certainty.

Similar to a I.C. § 45-1205 claim, damages are a requisite element of a tortious interference with prospective economic advantage claim, and EEF had to burden to establish such damages with reasonable certainty to survive summary judgment. *See Cantwell v. City of Boise*, 146 Idaho 127, 137-38, 191 P.3d 205, 215-16 (2008) (holding that a claim for intentional interference with a prospective economic advantage has five elements, including "resulting damage to the plaintiff whose expectancy has been disrupted"). The district court recognized the

same, stating that a tortious interference with prospective economic advantage claim "requires proof of damages resulting from the alleged interference." R. at 3057. Based on the fact that both of EEF's remaining claims against TitleOne required damage as a requisite element, the district court provided a singular analysis of both claims in its Order Granting Summary Judgment in favor of TitleOne. R. at 3057–61. As addressed above (*supra* § VI.B) the district court properly concluded that EEF failed to offer proof of any damage with reasonable certainty and dismissed this tortious interference claim. The district court's dismissal of EEF's tortious interference with prospective economic advantage claim for failure to offer proof of damages with reasonable certainty should be affirmed because the EEF failed to meet its burden on the express elements of the claim. *See Partout v. Harper*, 145 Idaho 683, 688, 183 P.3d 771, 776 (2008) ("The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.").

If this Court concludes, like the district court, that EEF failed to meet its burden to offer evidence of damages with reasonable certainty, the Court need not address any of the remaining arguments in this Respondent's Brief. However, out of an abundance of caution and to address all of the issues raised on appeal by EEF, TitleOne will continue to present argument and authority supporting an affirmance of the district court's judgment.

### D. Lack of Evidence of Intent to Interfere and Knowledge of the Expectancy Provide Independent Grounds to Affirm the District Court's Dismissal of EEF's Tortious Interference With Prospective Economic Advantage Claim.

In addition to being subject to dismissal for failure to offer competent evidence to establish damages with reasonable certainty, EEF's tortious interference with prospective economic advantage claim also fails on a lack of showing of two additional requisite elements of the cause of action.

First, EEF had the burden to show that TitleOne directed its actions in some way toward a third-party to "induc[e] termination of the expectancy." *Cantwell*, 146 Idaho at 138, 191 P.3d at 216. It is well-established that a plaintiff cannot state a claim for tortious interference where there is no evidence that a defendant made contact with or interfered with third-parties.[6]

In the instant case, EEF has not alleged that TitleOne induced a third-party to not enter into a contract, or otherwise terminate any relationship, with EEF. The gravamen of EEF's complaint is that TitleOne negligently reconveyed the EEF Deed of Trust. The reconveyance of the EEF Deed of Trust occurred in isolation and did not involve third parties nor did it involve

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[6] *See, e.g., Stofer v. First Nat'l Bank*, 571 N.E.2d 157, 167 (Ill. App Ct.. 1991) (interference with business interests requires action by the defendant toward a third party which causes the third party to breach a contractual relationship with the plaintiff); *State Nat'l Bank v. Academia, Inc.*, 802 S.W.2d 282, 297 (Tex. App. 1990) (interpreting Illinois law and finding no tortious interference where the defendant had made no direct contact with or interfered with relevant third parties); *K & K Mgmt. v. Lee*, 557 A.2d 965, 973 (Md. 1989) (finding that tortious interference with business relationships arises only out of the relationship between three parties–plaintiff, defendant, and the third party); *Galinski v. Kessler*, 480 N.E.2d 1176, 1180 (Ill. Ct. App. 1985) (finding that tort of interference with plaintiff's prospective economic advantage requires action by the defendant toward the third party); *Teleflex Info. Sys, Inc. v. Arnold*, 132 N.C. App. 689, 513 S.E.2d 85, 90 (N.C. Ct. App. 1999) (finding that one of the elements of a claim for tortious interference with a contract is that "the defendant intentionally induces the third person not to perform the contract").

TitleOne acting to divert or take business away from EEF. Because EEF has not alleged that TitleOne induced a third party to terminate a relationship with EEF or that TitleOne induced a third party not enter into a contract with EEF, EEF cannot satisfy the threshold "third-party inducement" element to state a claim for tortious interference with prospective economic advantage. Thus, the district court's dismissal should be affirmed.

Second, EEF had the burden to show that TitleOne had actual knowledge of EEF's expectancy. *Cantwell*, 146 Idaho at 138, 191 P.3d at 216. In the instant case, at the time of the Reconveyance, TitleOne was operating on the belief that the statutory reconveyance process had been satisfied and that EEF had been paid in full on the underlying note. Accordingly, TitleOne at the time of the Reconveyance was of the belief that EEF had no further expectancy because its economic interest in the property had been satisfied. Accordingly, TitleOne had no knowledge of EEF's expectancy, and the second element of a claim for tortious interference with prospective economic advantage claim cannot be satisfied by EEF.

In sum, even if EEF had offered the requisite evidence of damages–which it did not– EEF's tortious interference with prospective economic advantage claim still fails for lack of evidence on two remaining requisite elements: (1) intentionally inducing termination of the expectancy, and (2) knowledge of the expectancy on the part of the interferer. For these reasons, the Court should affirm the district court's dismissal of EEF's tortious interference with prospective economic advantage claim.

