4-27-2016

Green v. Green Respondent's Brief Dckt. 42916

IN THE SUPREME COURT OF THE STATE OF IDAHO

DWIGHT RANDY GREEN, as an Individual, as the Son of Ralph and Jeanne Green, and as a Shareholder of Green Enterprises, Inc.; KATHY LEFOR, as an Individual, as the Daughter of Ralph and Jeanne Green, and as a Shareholder of Green Enterprises, Inc.; GARY GREEN, as an Individual, as the Son of Ralph and Jeanne Green, and as a Shareholder of Green Enterprises, Inc.,

Plaintiffs-Appellants,

vs.

JAMES GREEN, as an Individual, as Trustee of the Ralph Maurice and Jeanne Green Revocable Inter Vivos Trust, as Conservator for Jeanne Green, and as President of Green Enterprises, Inc.; RALPH MAURICE AND JEANNE GREEN REVOCABLE INTERVIVOS TRUST; JEANNE GREEN, an Incapacitated individual; and GREEN ENTERPRISES, INC., an Idaho corporation,

Defendants/Respondents.

Docket No. 42961

Bonner County Case No. CV-2013-1509

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for Bonner County

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The Honorable John T. Mitchell, District Judge

For Respondents James Green and The Ralph Maurice and Jeanne Green Revocable Inter Vivos Trust:

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I. STATEMENT OF THE CASE.

A. Nature of the Case.

Ralph Green (now deceased) and Jeanne Green (now incapacitated) had five (5) children, four (4) of whom are involved in this proceeding. This appeal arises out of a suit which Appellants Dwight Randy Green ("Randy"), Kathy Lefor ("Kathy"), and Gary Green ("Gary") brought against their brother, Respondent James Green ("Jim").

Ralph and Jeanne formed Green Enterprises, Inc. ("the Corporation") in 1976. The Corporation holds approximately four hundred (400) acres of property with 3,500 feet of shoreline on Lake Pend Oreille. Over the years, Ralph and Jeanne gifted equal ten percent (10%) interest in the Corporation to Gary, Kathy, Randy, and Jim. The remaining sixty percent (60%) of the shares in the Corporation were held by the Ralph Maurice and Jeanne Green Revocable Intervivos Trust (hereafter "the Trust").

By 2010, issues had arisen between Ralph and Jeanne, on the one hand, and Gary, Kathy, and Randy, on the other hand, with respect to corporate and family matters. Due to their own personal economic circumstances, Gary, Kathy, and Randy desired that the Corporation distribute additional cash to them. When met with resistance from their parents, Gary, Kathy, and Randy began a course of objectively irrefutable conduct which caused their elderly parents anger, depression, and sorrow.

The Appellants caused correspondence to be sent to their parents' neighbors and business associates, questioning the competency of Ralph and Jeanne and intimating litigation against those

who did business with them or the Company. Randy, while a member of the Corporation's Board, and with the concurrence of shareholders Gary and Kathy, refused to sign a Letter of Intent to burden a portion of the Company's property with a conservation easement as was desired by his parents. Gary, Kathy, and Randy followed by bringing a shareholder derivative suit against the Company, their father, and Jim. That suit was ultimately dismissed. In addition, Gary, Kathy, and Randy initiated a proceeding against their mother, seeking to have her placed under a guardianship and a conservatorship. That proceeding was ultimately dismissed, on the merits, after a judicial determination that the Appellants' mother Jeanne was competent.

In light of the foregoing, and with the assistance of independent counsel (Richard Wallace), Ralph and Jeanne amended their estate plans, including the Trust, thereby removing the Appellants as beneficiaries. Wallace worked directly with Ralph and Jeanne, to the exclusion of Jim, and implemented the estate planning desires that Ralph and Jeanne specifically communicated to him on multiple occasions. The Trust ultimately distributed its shares in the Corporation to Jim, under an Agreement in conformity with the Trust and Estate Dispute Resolution Act ("TEDRA"). Ralph was represented in that proceeding by attorney Paul Fitzpatrick and Jeanne was represented by a Court-appointed special representative, attorney William F. Boyd. Gary, Kathy, and Randy unsuccessfully attempted to challenge the TEDRA Agreement which is now final.

The Appellants then brought suit against their brother Jim, claiming that their parents' estate plans, implemented with the advice and counsel of independent counsel, a Court-appointed special

representative, and a TEDRA Agreement, were the product of undue influence on Jim's part. The District Court determined that no material issues of fact existed, and granted summary judgment in favor of Jim. The Appellants now appeal.

B. Course of Proceedings.

On September 13, 2015, Appellants Gary, Kathy, and Randy filed suit against their brother Jim (the Respondent herein), their mother Jeanne, their parents' Trust, and Green Enterprises, Inc. R., Vol. I, pp. 34-89. As is discussed more fully herein, Ralph and Jeanne had previously amended the Trust and their respective Wills to remove the Appellants as beneficiaries.

As is also discussed more fully herein, after Ralph and Jeanne had modified their Wills and the Trust, so as to remove Gary, Kathy, and Randy as beneficiaries, a proceeding was initiated in Bonner County District Court under the Trust and Estate Dispute Resolution Act ("TEDRA"), I.C. § 15-8-101, *et seq.* That proceeding, denominated Bonner County Case No. CV-2012-02039 ("the TEDRA proceeding"), was initiated by Ralph and Jeanne for purposes of facilitating a sale and gifting of the Trust's remaining shares in the Corporation to Jim so as to avoid potentially devastating tax consequences. See Affidavit of John F. Magnuson (filed September 11, 2014) at Ex. A, p. 3.[1]

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[1]The Clerk's Record consists of two (2) volumes as well as numerous Declarations, Affidavits, and Memoranda which are identified more fully on the Clerk's "Certificate of Exhibits." The Clerk's "Certificate of Exhibits" does not number or otherwise identify these Declarations, Affidavits, or Memoranda with any specificity other than the title thereof. Where the Clerk's Record is cited herein, the acroynm "R.," with the applicable Volume number, will be used. When a filing is identified with specificity by title and filing date, that reference should be

Ralph was represented in the TEDRA proceeding by independent counsel (Paul D. Fitzpatrick) ("Fitzpatrick"). R., Vol. I, pp. 125-29. Jeanne was represented in the TEDRA proceeding by attorney William F. Boyd ("Boyd"), who was appointed as a special representative pursuant to I.C. § 15-8-305. Id. Through the TEDRA, a Non-Judicial Resolution Agreement was filed on December 19, 2012 between Ralph (with the assistance of attorney Fitzpatrick), Jeanne (with the assistance of special representative Boyd), and Jim. R., Vol. I, p. 138. By its terms, the Agreement provided for the sale and distribution of the Trust's remaining shares in Green Enterprises, Inc. ("the Corporation") to Jim. Id.