### E. The District Court Correctly Held that the Three-Year Limitations Period from I.C. § 5-218(1) Applied to EEF's I.C. § 45-1205 Claim and that the Cause of Action Accrued on February 11, 2010.

To be clear, the district court's dismissal of EEF's Revised Second Amended Complaint in no way relied on the fact that the statute of limitations on EEF's I.C. § 45-1205 claim had run. *See* R. at 3062. The dismissal was based exclusively on EEF's failure to offer competent evidence of damages. Accordingly, if the Court affirms the district court's grant of summary judgment due to EEF's failure to meet its burden on damages, the Court need not take up the statute of limitations issues raised by EEF on appeal. However, even if EEF had not failed to offer cognizable proof of damages, its I.C. § 45-1205 claim was barred by the statute of limitations.

EEF's First Amended Complaint added an I.C. § 45-1205 claim against TitleOne. R. at 581–82. TitleOne argued that the I.C. § 45-1205 claim was time barred by the three-year limitations period from I.C. § 5-218(1). R. at 636–37. The district court agreed, holding that EEF's I.C. § 45-1205 claim was an action upon liability created by statute and that I.C. § 5-218(1) applied. R. at 1064. The district court then held that the limitation period began to run no later than February 11, 2010 and that EEF initiated its case more than three years thereafter, on June 5, 2013. R. at 1065. However, despite being time barred, the district court did not dismiss EEF's I.C. § 45-1205 claim. R. at 1065–66. Instead, the district court granted EEF additional time to establish that TitleOne was barred by the doctrine of equitable estoppel from asserting the statute of limitations as an affirmative defense. R. at 1065–66. Unable to establish equitable estoppel, EEF asked the district court to reconsider its ruling on the statute of limitations (R. at

2734–36), which the district court denied as moot because the I.C. § 45-1205 claim was ultimately dismissed on separate grounds. R. at 3062.

EEF argues that the district court erred in applying I.C. § 5-218(1)'s three-year limitations period and by holding that the accrual date was no later than February 11, 2010. Appellant's Br. at 13–17. EEF argues that the district court erred in applying I.C. § 5-218(1) to an I.C. § 45-1205 claim because I.C. § 45-1205 "is actually a codified tort, and tort law stands independent of the existence of any statute." *Id.* at 13. EEF argues that the twenty-year limitations period from I.C. § 5-204 (claims arising from title to real property) should apply, or alternatively, the four-year limitations period from I.C. § 5-224 (catchall limitations period). *Id.* As to the date of accrual, EEF argues that its I.C. § 45-1205 claim accrued on May 12, 2012, the date the Property was sold to DAS. *Id.* at 15.

**i. EEF's I.C. § 45-1205 Claim is Created by Statute and the Three-Year Statute of Limitations Period from I.C. § 5-218(1) Applies.**

The district court correctly described EEF's I.C. § 45-1205 claim:

> EEF alleges TitleOne is liable to EEF based on violating the provisions of Idaho Code § 45-1205. Thus, [the I.C. § 45-1205 claim] plainly states "[a]n action upon a liability created by statute." Although EEF may seek to establish a violation of Idaho Code 45-1205 through a theory of negligence, whatever liability TitleOne may incur would be due to violation of Idaho Code § 45-1205. Thus, the three-year statute of limitations under Idaho Code § 5-218(1) applies.

R. at 1064. The district court's reasoning is sound and should be affirmed. Indeed, EEF itself appears to agree, stating in the discovery phase that "Idaho Code §45-1205 provides the statutory basis for Plaintiff's negligence claim." R. at 819.

"*An action upon a liability created by statute*" must be brought within three years. I.C. § 5-218(1) (emphasis added); *Farber v. Idaho State Ins. Fund*, 152 Idaho 495, 497, 272 P.3d 467, 469 (2012) (holding that under I.C. § 5-218(1), a three-year statute of limitation applies to an action upon a liability created by statute). Whether an action involves "a liability created by statute" was directly addressed by this Court in *City of Rexburg v. Madison County*, 115 Idaho 88, 89, 764 P.2d 838, 838 (1988). There, the Court stated: "The phrase, 'a liability created by statute,' means a liability which would not exist but for the statute." *Id.* (citing *Dietrich v. Copeland Lumber Co.*, 28 Idaho 312, 154 P. 626 (1916); 51 Am.Jur.2d *Limitation of Actions* § 82 (1970); 54 C.J.S. *Limitations of Actions* § 83 (1948)). To determine whether a statute creates liability, the *City of Rexburg* Court focused on whether the applicable statute created a duty "not based in common law, contract, or in any other theory of law." *Id.*

In this case, EEF's claim against TitleOne under I.C. § 45-1205 is squarely based upon "a liability created by statute" and the district court's application of I.C. § 5-218(1)'s three-year limitations period was proper. Contrary to EEF's repeated statements, an action pursuant to I.C. § 45-1205 is not tantamount to a common law negligence action. Rather, it is a separate and unique action that derives from a statutorily created duty. The starting point is the recognition that deeds of trust themselves are creatures of statute, allowed and recognized under statutory scheme, with only certain persons and entities being allowed to serve as trustees of deeds of trust. *See e.g.,* I.C. § 45-1502(3) and 45-1502(4), § 45-1504. The "forced reconveyance" statutes further shape the purely statutory liability created under I.C. § 45-1501, *et seq.* by only permitting "title agents" and "title insurers" to lawfully complete forced reconveyances and by

providing express consequences to those persons if they fail to substantially comply with statutory reconveyance procedures, act with negligence or act in bad faith. *See e.g.,* I.C. § 45-1201(5) and (6), § 45-1202, and § 45-1205.

More specifically, the statutory scheme of Chapters 12 and 15, Title 45, of the Idaho Code establish a new statutory process for forced reconveyances. There is no common law analog for the ability to make forced reconveyances and the corresponding liability created by I.C. § 45-1205. Chapter 12 of Title 45 is titled "reconveyance" and gives rights to title insurers and title agents that do not exist under common law. For instance, under I.C. § 45-1202, a title insurer or title agent may reconvey a trust deed pursuant to the procedure prescribed in I.C. § 45-1203, whether or not it is then named as trustee under the deed of trust. *Compare with*, I.C. § 45-1514 (only permitting the named trustee to reconvey the deed of trust upon written request of the named beneficiary). In this case, the Reconveyance by TitleOne pursuant to I.C. § 45-1202 was a "forced reconveyance," which is purely a creature of statute. Therefore, without I.C. §§ 45-1202 and 1203 there would be no mechanism to achieve the forced reconveyance issued by TitleOne in this case and which forms the basis of EEF's lawsuit. Likewise, Chapter 12 of Title 45 also provides a statutorily prescribed right to damages for a wrongful forced reconveyance–I.C. § 45-1205–the very statute that EEF claimed TitleOne violated.

EEF expressly pled a cause of action under I.C. § 45-1205 in an attempt to make TitleOne liable for an allegedly wrongful reconveyance. R. at 994. EEF also freely admitted that I.C. § 45-1205 provided the "statutory basis" for its negligence claim. R. at 819. Now, on

appeal, for EEF to argue that its I.C. § 45-1205 claim did not seek to make TitleOne liable under a statute is disingenuous.

Applying this Court's rule of law from *City of Rexburg* results in a conclusion that EEF's I.C. § 45-1205 claim is a claim based upon liability created by statute and the three-year limitations period from I.C. § 5-218(1) applies. To employ the phraseology of the *City of Rexburg* Court, the liability EEF sought to establish on the part of TitleOne "would not exist but for the statute." 115 Idaho at 89, 764 P.2d at 839. In fact, as addressed above, deeds of trust would not exist, nor would forced reconveyances be permitted, without statutory authority. Idaho Code § 45-1205, and Chapter 12 of Title 45 generally, create a duty that is not based in common law, contract, or in any other theory of law. Accordingly, a claim for a violation of I.C. § 45-1205 is based upon liability created by statute and the three-year limitations period applies.[7]

**ii. The Date of Accrual is the Date of the Alleged Wrongful Reconveyance.**

The district court held that EEF's I.C. § 45-1205 claims "accrued and the statute of limitations began to run no later than February 11, 2010, at which point the reconveyance had been signed and recorded." R. at 1065. The district court settled on February 11, 2010 because this was the date that EEF would have been permitted to maintain a lawsuit against TitleOne predicated on I.C. § 45-1205. R. at 1064.

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[7] The fact that the title agent or title insurer is made expressly "liable" for "damages suffered" under I.C. § 45-1205 refutes EEF's argument that the four-year "catch all" limitations period from of I.C. § 5-224 is applicable. Idaho Code § 5-224 begins by saying "[an] action for relief not hereinbefore provided for must be commenced . . . ." However, I.C. § 5-218(1) is very specific in proving a statute of limitations for actions upon liability created by statute, such as actions pursuant to I.C. § 45-1205. Therefore, the four-year limitations period from I.C. § 5-224 is not applicable to EEF's I.C. § 45-1205 claim.

EEF argues that the district court erred in holding that the accrual date was February 11, 2010. EEF argues that the district court's holding is "patently unfair" because the limitations period ran on its I.C. § 45-1205 claim prior to discovering the Reconveyance. Appellant's Br. at 14. EEF also argues that February 11, 2010 is an improper accrual date because it was not until May 12, 2012, the date that Galiano sold the Property to DAS, that EEF allegedly suffered damage from the Reconveyance. *Id.* at 14–15.