Gary, Kathy, and Randy thereafter moved to set aside the Non-Judicial Resolution Agreement. R., Vol. I, at pp. 136-43. On December 2, 2013, Magistrate Debra Heise entered the Court's Order denying the Appellants' request to set aside the Non-Judicial Resolution Agreement. R., Vol. I, pp. 136-44. The Appellants appealed Judge Heise's Order to District Judge Jeff M. Brudie. See Magnuson Affidavit (filed September 11, 2014) at Ex. A. On September 11, 2014, Judge Brudie entered his "Opinion and Order on Appeal," affirming Judge Heise's Order. Id. The Appellants took no further appeal from Judge Brudie's Order, and the same has now become final.

Through their Complaint in this proceeding, Gary, Kathy, and Randy asserted three (3) claims:

- A claim for declaratory relief that "the complete disinheritance of Gary, Kathy, and Randy from the estates of Ralph and Jeanne" was the result of

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understood to refer to one of the filings identified in the Clerk's "Certificate of Exhibits."

undue influence on the part of Jim.

- A claim for declaratory relief that the TEDRA Agreement was procedurally-improper or otherwise the product of undue influence on the part of Jim.

- A claim for entry of a preliminary injunction against Jim (as President of the Corporation) and the Corporation, enjoining certain specified conduct (including Jim's ability to vote the shares he acquired by gift and purchase from the Trust under the TEDRA Agreement) during the pendency of the action.[2]

R., Vol. I, pp. 48-86.

Even though Jim had the authority under a Durable Power of Attorney to appear in the underlying suit for Jeanne, he moved the Court for appointment of an independent guardian ad litem in order to avoid any potential questions as to her defense. R., Vol. I, pp. 112-13. See also Declaration of James Green (filed October 25, 2013) at Ex. D. On December 30, 2013, the District Court entered its Order appointing attorney Boyd to serve as guardian ad litem for purposes of Jeanne's defense in the underlying proceeding. R., Vol. I., pp. 158-61.

On December 30, 2013, the Court entered its "Scheduling Order." R., Vol. I, pp. 151-57. The Court's Order set the matter for trial commencing January 26, 2015. Id. The Order required that summary judgment motions be noticed and heard by October 28, 2014. The Plaintiffs' expert disclosures were required to be made by July 28, 2014. Id. The Court further required that the parties file notice of compliance as to all expert disclosures and that no expert could testify as to

[2]No further motions or other requests were made by Appellants, in the underlying action, for any further affirmative relief under their preliminary injunction claim.

matters not included in any such disclosures. Id.

At the Plaintiffs' request, the parties subsequently stipulated to extend the Plaintiffs' expert disclosure deadline from July 28, 2014 to October 31, 2014. R., Vol. I, pp. 337-40. The District Court entered an Order extending Plaintiffs' expert disclosure date consistent with the terms of the parties' stipulation. R., Vol. I, pp. 351-53.

On August 29, 2014, Jim filed a Motion for Partial Summary Judgment. R., Vol. I, pp. 354-57. The Motion was supported by declarations from the two (2) independent attorneys who had assisted Ralph and Jeanne in developing their estate planning (Tevis Hull and Wallace) and Steve Klatt ("Klatt"), who Ralph had hired to assist him in managing the Corporation.[3] On September 4, 2014, Jeanne's guardian ad litem filed his own Motion for Summary Judgment, adopting the declarations and briefing previously filed by Jim. Id. at pp. 358-60.

On September 17, 2014, twelve (12) days before the hearing noticed on Jim's Motion for Partial Summary Judgment, the Appellants filed an opposing Memorandum together with affidavits of Randy, Gary, Kathy, and counsel.[4] On Friday, September 26, 2014, three (3) days before the hearing set on Jim's Motion for Partial Summary Judgment, the Appellants moved to continue the hearing. Id. at pp. 385-87. The District Court expressed concern that the Appellants had "made the

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[3]In addition, Jim's Motion was supported by his declaration and a declaration of counsel (Magnuson). All five (5) supporting declarations are included in the record under the Clerk's "Certificate of Exhibits."

[4]The Appellants' affidavits filed in opposition to Jim's Motion for Summary Judgment are also included in the record under the Clerk's "Certificate of Exhibits."

motion Friday [September 26] when [their] reasons had to have been known the day [they] received . . . the Defendants' Motion for Summary Judgment. . . ." Tr., September 29, 2014, p. 12. Notwithstanding the same, the Court entered an October 2, 2014 Order which continued the summary judgment hearing to November 18, 2014 and which afforded Appellants the ability to conduct additional discovery and to make any supplemental filings before November 4, 2014. R., Vol. I, pp. 406-08.

On November 4, 2014, Appellants filed their supplementary materials, which included the Declaration of Bennett Blum, M.D. (which is also included in the record under the Clerk's "Certificate of Exhibits"). Dr. Blum had not previously been disclosed, timely or otherwise, as required by the terms of the Court's Scheduling Order as amended by the Court's August 26, 2014 Order. R., Vol. I, pp. 337-40; 351-53. Jim and Jeanne (through her guardian ad litem) moved to strike Blum's Declaration. R., Vol. II, pp. 424-30. Jim and Jeanne argued that the opinions set forth in the Blum Declaration were inadmissible as conclusory and lacking in foundation. Id. Jim also objected on the basis that Blum's opinions were not previously consistent with the requirements of the Court's Pre-Trial Order. See Supplemental Memorandum of James Green (filed November 13, 2014) at p. 3.