This Court has held that there is no discovery rule exception associated with I.C. § 5-218(1) and that the cause of action accrues when "some damage" is suffered. *Knudsen v. Agee Title*, 128 Idaho 776, 778–79, 918 P.2d 1221, 1223–24 (1996). In *Knudsen*, for instance, the statutorily created liability was alleged to be liability under a wire tapping statute. The court there held that some damage accrued when the original wire tap was made, saying: "Based upon our determination that in the case of wiretapping the damage is immediate, we hold that the statute of limitations begins to run no later than the last day of wiretapping." *Id.* The import of *Knudsen*, that damage in that type of situation is immediate, is entirely consistent with the previously cited case of *Stephans v. Herman*, and the so called "Stephans Rule" espoused therein that the loss for wrongful reconveyance of a deed of trust is measured "as of the date of conversion." *Id.*

Here, it is undisputed that the reconveyance of the EEF Deed of Trust was executed by TitleOne employees on January 25, 2010, and recorded in the real property records of Ada County, Idaho on February 11, 2010. R. at 691. This was the vehicle by which EEF's deed of trust disappeared from the public record, stripping EEF of its rights as a lien holder and causing

some damage to EEF at that point in time.[8] The Complaint in this matter was filed June 5, 2013, more than three years after the date of recording of the allegedly improper reconveyance on February 11, 2010. Accordingly, I.C. § 5-218(1) bars the filing of a cause of action under I.C. § 45-1205 and the district court's holding stating the same should be affirmed.[9]

**iii. The Twenty-Year Adverse Possession Limitations Period is Inapplicable.**

Within Title 5, Chapter 2, of the Idaho Code many limitations periods have been codified. Idaho Code § 5-204 provides:

> No cause of action ... arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action ... or under whose title the action is prosecuted ... *was seized or possessed of the premises* in question within twenty (20) years before the commencement of the act in respect to which such action is prosecuted or defense made.

I.C. § 5-204 (emphasis added).

EEF seizes on the phrase "arising out of title to real property" to argue that its claims arising out of the Reconveyance have a twenty-year limitations period because the Reconveyance effected the title of the Property. Appellant's Br. at 18. EEF's argument lacks merit for the following reasons.

First, the plain language of I.C. § 5-204 establishes that the provision is not applicable under the facts of this case. For I.C. § 5-204's twenty-year limitations period to apply, "the

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[8] Footnote 24 in TitleOne's Memorandum in Support of Motion for Summary Judgment, R. at 637, is hereby incorporated by reference and restated as if set forth in full.

[9] TitleOne also notes that the forced reconveyance statute provides for mailed notice of intent to reconvey 60 days in advance of any such reconveyance (I.C. § 45-1203(3)), and that the evidence in the record is that this notice was mailed to EEF at its address on or around October 12, 2009, via certified mail, return receipt requested. R. at 691, 1768, and 1769.

person prosecuting the action," EEF in this case, must have been "seized or possessed of the" Property within twenty years before the commencement of this action. However, EEF was never "seized or possessed of the" Property at any time.

As used in I.C. § 5-204 "seized" is synonymous with "seisin" and requires that the party relying on I.C. § 5-204 be the "holder of the legal title." *Dickerson v. Brewster*, 88 Idaho 330, 336, 399 P.2d 407, 410 (1965); *see also* Black's Law Dictionary (10th ed. 2014) (defining "seisin" as "[p]ossession of a freehold estate in land; ownership"). The *Dickerson* Court elaborated that the requirement of seisin or possession under I.C. § 5-204 "is met when it is established that the plaintiff was possessed of legal title..." *Id.* (quoting *Smith v. Long*, 76 Idaho 265, 277, 281 P.2d 483, 491 (1955). "Possession" as used in I.C. § 5-204 requires "actual, exclusive, open, and adverse possession of the premises." *Fountain v. Lewiston Nat. Bank*, 11 Idaho 451, 83 P. 505, 511 (1905); *see also Hazard v. Cole*, 1 Idaho 276, 285 (1869) (generally defining "possession" in the legal context as "the having, holding, or detention of property in one's power or command; actual seisin or occupancy; ownership, whether rightful or wrongful").

In this case, EEF has not even alleged that that it was seized or possessed of the Property, this alone should defeat any argument that the twenty-year limitations period of I.C. § 5-204 should be applied. *See Ryan v. Woodin*, 9 Idaho 525, 75 P. 261, 262 (1904) (barring an action under I.C. § 5-204's predecessor, Section 4037, where no allegation of seisen or possession was made). Notwithstanding, EEF's failure to allege seisen or possession, the facts clearly establish that EEF was neither seized nor possessed of the Property. EEF was not the titled owner and at no time held actual possession of the Property. EEF's status as second position beneficiary of a

deed of trust in the Property is not sufficient to establish seisen or possession because it had no present rights or interest in the Property as a beneficiary. *See e.g., Berryhill v. Moore*, 180 Ariz. 77, 88, 881 P.2d 1182, 1193 (App. 1994) (holding that Arizona's statute on adverse possession had language that "implies that only a person with a *present* right to recover land from an adverse possessor is required to begin an action to do so within the ten-year period"). Accordingly, because EEF, as a beneficiary of a non-foreclosed deed of trust, was never "seized or possessed of the premises" at any time I.C. § 5-204 by its plain terms is not applicable.

Second, the overall structure of Chapter 2, Title 5 clearly establishes that I.C. § 5-204 is designed to create limitations periods for the recovery of real property, not the pursuit of a statutory negligence claim and money damages. Chapter 2, Title 5, titled "Limitation of Actions," is divided into two general sections: (1) actions to recover real property,[10] I.C. §§ 5-203 to 213; and (2) actions other than for the recovery of real property, I.C. §§ 5-214 to 226.

Statutory "[p]rovisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011) (citation omitted).

Chapter 2, Title 5's structure is significant and establishes that I.C. § 5-204's twenty-year limitations period does not apply to an I.C. § 45-1205 claim simply because the claim tangentially arises out of title to real property as EEF claims. Based on the above, EEF is indeed

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[10] Including actions to recover "issues and profits [of real property] or "to rents and profits [arising] out of [the title to real property]." I.C. Sections 5-202 and § 5-204.

trying to drive a square peg into a round hole when it claims that its "45-1205 negligence claim" is the type of claim that is contemplated by 5-204's reference to "arising out of the title to real property." Idaho Code § 45-1205 does not provide for a reinstatement of the deed of trust or recovery of the property; instead it only provides for damages when a deed of trust is negligently reconveyed.[11] As an action for money damages, it certainly would seem to be an action "*other than for the recovery of real property,*" and accordingly found in Chapter 2 following after I.C. § 5-214, not before it. I.C. § 5-214 (emphasis added). Because I.C. § 5-204 plainly applies to the *recovery of real property* this Court should affirm the district court's application of I.C. § 5-218(1) limitations period to EEF's claim for *recovery of damages* under I.C. § 45-1205.

Third, since enactment, I.C. § 5-204 and its companion statutes I.C. §§ 5-202 to 5-213 have been employed nearly exclusively in the context of adverse possession.[12] For instance, in *Salvis*, the Court cited to I.C. §§ 5-203, 5-204, 5-206, and 5-210 as all working together with respect to the adverse possession claims in that case. 73 Idaho at 471-72, 253 P.2d at 590.

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[11] TitleOne would note that a separate provision, I.C. Section 45-1203, provides only in very limited circumstances of forgery of the title insurer or title agent's signature that the forced reconveyance deed "shall constitute a reconveyance of the trust deed identified therein, irrespective of any deficiency in their reconveyance procedure not disclosed in the release or reconveyance that is recorded ...". I.C. § 45-1203(4).

[12] *See, e.g., Ryan v. Woodin*, 9 Idaho 525, 75 P. 261 (1904) (adverse possession); *Canady v. Coeur d'Alene Lumber Co.*, 21 Idaho 77, 120 P. 830 (1911) (claim barred based on statute of limitations against lumber mill who had occupied vacated city property for more than five (now 20) years); *Last Chance Ditch Co. v. Sawyer*, 35 Idaho 61, 204 P. 654 (1922) ("adverse use"); *Pleasants v. Henry*, 36 Idaho 728, 213 P. 565 (1923) (adverse possession); *Chapin v. Stewart*, 71 Idaho 306, 230 P.2d 998 (1951) (adverse possession); *Salvis v. Lawyer*, 73 Idaho 469, 253 P.2d 589 (1951) (adverse possession); *Obermeyer v. Idohl*, 76 Idaho 103, 278 P.2d 188 (1954) (adverse possession); and *Dickerson v. Brewster*, 88 Idaho 330, 399 P.2d 407 (1965) (adverse possession).

Based on this Court's historic application of I.C. § 5-204 and its companion statutes to adverse possession cases, it is no surprise that when the Idaho Legislature amended I.C. § 5-204 and its companion statutes in 2006 by changing the limitations period from five years to twenty years it stated: "This amendment to existing Code extends the time required *to adversely possess real property* from five (5) years to twenty (20) years. 2006 Idaho Laws ch. 158 (S.B. 1311) (emphasis added). Based on this, it is reasonable to infer that the Legislature intends for I.C. § 5-204 to apply to adverse possession claims in precisely the same way as this Court has interpreted it for over a hundred years, as relating to adverse possession issues. For these reasons, the Court should affirm the district court's application of I.C. § I.C. § 5-218(1) limitations period to EEF's I.C. § 45-1205 claim.

**F. The District Court's Dismissal of EEF's Common Law Negligence Claim was Proper because EEF Conceded that the Claim was Barred by the Economic Loss Doctrine.**

Below, TitleOne argued that EEF's common law negligence claim should be dismissed because it was barred by the economic loss doctrine. R. at 107–10. EEF conceded that TitleOne's argument may be correct but argued that despite dismissal of the common law negligence claim, EEF could still pursue a separate statutory negligence claim predicated on I.C. § 45-1205. R. at 194.[13] Specifically, EEF stated: "unlike common law economic loss in negligence, Idaho statutory law enables recovery for the negligent improper reconveyance of a trust deed." *Id.* On that basis, EEF amended its complaint "to include a separate claim under

[13] EEF stated: "Although the Defendant TitleOne may be correct when they [sic] spent 3½ pages discussing economic loss theory, they completely ignore the statutory remedy under Idaho Code § 45-1205." R. at 194.

I.C. § 45-1205". R. at 209. Thereafter, the district court dismissed EEF's common law negligence claim because EEF conceded that the economic loss doctrine applied and did not argue that any exceptions to the economic loss doctrine applied. R. at 535.