On November 20, 2014, the Court entered its Memorandum Decision and Order, wherein the Court granted the joint motion by Jim and Jeanne to strike the Blum Declaration, as well as Jim's and Jeanne's Motion for Summary Judgment. The Court's Memorandum Decision is included in the

Clerk's "Certificate of Exhibits."

On December 12, 2014, the Court entered its Judgment, dismissing the Appellants' claims against Jim, the Trust, Jeanne, and Green Enterprises, Inc. R., Vol. II, pp. 438-41. On January 22, 2015, Gary, Kathy, and Randy timely appealed to this Court.[5]

C. Statement of Facts.

The following undisputed materials facts were presented to the District Court for its consideration by way of summary judgment motions. Ralph Green (Ralph) and Jeanne Green (Jeanne) had five (5) children. Three of the children, Gary, Randy, and Kathy, are the Plaintiffs to this proceeding. See Declaration of James M. Green (filed August 19, 2014) (referred to herein as "Green Declaration") ¶¶2 and 6. A fourth child, Jim, is the Defendant to this proceeding. The fifth child, Sheila, who is developmentally disabled, is not involved in this proceeding. Id. at ¶7.

In 1965, Jeanne inherited substantial land holdings on Lake Pend Oreille that included 3,500 feet of shoreline and approximately 400 acres. See Declaration of Tevis W. Hull (filed August 29, 2014) (referred to herein as "Hull Declaration") at ¶7. In 1976, Ralph and Jeanne caused Green Enterprises, Inc. to be incorporated. Id. at ¶6. The property that Jeanne inherited was subsequently conveyed to the Company. Id. at ¶¶6 and 7. See also Green Declaration at ¶4. By 1998, Ralph and Jeanne had gifted separate 10% interests in the Company to Gary, Randy, Kathy, and Jim. See Green Declaration at ¶7.

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[5]On January 8, 2016, this Court, pursuant to the parties' Stipulation, entered its Order dismissing the appeal as to Jeanne Green.

In 1998, Ralph and Jeanne created the "Ralph Maurice and Jeanne Green Revocable Inter Vivos Trust." See Hull Declaration at ¶10 and Ex. B. Pursuant to Article 25 of the Trust, as originally established, Gary Green was the First Successor Trustee and James Green was the Second Successor Trustee. Id. at Ex. B, p. 34. Pursuant to the terms of the Trust, at Article 12(6), upon the death of both Ralph and Jeanne, the Trustee was to divide the Trust corpus into equal shares among the Green children. See Hull Declaration at Ex. B, p. 18. The Trust ultimately succeeded to the remaining 60% of the outstanding shares in Green Enterprises, Inc. that formerly stood of record in the names of Ralph and Jeanne Green. Id. at ¶12.

Tevis Hull personally knew Ralph and Jeanne Green since his childhood. Id. at ¶2. Hull prepared the original 1998 Trust Agreement at the expressed direction of Ralph and Jeanne and without any direction by any third-party. Id. at ¶11. The only parties he consulted with were Ralph and Jeanne. Id. He did not communicate the substance of the Trust to anyone else, including Jim. Id.

At or about the same time, in 1998, Hull undertook the representation of Green Enterprises, Inc. on an as-needed basis, at the request of both Ralph and Jeanne. Id. at ¶13. Hull served in that capacity from 1998 to 2007 and again from 2010 until he resigned in 2012. Id.

In December of 1998, Ralph and Jeanne executed an "Amendment to Trust," which was also prepared by Hull. See Hull Declaration at Ex. C. The December 1998 "Amendment to Trust" was drafted by Hull at the expressed direction of Ralph and Jeanne and no other person. Id. at ¶14. Hull

did not discuss the contents of the 1998 "Amendment to Trust" with any other person than Ralph and Jeanne. Id. In 2008, Ralph and Jeanne again amended their Trust through a "Second Amendment." Id. at Ex. D. This "Second Amendment" was drafted by attorney William Berg. Id.

In 2010, while serving as corporate counsel to Green Enterprises, Hull attended meetings of the board of directors and meetings of the shareholder. Id. at ¶13. On April 2, 2010, the shareholders of Green Enterprises met. Id. at ¶16. The Company's assets included approximately four cabins, which the Company owned, and leaseable sites for approximately 16 other cabins. Id. at ¶8. The 16 cabins constituted personal property, each owned by separate private parties, who in turn leased the land under their cabins from the Company. Id. The Company generated income from those leases, as well as from logging operations on the Company's property. Id. The Company's operations have remained largely unchanged since the Company was incorporated in 1978. During that time, Ralph and Jeanne lived on the property in one of the Company's cabins.

At the Company's April 2, 2010 shareholder meeting, Gary, Kathy, and Randy each expressed a desire that the Company's property going forward should be a revenue-generating asset that would financially assist and provide for their own families due to needs that resulted from the Great Recession, rising insurance costs, their loss of employment, and their shrinking retirement funds. See Hull Declaration at ¶18 and Ex. E (p. 1).

Following the April 2, 2010 shareholder meeting, as the year progressed, management disagreements between the Company's shareholders became more evident. Id. at ¶19. In the context

of these disagreements, Kathy sought legal guidance from attorney Alan Rubens. See Declaration of John F. Magnuson (filed August 29, 2014 (referred to herein as "the Magnuson Declaration") at Ex. A. Kathy expressed concern to Rubens that the bylaws of Green Enterprises, Inc. might be amended by a majority of the shareholders so as to reduce the number of board positions from six to three. Id. at ¶¶1598-1599.

On September 22, 2010, Rubens summarized Kathy's presentation of the situation as follows:

> [Y]our dad [Ralph Green] wishes to change the Corporate structure [of Green Enterprises, Inc.], so as to effectively eliminate you and two of your brothers [Randy Green and Gary Green] from the Board of Directors, so that he, his wife and Jim, who are generally all on the same page, can operate the Corporation without any interference. You have serious concerns about your dad and mom's mental capacity, which could affect their decision making, and also have serious concerns about whether their proposed actions in behalf of the Corporation will have a negative effect on your financial interest as a Shareholder.

Id.