EEF now argues that the district court erred in dismissing its common law negligence claim. Appellant's Br. at 19. First, EEF argues that this case involves the negligent rendition of services as opposed to the provision of a negligent product making the economic loss doctrine inapplicable. *Id.* at 19–21. Second, EEF argues that even if the economic loss doctrine is applicable, the "special relationship" exception to the economic loss rule applies because "a special relationship exists between title companies and any holder of a deed of trust." *Id.* at 22–23. EEF's arguments lack merit and should not even be addressed by the Court because EEF has waived them or is judicially estopped from doing so.

### i. EEF Conceded that the Economic Loss Rule Applied to Bar Its Common Law Negligence Claim and thereby Waived that Claim or is Judicially Estopped from Asserting It.

EEF knowingly and voluntarily conceded the soundness of TitleOne's argument that the economic loss doctrine barred EEF's common law negligence claim. EEF's briefing to the district court stated:

> *Although the Defendant TitleOne may be correct* when they [sic] spent 3½ pages discussing economic loss theory, they completely ignored the statutory remedy under Idaho Code § 45-1205. Because the statute requires, among other things, negligence in a reconveyance to trigger liability for damages, the Plaintiffs' claim for negligence must remain. In other words, unlike common law economic loss in negligence, Idaho statutory law enables recovery for the negligent improper reconveyance of a trust deed.

R. at 194 (emphasis added).[14]

Based on EEF's above statements, the district court dismissed EEF's common law negligence count, stating: "Plaintiffs concede the economic loss doctrine bars its negligence claim unless that claim is brought under Idaho Code § 45-1205." R. at 535. In conceding the issue below and not presenting any argument to rebut TitleOne's position that the economic loss doctrine barred EEF's common law negligence claim, EEF has waived any argument to the contrary on appeal, or alternatively is judicially estopped against pursuing it.

Waiver is the "[t]he intentional or voluntary relinquishment of a known right." *Frontier Fed. Sav. & Loan Ass'n v. Douglass*, 123 Idaho 808, 816, 853 P.2d 553, 561 (1993). Waiver is distinguishable from judicial estoppel. *Id.* "Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Hoagland v. Ada Cty.*, 154 Idaho 900, 912, 303 P.3d 587, 599 (2013) (citation omitted) (applying judicial estoppel in an appeal to bar appellant from arguing that she was entitled to recover under a theory she informed the district court that she was not seeking recovery under).[15] "Substantive issues will not be considered the first time on appeal."

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[14] *See also* R. 819 wherein EEF says: "Idaho Code §45-1205 provides the **statutory basis** for Plaintiff's negligence claim. Additionally, Plaintiff believes that common law negligence does apply and intents [sic "intends"] on moving the court for leave to amend its complaint to further clarify what Plaintiff believe are exceptions to the economic loss rule." (Emphasis added.)

[15] TitleOne also notes and incorporates from the record on appeal as argument on this appeal that it had argued unsuccessfully to the district court that I.C. § 45-1201, *et seq.* provides the exclusive remedy for negligent reconveyance. R. at 916, 936, and 950. This argument, if accepted, would provide an independent ground to uphold the district court's decisions to dismiss the common law negligence count and not to allow that argument back in by way of a

*Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007). Therefore, "[a] litigant may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982).

In this case, EEF voluntarily relinquished its right to pursue a common negligence claim against TitleOne by conceding that the claim was barred by the economic loss doctrine. The record establishes that EEF voluntarily and knowingly stated that TitleOne's arguments with respect to the economic loss doctrine were likely correct and did not correct the district court's conclusion that EFF conceded the issue. This amounts to waiver of the claim. In addition, EEF's briefing and argument before the district court appears to establish that EEF was only seeking to recover on TitleOne's alleged negligence under I.C. § 45-1205, thereby implicitly abandoning its argument on common law negligence claim and representing to the district court that the case was moving forward solely on the duty created by I.C. § 45-1205. This Court should not permit to EEF to now change its position on appeal and assert that its common law negligence claims was improperly denied.

Lastly, as a practical matter, EEF's common law negligence claim was not actually litigated below; instead, it was essentially voluntarily dismissed. Thus, EEF should not be permitted to raise the issue now on appeal because the district court did not rule on the merits of EEF's common law negligence claim or TitleOne's defenses thereon, namely the application of

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later amendment. TitleOne has listed exclusivity of the forced reconveyance statutes as an additional issue in this appeal.

the economic loss doctrine. For these reasons, this Court should not address any of EFF's argument on appeal that the district court erred in applying the economic loss doctrine.

**ii. The Economic Loss Rule Applies to Damages for Loss of Equity or Security.**

In *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978), the court adopted the following summary by Dean Prosser regarding the economic loss rule:

> Certain types of interests, because of the various difficulties which they present, have been afforded relatively little protection at the hands of the law against negligent invasions. Thus interests of a pecuniary nature, such as the right to have a contract performed, *the expectation of financial advantage*, or the integrity of the pocketbook which may be damaged by reliance upon a representation, all present special problems . . . . In general, however, it may be said that the law gives protection against negligent acts *to the interest in security of the person, and all interests in tangible property*. In other words, negligence may result in liability for personal injury or property damage.

99 Idaho at 469, 583 P.2d 1004 (emphasis added).[16] Courts have held that a claimed loss of equity is indeed an economic loss and dismissed common law negligence claims on this basis. *See e.g., Schaefer v. Indymac Mortgage Services*, 2012 WL 4929094, at *1-2 (D.N.H. October 16, 2012)(claim that loss of home of 28 years and any equity therein to wrongful *foreclosure* "is economic--the loss of his property and the equity he held in his property."); *First Internet Bank of Indiana v. Lawyers Title Insurance Co.*, 2009 WL 2092782, at *1 (S.D. Ind. July 13, 2009)(where claim was improper execution of escrow instructions prevented lender from being

[16] *Accord Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 790, 215 P.3d 505, 510 (2009) ("Generally, a plaintiff may not recover in tort where the sole allegation is that the defendant prevented the plaintiff from gaining a purely economic advantage.") (citing *Just's, Inc. v. Arrington Const. Co., Inc.*, 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978)) and ("Economic loss has been defined as, but not limited to, . . . commercial loss for inadequate value and consequent loss of profits or use.") *Id.* (quoting *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975) (*rev'd on other grounds* )).

in first position and thereby damaged its equity, "[t]he improper loan closing damaged the security interest, but this damage falls squarely within the economic loss doctrine, is covered by the contract, and is not recoverable in a tort action.").

### iii. No Exceptions to the Economic Loss Rule Were Argued Below and Thus May Not be Raised on Appeal.

The district court noted that "neither party has discussed or argued any of the exceptions to the economic loss rule." R. at 535. "Issues not raised below and presented for the first time on appeal will not be considered for review." *Frontier Dev. Grp., LLC v. Caravella*, 157 Idaho 589, 595, 338 P.3d 1193, 1199 (2014) (citations omitted). However, even if the issue of special exceptions to the rule is reachable on appeal—which it is not—then this argument fails as well.

The "special relationship" exception generally pertains to claims for personal services provided by professionals, such as physicians, attorneys, architects, engineers, and insurance agents. *Eliopulos v. Knox*, 123 Idaho 400, 408, 848 P.2d 984, 992 (Ct.App. 1992). A special relationship may exist where a party holds itself out to the public as performing a specialized function and induces reliance on superior knowledge and skill. *Duffin v. Idaho Crop Improvement Assn.,* 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995). A statutory trustee is different from those parties, in that such a person or entity's entire relationship is defined by statutes and precisely what duties they agree to assume and is not fiduciary in nature. As U.S. District Judge Lynn B. Winmill stated:

> Under Idaho law, the duties of a trustee on a deed trust have only been recognized as those specified under either in the Idaho Trust Deeds Act or in the deed of trust document itself. *See Davis v. Keybank Nat'l Assoc.,* 2005 WL 2847239, 2-3 & n. 5 (D. Idaho October 26, 2005) (Construing deed of trust trustee's duty under the

> Deeds Trust Act, and noting that Idaho courts had not determined duty to be fiduciary in nature.); *Diamond v. Sandpoint Title Ins., Inc.,* 132 Idaho 145, 968 P.2d 240, 246 (Idaho 1998) (Noting that the Idaho courts have not recognized that the duties of a trustee under a deed of trust are fiduciary in nature.).

*Sykes v. Mortgage Electronic Registration Sys., Inc.,* 2012 WL 914922, *4 (D. Idaho 2012).

With respect to the forced reconveyance of a deed of trust, the Legislature has granted title insurers and title agents, who are not even the trustee listed in the deed of trust at issue, the power to reconvey. Such individuals likely have never even met, communicated with, or had any interaction with the beneficiaries of those deeds of trust being reconveyed. Additionally, such individuals are acting solely based on statutory authority and are not even the trustee named in the deed of trust at issue. Accordingly, the close, special relationship from which a duty can arise to create an exception to the economic loss doctrine is simply not present in the statutorily created and defined forced reconveyance context. EEF's proposal that "a special relationship exists between title companies and any holder of a deed of trust" would create an exception without any relationship, thereby eviscerating the special relationship exception.

## G. TitleOne is Entitled to its Costs and Attorney Fees on Appeal.

For the reasons discussed above, TitleOne is the prevailing party in this appeal and is entitled to costs pursuant to I.A.R. 40 and attorney fees pursuant to I.C. §§ 12-121 and 120(3).

### i. TitleOne is Entitled to its Fees on Appeal Under I.C. § 12-121 Because EEF Pursued this Appeal Frivolously, Unreasonably, or Without Foundation.

Reasonable attorney fees may be awarded to the prevailing party pursuant to I.C. § 12-121. *Teurlings v. Larson*, 156 Idaho 65, 75, 320 P.3d 1224, 1234 (2014). An "award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate

only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *Id.* at 75–76, 320 P.3d at 1234–35 (citation omitted). "Idaho Code section 12-121 permits a court to apportion and award reasonable attorney fees for claims that are brought or defended unreasonably, frivolously, or without adequate foundation in fact or law." *Baird-Sallaz v. Sallaz*, 157 Idaho 342, 347, 336 P.3d 275, 280 (2014) (citation omitted). An appeal from a well reasoned decision of a district court without adding any new analysis of or authority to the issues raised below may be frivolous and unreasonable. *See Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005).