Having analyzed the information provided by Kathy, and having researched the same, Rubens responded with the following advice:

- "It appears to me based upon my review of the current by-laws [of Green Enterprises], and my general understanding of Idaho Corporate law, that a majority of Shareholders can decide to modify the bylaws so as to reduce the number of directors.... That being said, the question of your parents' incapacity might affect their ability to vote their shares. If you could establish their incapacity, then their votes would need to be made by the guardians in their behalf. Of course, in the process of having your parents determined to be incapacitated, a guardian will need to be appointed."

- "Establishing your parents' incapacity will likely be a very expensive and emotionally difficult process. Such a process will also be very time

consuming, as it generally requires independent evaluations by a Guardian-ad-Litem, consideration by the Court, presentation of arguments and so forth. There is no certainty as to what the result might be.... You can be assured that they will be fighting you all the way...."

- "As a shareholder, you have a right to bring an action against the Directors and/or Officers for their violation of fiduciary duties (referred to as a Shareholder derivative suit)...."

- "You may also want to take a pre-emptive strike by advising the Conservancy Trust companies which are in consultation with your Company [Green Enterprises, Inc.], that you object to any transfer of property by the Corporation to them, and that if such transfers occur, you will seek to have the transfer undone...."

Id. at pp. 1598-1599.

Mr. Rubens closed his opinion letter with the following statement:

> One observation that I have that you should at least consider as you decide how to proceed, is that you currently only own slightly more than ten percent (10%) of the total Corporation. Your parents have no obligations to leave any other assets to you, and you may find that in pursuing this matter, you will be "cut out" of any further inheritance. If as a result of your activity, your parents decide to leave everything to the 'favored child(ren)", your interest will never exceed the ten percent (10%) value that you have now. I point this out to you only so that in considering whether you are better off to fight or to go along with their plan, you should take a look at where you are now and where you might be in the future."

Id. at p. 1600 (emphasis added).

Less than a month later, on October 13, 2010, Rubens again wrote Kathy. See Magnuson Declaration at Ex. B. Rubens was offering advice to Kathy in advance of a then-scheduled shareholder meeting of Green Enterprises, Inc. (set for October 22, 2010). Id. Rubens offered his opinion to Kathy as to what she might expect should she send a letter expressing concerns to then-

corporate attorney Tevis Hull.

> [You] have to anticipate that any letter you send will be considered inflammatory by your parents, if and when shared with them. It is impossible to anticipate how they might react. However, doing nothing may not avoid a negative reaction, since your father is apparently upset with you. It seems to me that if you are to send the letter, you need to be prepared for the worst case result, which would be that you continue to own a ten percent (10%) interest in the Company, but are otherwise disinherited. If you have not already been disinherited, you may be able to argue later that any action taken from this point forward is inappropriate, due to incapacity. As a practical matter however, that is a difficult case to make.

Id. at p. 1610.

On October 22, 2010, the shareholders of Green Enterprises, Inc. met. See Hull Declaration at ¶¶19-22 and Ex. F. The shareholders present at the October 22, 2010 meeting, by a majority vote, amended the Company's bylaws to reduce the number of directors from six to three. Id. at ¶19. The shareholders present on October 22, 2010 then elected three members to the board, who consisted of Ralph, Jeanne, and Jim. Id. The meeting continued with Kathy making allegations of self-dealing against her parents and Jim. Id.

As the meeting progressed, Jeanne and Ralph expressed increasing dissatisfaction with the actions of Gary, Kathy, and Randy, including the following:

- Kathy asked her father Ralph why he chose Jim as the sibling on the board over the other siblings. Ralph indicated that Jim "was more in line with Ralph and Jeanne Green's positions and that he [Jim] honored his father and mother and the other siblings did not."

- Jeanne Green stated "that she gave a partial ownership through the shares of stocks to the kids. However, had she known of the problems, she would never have put the property in the Corporation."

See Hull Declaration at Ex. F.

Other unpleasant exchanges occurred at the October 22, 2010 shareholder meeting. Jeanne Green verbally expressed her dismay, to all present, stating that "the next thing her children would be doing (referring to Gary, Kathy, and Randy), would be challenging my competency." Id at ¶22. In the months that followed the October 22, 2010 meeting, Ralph expressed to Hull that he (Ralph) and Jeanne desired to amend the Trust. See Hull Declaration at ¶23. In early 2011, both Ralph and Jeanne advised Hull that they wanted Jim to be listed as the First Successor Trustee rather than Gary. Id. Gary could only be removed as the First Successor Trustee through an amendment to the Trust. Id. . Hull did not discuss the subject matter with Jim. Id.

Hull advised Ralph that due to the growing dissension in the Corporation, and given his status as corporate counsel, he would prefer that Ralph and Jeanne consult with another attorney for purposes of implementing whatever estate plan modifications they desired. Id. at ¶24. Ralph asked Hull for a recommendation for a new estate planning attorney. Hull suggested attorney Kimmer Callahan. Id. From that point onward, in early 2011, Hull no longer provided Ralph or Jeanne with professional assistance in terms of amending, modifying, or implementing their estate planning desires, whether through the Trust or otherwise. Id.

At or about the same time, in early 2011, Ralph requested that Steve Klatt provide the Corporation with property management services and professional consultation and advice, as needed, with respect to issue pertaining to the Corporation's property. See Declaration of Steve Klatt (filed

August 29, 2014) (referred to herein as "the Klatt Declaration") at ¶9. Klatt is a former Bonner County Commissioner and a former Chairman of the Idaho State Parks Board. Id. at ¶¶6 and 7. Klatt has nearly 30 years of experience providing property development advice and property management services. Id. at ¶¶3-5.

Klatt agreed to assist the Corporation in dealing with its lessees (who leased corporate land under their privately owned cabins). Klatt also agreed to assist the Corporation in attempting to implement a conservation easement on portions of the Corporation's property, as had been requested by Ralph and Jeanne. Id. at ¶9. Klatt also helped Ralph and Jeanne by facilitating Company meetings, transmitting Company information to the Company's shareholders and directors, and in managing and arranging for corporate meetings. Id.

In the early months of 2011, Ralph apprised Klatt that he (Ralph) was considering making modifications to his estate planning documents. Id. at ¶10. Klatt in turn advised Ralph that he (Klatt) had been aware of prior situations when family dissension had led to protracted legal proceedings and that any estate planning needed to be accomplished by a professional in order to minimize adverse financial ramifications. Id. at ¶10.

Ralph asked Klatt if Klatt knew of any individuals to whom he might refer Ralph. Id. at ¶11. Klatt ultimately suggested that Ralph contact attorney Rich Wallace and offered to facilitate an introduction. Id. at ¶11.

At Ralph's request, Klatt reached out to attorney Wallace to generally familiarize him

(Wallace) with issues related to Ralph, Jeanne, and the Company's property. Id. at ¶13. Klatt did not discuss with Jim Green the substance of his conversations with Wallace. Id. Wallace was apprised by Klatt that there were issues in the Green family, between Ralph and Jeanne, on the one hand, and some of their children, on the other hand. See Declaration of Richard P. Wallace (filed August 29, 2014) (referred to herein as "the Wallace Declaration") at ¶5. The issues included disagreements over a conservation easement that Ralph and Jeanne were considering for the Company property. Id.

Klatt asked Wallace if he would be willing to meet with Ralph and Jeanne and to see if he (Wallace) could provide assistance to the Greens. See Wallace Declaration at ¶6. Wallace indicated that he would be willing to meet with Ralph and Jeanne and would be willing to provide whatever assistance he could. Id.

At or about the same time, Ralph and Jeanne requested that Klatt reach out on their behalf to the Green children in an effort to open a dialogue about amicably moving forward with their plans for the Company property. See Klatt Declaration at ¶14. At the request of Ralph and Jeanne, Klatt wrote a March 14, 2011 letter to Gary and Kathy which advised as follows:

- Klatt introduced himself to Gary and Kathy.
- Klatt advised that he was working with Ralph and Jeanne to search for a solution that might provide equitable opportunities for each of the Green children to improve a cabin on the Company property and to resolve several other issues.
- Klatt had been discussing the concept of a conservation easement on a part

of the Company's property with Ralph and Jeanne.

- In the context of discussing a conservation easement, Klatt had asked Ralph and Jeanne "if they had reviewed their personal estate status recently in light of changing inheritance laws."

- Klatt further advised Gary and Kathy that, with the encouragement of Ralph and Jeanne, "I got some references and introduced them to Rich Wallace. He will need to review with Hull what is in place before making any recommendations."

See Klatt Declaration at Ex. B. In addition to sending his March 14, 2011 letter to Gary and Kathy, Klatt personally met with Randy Green in Coeur d'Alene on Mach 8 to convey the same information in person. Id. at ¶17.

Klatt's search for an estate attorney for Ralph and Jeanne was done with no involvement on the part of Jim Green. Id. at ¶16. Klatt only discussed Ralph's and Jeanne's estate planning desires directly with them and with no other Green family member. Id.

Having reached out to Gary, Kathy, and Randy, at the request of Ralph and Jeanne, Klatt again met with Ralph and Jeanne on March 19, to continue efforts to move forward with Company matters. Id. at ¶18. At the request of Ralph and Jeanne, Klatt drafted a March 21, 2011 letter to Gary, Kathy, Randy, and Jim. Id. Before sending the letter, Klatt met yet again with Ralph and Jeanne, on March 21, and they approved the message he was conveying to their children on their behalf. Id. at ¶18 and Ex. C.

On March 21, 2011, with the written concurrence of Ralph and Jeanne, Klatt wrote to Gary, Kathy, Randy, and Jim to advise as follows:

> An observation that troubles and saddens me is that your family seems more intent on nurturing past grievances than on collaborating in an effort to manage and preserve what is a remarkable piece of family property and history. You have a unique opportunity to enjoy equitably with your siblings, plus share with your children, what is unequivocally one of the very finest places on the lake. The sad thing about your recalcitrant approach to this situation is how quickly time is running out for you as siblings to attempt working together with your parents as asset managers of an irreplaceable asset.
>
> . . .
>
> This likely future for settling family estate differences is what has pressed Jeanne and Ralph to move in the direction of establishing a conservation easement and turning the property over to a conservator. The two greatest wishes Jeanne has for the remembrance of her life are keeping the VanSchravendyk property [the Green Enterprises property] intact and seeing her children put some grievances aside in an effort to become a family unit while preserving her family's ground. You have all expressed your doubts to me whether there is hope for any mending of the family breach and your folks are of the same opinion, leaving them to conclude that an outside conservator controlling the property is the only preservation option. 2011 is the last year you will have the opportunity to look for mending some personal fences and retaining the family's direct control of this property. Jeanne and Ralph don't feel they can wait any longer.
>
> . . .
>
> At the end of the day, folks, you must remember – no one has the ability to help people who simply do not want to help themselves. It really and truly is up to you!

Id. at Ex. C (emphasis added).

On March 23, 2011, Klatt met with Hull, Ralph, and Jeanne. Klatt helped to facilitate Ralph's and Jeanne's wishes by providing Rich Wallace with the estate planning documents that Hull had previously prepared for them. Id. at ¶20.

On April 17, 2011, Jim Green wrote to his siblings and asked that they favorably consider

the positions Klatt had communicated with the concurrence of the siblings' parents. See Green Declaration at ¶11.

The next day, on April 18, 2011, attorney John Finney, on behalf of Gary, Kathy, and Randy, wrote a letter to all of the Company's tenants, who were also Ralph's and Jeanne's neighbors. See Hull Declaration at ¶25 and Ex. G. Through his letter to the Company's tenants, Finney, on behalf of Gary, Kathy, and Randy, advised the tenants not to sign any new leases or lease renewals with the Company because of concerns on the part of his clients, which were stated to include the competency and/or legal capacity of Ralph and/or Jeanne to negotiate and/or enter into new leases or renewal of leases. Finney stated that any tenants who entered into such leases with Ralph or Jeanne, as representatives of the Company, could be subject to "severe scrutiny" and potential "legal action." See Hull Declaration at ¶26 and Ex. G.

After Ralph and Jeanne became aware of the substance of Finney's letter, and the fact that it had been sent to the Company's tenants and their neighbors, they were visibly upset and asked to immediately meet with Hull to discuss a potential response. Id. at ¶27. Ralph and Jeanne also immediately contacted Klatt and asked that he meet with them as well. See Klatt Declaration at ¶22.