In this case, failure to offer competent evidence of damages is the only basis upon which EEF's remaining claims against TitleOne were dismissed. R. at 3061. This should not have been a surprise to EEF, who throughout the underlying case ignored its burden to establish damages. EEF even ignored its burden after an express reminder from the district court that it was neglecting its burden to offer evidence of damages. *See Supra* p. 13[17] (establishing that the district court warned EEF of its need to offer evidence of damages, and EEF willfully refusing to do so because any attempt would be speculative).

Thus, despite knowingly failing to meet its burden on a requisite element of its claims, EEF still unsuccessfully pursued claims against TitleOne. R. at 3052–53. Now, with no new evidence, EEF has appealed to this Court arguing that it sufficiently met its burden to establish

[17] Tr. at 248 (court indicating to defense counsel in setting expert disclosure deadline "I think it would seem to be significant to try and sort out what kind of damages are claimed and are at stake and whether they're recoverable and all of that.").

damages with reasonable certainly below (Appellant's Br. p. 8–12), yet EEF conceded below that establishing damages would be only speculation and was not possible.

Pursuit of this appeal with no new evidence or arguments related to damages, after the district court warned EEF of that it was not meeting its burden to offer evidence of damages, is frivolous and unreasonable. Furthermore, the bulk of EEF's appeal argues non-dispositive issues; namely the applicable statute of limitations (a frivolous argument in light of one hundred years of contrary authority on I.C. § 5-204) and the application of the economic loss doctrine (which is not ripe for appeal and was conceded by EEF below). For these reasons, an award of costs and attorney fees on appeal is proper under I.C. § 12-121.

**ii. TitleOne is Entitled to Its Fees on Appeal Under I.C. § 12-120(3) because This Case Arises From a Commercial Transaction That is the Gravamen of EEF's Lawsuit.**

"Idaho Code Section 12-120(3) provides for attorney fees to the prevailing party in a civil action to recover on 'any commercial transaction.' Commercial transactions are all transactions except for personal or household purposes." *De Groot v. Standley Trenching, Inc.*, 157 Idaho 557, 566–67, 338 P.3d 536, 546 (2014). Where a commercial transaction is the "gravamen of the lawsuit," I.C. § 12-120(3) "compels" an award of attorney fees and costs. *See e.g. Edged In Stone, Inc. v. Nw. Power Sys., LLC*, 156 Idaho 176, 181, 321 P.3d 726, 731 (2014). A commercial transaction is the gravamen "in any civil action arising from a commercial transaction . . . ." *Frontier Dev. Grp., LLC v. Caravella*, 157 Idaho 589, 599, 338 P.3d 1193, 1203 (2014); *see also Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 148 Idaho 588, 592, 226 P.3d 530, 534 (2010). "Idaho Code § 12-120(3) does not require that there be a

contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *In re Univ. Place/Idaho Water Ctr. Project*, 146 Idaho 527, 541, 199 P.3d 102, 116 (2008). In *Goodman*, the Court equated the gravamen issue to a "but for cause" analysis stating that without the underlying commercial transaction, "the lawsuit would not have been brought." 148 Idaho at 592, 226 P.3d at 534. The *Goodman* decision is supported by the oft-cited *Carrillo v. Boise Tire Co.*, which held "as long as a commercial transaction is at the center of the lawsuit, the prevailing party may be entitled to attorney fees for claims that are fundamentally related to the commercial transaction. . . ." 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012).

In this case, TitleOne is entitled to attorney fees pursuant to I.C. § 12-120(3) because TitleOne is the prevailing party in this litigation and EEF's claims in this lawsuit arise out of a commercial transaction and such commercial transaction is the gravamen of this lawsuit. At the heart of this lawsuit are the EEF Loan and EEF Deed of Trust, which were executed as part of a series of transactions for the commercial development of consumer dwellings. The EEF Loan and EEF Deed of Trust transactions were by definition commercial transactions. *See* I.C. § 12-120(3). Because this case arises from a commercial transaction, TitleOne, as the prevailing party, is entitled to an award of costs and attorney fees pursuant to I.C. § 12-120(3).

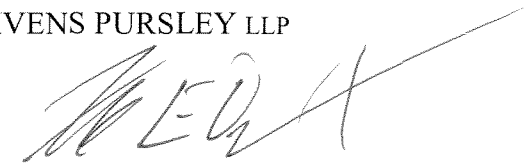
## VI. CONCLUSION

Therefore, primarily on the basis that no recognizable basis for a claim of damage ever existed in this case, TitleOne respectfully requests that this Court affirm the district court's decisions in this case with respect to TitleOne, including the dismissal of claims against TitleOne

and granting of summary judgment in favor of TitleOne, and the associated award of attorneys fees. TitleOne further requests an award of its cost and attorneys fees on appeal.

RESPECTFULLY SUBMITTED this 23rd day of December, 2015.

GIVENS PURSLEY LLP



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## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2015, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

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