On April 20, 2011, Hull, Klatt, and Jim Green met with Ralph and Jeanne. See Klatt Declaration at ¶22. Ralph and Jeanne remained visibly upset and angered that three of their children (Gary, Kathy, and Randy) were interfering with their relationships with their neighbors and tenants and challenging their competency. Id. As a result of his meeting Ralph and Jeanne, and at their

expressed direction and request, Hull sent an April 20, 2011 response to Finney. See Hull Declaration at Ex. H.

Hull sternly advised Finney that Finney's clients were minority shareholders in the Company and that they should be embarrassed by their conduct. Id. at ¶28 and Ex. H. Hull further demanded that Kathy, Gary, and Randy "cease and [desist] in their efforts to destroy the integrity of the Corporation and Ralph and Jeanne Green...." Id.

On April 29, 2011, a meeting was arranged with attorney Wallace at the request of Ralph and Jeanne. See Klatt Declaration at ¶23. On April 29, 2011, Ralph, Jeanne, Klatt, Hull, and Jim Green met at the Green home. See Wallace Declaration at ¶8. Ralph and Jeanne advised Wallace that they were looking for someone to take over for Hull and to provide estate planning services going forward. Id.

Ralph and Jeanne told Wallace about the April 18, 2011 letter that attorney Finney had sent to the Company's tenants. Id. at ¶9. Wallace was provided with a copy of the letter. Ralph and Jeanne expressed consternation over the contents of the letter to Mr. Wallace. Id. at ¶10. Jeanne further expressed concern to attorney Wallace that all of her children would not embrace the concept of a conservation easement on the Company property. Id. at ¶11. Wallace agreed to undertake the representation of Ralph and Jeanne with respect to their estate planning matters. Id. at ¶12. Wallace testified that it was his responsibility to protect Ralph and Jeanne from the conflict with their children and to implement their goals for estate planning. Id.

Ralph and Jeanne expressed to Wallace, as he left the April 29, 2011 meeting, that they desired to try to work something out with all of their children in a manner that would protect the desires of Ralph and Jeanne. Id. at ¶13. Wallace was supposed to give the matter some thought and to then get back to Ralph and Jeanne for further discussion and possible action. Id.

After meeting Jim Green at the informational meeting of April 29, Wallace never again met Jim Green until Wallace was deposed in this proceeding nearly three (3) years later, on February 13, 2014. Id. at ¶14. Wallace may have had a couple of phone conversations with Jim Green after April 29, 2011, but he could not recall the specific substance of the same, although he was certain that they did not involve Jim Green giving any direction to Wallace over his parents' estate planning. Id.

Ralph subsequently phoned Wallace, after the April 29 meeting, and expressed to Wallace that he was to prepare documentation to remove Gary Green as a party to whom Ralph and Jeanne had previously granted durable powers of attorney. Id. at ¶15. As requested, Wallace prepared the requested "Revocation of Durable Power of Attorney." Id. at Ex. B.

Ralph's request to Wallace that he prepare a revocation of Ralph and Jeanne's durable powers of attorney was entirely consistent with the feelings Ralph and Jeanne had made known to Wallace at the April 29 meeting. Id. Wallace never discussed the Revocation of Durable Powers of Attorney with Jim Green, either before or after Ralph and Jeanne signed the same. Id. Wallace took no direction from Jim Green with respect to the preparation or execution of a new Durable Power of Attorney. Id. Wallace has no recollection of ever having discussed the subject matter with

Jim Green. Id.

At or about the same time, Wallace prepared new Durable Powers of Attorney for both Ralph and Jeanne. Id. at ¶16 and Exs. C and D. The requests to prepare these Durable Powers of Attorney were communicated to Wallace by Ralph. Id. Wallace prepared Durable Powers of Attorney which designated Jim Green as his parents' alternate attorney-in-fact, without any direction from or contact with Jim Green. Id. at ¶17. Wallace followed the specific marching orders of Ralph and Jeanne. Id.

Between April 29, 2011 and October of 2011, Wallace either met with Ralph and Jeanne, or spoke with Ralph by phone, perhaps 10 to 15 times. Id. at ¶18. On June 7, 2011, Ralph and Jeanne executed a "Third Amendment" to the Trust. See Wallace Declaration at Ex. E. This Amendment removed Gary Green as Successor Trustee and replaced him with Jim Green. Id. The request to prepare this Amendment was communicated to Wallace by Ralph and Jeanne. Id. Wallace had no discussion or communication with Jim regarding the Amendment. Id.

After preparing the Third Amendment at the request of Ralph and Jeanne, Wallace personally drove up to the Green's home, on June 7, 2011, and reviewed the proposed Amendment with the Greens in person. Id. at ¶20. Jim Green was not present. Id. After reviewing the contents of the Third Amendment, which replaced Gary with Jim as Successor Trustee, both Ralph and Jeanne acknowledged to Wallace, in his presence, that they understood what they were signing and the legal effect of the same. Id. at ¶21.

On June 15, 2011, at the request of Ralph, Klatt contacted Kyler Wolf, Interim Director and President of the Clark Fork Pend Oreille Conservancy ("the Conservancy"). See Declaration of Klatt at ¶26 and Ex. F. Klatt advised Wolf that he (Klatt) had been retained by the Company to work towards the creation of a conservation easement. Klatt advised Wolf as follows:

> Ralph and Jeanne stated that their first preference in placing this property [the Corporation property] in a conservation easement would be to work with your organization. That being the case, I think it is very important for your Board and legal counsel to determine whether you wish to proceed with negotiations if the Green family is divided on the subject of conservation easements. I am not certain this will be the case, but there is a real possibility that the four Green siblings, each holding 10% of the Corporate shares, will not be supportive of this idea.

See Klatt Declaration at Ex. F.

On June 23, 2011, Wallace returned to the home of Ralph and Jeanne to present them with a "Fourth Amendment" to the Green Trust. Id. at ¶23 and Ex. F. The Fourth Amendment essentially provided that if the four Green Children could not agree on the terms of a conservation easement, that the Green property would pass in equal thirds to three designated charitable organizations. Id. at ¶23.

Wallace personally went over the substance of the Fourth Amendment with both Ralph and Jeanne in their presence. Id. Ralph and Jeanne both manifested to Wallace that they understood the terms of the Fourth Amendment which Wallace had prepared at their request. Id. at ¶24. Jim Green was not present on June 23, 2011 when his parents signed the Fourth Amendment. Wallace never discussed or communicated with Jim Green regarding the subject of the Fourth Amendment. Id.

Simply put, Wallace took no direction from anyone other than Ralph and Jeanne with respect to the preparation and execution of the Fourth Amendment. Id.

Wallace subsequently prepared a "Fifth Amendment" to the Green Trust. Id. at Ex. J. The Fifth Amendment differed from the Fourth Amendment only in the introductory language in the first paragraph. Id. The Fifth Amendment clarified that it was in fact the "fifth time" that the Green Trust was being amended. Id. The Fifth Amendment, like the Fourth Amendment, provided that the Trust assets would be distributed to three designated charities in the event the Green children could not agree upon the terms of a conservation easement on the Company property. Id. at Ex. J.

Wallace personally went over the terms of the Fifth Amendment with Ralph and Jeanne on July 6, 2011 at their home. Id. at ¶26. Ralph and Jeanne both manifested to Wallace their understanding of the Fifth Amendment. Id. Jim Green was neither present on July 6, 2011 nor did he ever discuss the subject of the Fifth Amendment with Wallace. Id. Wallace took no direction from anyone other than Ralph and Jeanne with respect to the preparation and execution of the Fifth Amendment. Id.

During the same general timeframe, in the summer of 2011, with the assistance of Klatt, Ralph and Jeanne pursued further discussions with Kyler Wolf of the Clark Fork Pend Oreille Conservancy. Wolf met with Ralph and Jeanne at their home to explain in general terms the concept of a conservation easement, what would be involved in the process, and how it might benefit the Corporation. See Magnuson Declaration at Ex. C, p. 42. Wolf testified that Ralph and Jeanne

expressed a desire to go forward with the conservation easement. Id.

On September 9, 2011, Wolf and Eric Grace, the Executive Director for the Conservancy, met with all of the Green family members to provide additional information about the benefits and issues associated with a conservation easement. See Magnuson Declaration at Ex. D, pp. 23-24. Grace testified as to his overall impression of the September 9 meeting.

> I remember thinking that it was going to be a really uphill battle to get this project done because there was a level of dysfunction in the family that was far exceeding what I thought would be a conducive working environment to get a complicated project completed. The animosity was very deep. There was very little consensus and, as far as I could tell, almost no trust whatsoever between factions within the family.

See Magnuson Declaration at Ex. D, p. 23.

On September 9, 2011, the Green family also gathered for a meeting of the Company's shareholders. See Hull Declaration at Ex. I. At the meeting, Gary polled all of the Company's shareholders "on their history of dementia," asking Jim, Randy, Kathy, and himself whether or not they had been diagnosed with dementia in the past. See Klatt Declaration at Ex. I, p. 5. Gary further polled his parents, Ralph and Jeanne, asking that they state on the record whether or not they had ever suffered from dementia. Id. Ralph concluded that he did not think that Gary, Kathy, and Randy were fit to be on the board. Id. at p. 7.

On September 15, 2011, the Conservancy wrote to Ralph, Jim, and Randy, as the three then directors of the Company, to provide them with a proposed "Letter of Intent to Establish Conservation Easement" with the Conservancy. See Magnuson Declaration at Ex. D (Depo. Tr. of

Eric Grace, at Ex. 1). Grace requested that all three of the Company's then-directors (Ralph, Jim, and Randy) sign the Letter of Intent. Id.

At or about the same time, Kathy and Randy communicated directly with the Conservancy to express their "serious concerns about moving forward with the conservation easement." Id. at Ex. D, pp. 30-32. Grace recalled having several telephone conversations with the Appellants, particularly Kathy. Id. at p. 30. Grace testified, "The nature of the conversation was that Kathy was expressing serious concern about moving forward with the conservation easement. And I felt that she was lobbying me, as representative of the [Conservancy], to not move forward with it." Id. Grace testified that the basis of Kathy's objection was that the conservation easement stripped away the development rights in the property, "thereby reducing the value of the property." Id. at p. 31. Randy communicated similar concerns to Grace. Id.

By October 14, 2011, the Letter of Intent remained unsigned. Counsel for Ralph, Jeanne, and Jim advised counsel for Randy, Gary, and Kathy that Ralph and Jim "are prepared to execute the LOI on behalf of the Company given that the matters set forth therein are consistent with the long-term goals for which the Company was created and with the intentions of Ralph and Jeanne Green in contributing the property to the Company years ago." See Magnuson Declaration at Ex. E.

Gary, Kathy, and Randy, through counsel, were further advised as follows:

> While we [Ralph, Jeanne, and Jim] believe that the Company can properly execute the LOI based upon the affirmative consent of two of the three individuals designated as directors, following a meeting on the same, we would like to make sure that any questions you [Finney] or your clients [Gary, Kathy, and Randy] have with

> respect to the LOI are fully answered. Are there any such questions? Does Randy intend to execute the LOI as a director of the Company?

Id. On October 19, 2011, counsel for Ralph, Jeanne, and Jim followed up yet again with Gary, Kathy, and Randy through their attorney, Mr. Finney. Id. at Ex. F. Request was again made that Randy execute the LOI as requested by his parents. Id.

On October 19, 2011, unbeknownst to the Green family, the Conservancy's board was considering whether to proceed in light of the family discussion Wolf and Grace had observed. See Magnuson Declaration at Ex. C and Depo. Tr. of Wolf at Ex. 1. The Conservancy's Board was confidentially advised by Executive Director Grace on October 19, 2011 as follows:

> The parents are eager to see the property protected. As majority shareholders, they are likely legally entitled to do so. However, it now appears that, despite being request[ed] to initiate the LOI, there are serious concerns with the CE [conservation easement] from minority shareholders. They have hired an attorney, John Finney of Sandpoint to represent their interests in this process, as well as other shareholder grievances.
>
> The family has reached a remarkable level of dysfunction. There is no trust, and any inter-family communication is unproductive. The CE is being framed within much deeper family issues. We had hoped that the CE might be common ground that would build trust among the hostile parties, but it seems that this will not be the case.
>
> The question for the CFPOC board is: Do we want to enter into a conservation project where there is significant disagreement amongst the shareholders? Of particular concern is that the initiators of the project, Ralph and Jeanne, are aging rapidly and will not likely be with us for long. It will then be a perpetual relationship between the hostile shareholders and CFPOC....

Id.

On October 26, 2011, Executive Director Grace, on behalf of the Conservancy, wrote to

Ralph and stated, "As a conservationist, the hardest thing I am forced to do is turn down a good conservation project. Unfortunately, this is the case that I currently find myself in with the protection of your property." See Magnuson Declaration at Ex. D (deposition transcript of Eric Grace at Ex. 2).

In the same month, October of 2011, Ralph Green called Wallace to advise that he (Ralph) and Jeanne were frustrated and tired of the process of dealing with Gary, Kathy, and Randy. See Wallace Declaration at ¶27. Ralph asked Wallace to prepare a "Sixth Amendment" to the Trust, giving everything to Jim, because Ralph and Jeanne were worried about the other children and thought that Jim was best able to follow his parents' wishes. Id. Wallace did as Ralph had requested.

On October 28, 2011, Wallace and his wife drove to the Green home to meet with Ralph and Jeanne. Id. at ¶28. Wallace sat with Ralph and Jeanne and personally explained the legal effect of the Sixth Amendment. Id. He confirmed with both of them that they knew that by executing the Sixth Amendment, no shares in the Company would go under the Trust to any child other than Jim. Id. Both Ralph and Jeanne acknowledged to Wallace that they understood the effect of the Sixth Amendment and that they were willingly executing the same as a manifestation of their own intentions. Id.

Wallace never discussed the subject of the Sixth Amendment with Jim, either before or after its execution. Id. at ¶29. Wallace took no direction from anyone other than Ralph and Jeanne with respect to the preparation and execution of the Sixth Amendment. Id. When Ralph and Jeanne

executed the Sixth Amendment, in Wallace's presence, they confirmed that it reflected their intentions and desires. Id. Neither Ralph nor Jeanne manifested any indication of, nor appeared to be under, the influence of any third-party or person, and the only persons present were Wallace, his wife, and a neighbor as a witness.

Also on October 28, 2011, consistent with the "Sixth Amendment," Wallace prepared separate "Last Wills and Testaments" for both Jeanne and Ralph. Id. at ¶30 and Exs. H and I. The Wills are "pour-over wills," which bequeath to the Green Trust any assets that either Ralph or Jeanne forgot to put into their Trusts prior to their passing. Id.

As with the "Sixth Amendment," Wallace personally went over the "Last Will of Jeanne Green" with Jeanne and the "Last Will of Ralph Green" with Ralph. Wallace reviewed each provision of Jeanne's Will with her in her presence. She acknowledged that she understood what she was signing and that the Last Will reflected her intentions. Id. at ¶32. She initialed each of the seven (7) pages of the Will, and signed the same twice, all in the presence of Wallace, his wife, and the neighbor. Id.

Wallace never discussed the subject of Jeanne's Last Will or Ralph's Last Will with anyone else, either before or after October 28, 2011. Id. at ¶34. Wallace took no direction from anyone other than Ralph and Jeanne with respect to the preparation of their Last Wills. Wallace did not discuss the subject of the Last Wills with any other members of the Green family, either before or after October 28, 2011.

On December 16, 2011, attorney Finney provided a "written demand" to the directors of Green Enterprises, Inc. on behalf of Kathy, Gary, and Randy. See Magnuson Declaration at Ex. G. Finney alleged various grievances on the part of his clients, as a precursor to a shareholder derivative suit. Id.

On January 6, 2012, Ralph and Jim responded through counsel, refuting each and every claim of Gary, Kathy, and Randy. See Magnuson Declaration at Ex. H. Through counsel, Jim and Ralph advised Finney:

> [W]e had previously written you in an effort to try to set forth the methodology to work out issues. In return, we received an inflammatory holiday greeting that bears no relationship to reality.... This is neither a productive nor wise use of the parties' resources or the Court's resources. If there are problems that need to be worked out, your clients [Gary, Kathy, and Randy] are taking the wrong approach. If they wish to reconsider and engage in a meaningful, respectful, and balanced dialogue, then let me know.

Id.

Gary, Kathy, and Randy responded by filing a petition seeking the appointment of a guardian and a conservator over their mother, Jeanne. Id. at Ex. I. Through their February 13, 2012 petition, the Appellants alleged that their mother "suffers from dementia and is thought to be unable to make responsible decisions about her personal safety or welfare...." Lest they single out Jeanne, the Appellants also alleged that Ralph may have "possible dementia." Id.

Gary, Kathy, and Randy were immediately asked to reconsider. Id. at Ex. K. Their attorney was advised as follows, within the week that followed the filing of the petition:

> Your clients [Gary, Kathy, and Randy] do not believe that their interests are being served. Your clients apparently believe that the majority stockholders (their elderly parents) are frustrating their desires to improve their own financial situations. Their announced objectives, reenforced by their legal efforts, disclose the most likely reasons for the action they now take against their mother. It likely cannot be out of regard for her personal well being. Your clients [Gary, Kathy, and Randy] have not had social interaction with their mother for over two years and, in some instances, more. You might ask them when they most recently visited their parents or, when did they last simply send a mother's or father's day card. Considering the estrangement they have from their parents, one must wonder how they even pretend to make such a conclusory assessment about their mother's or father's capacity. Do you know the foundation on which they base such a hurtful decision? Whose welfare are [they] really considering?

Id. at Ex. K. Regrettably, Gary, Kathy, and Randy pressed on.

On April 23, 2012, the Bonner County District Court, the Honorable Barbara Buchanan, District Magistrate, entered a Stipulated Order providing for the examination of Jeanne Green by a mutually agreeable geriatric specialist. See Magnuson Declaration at Ex. L.

With the guardianship/conservatorship still pending, Gary, Kathy, and Randy then sued Ralph, Jim, and the Corporation, alleging various claims of impropriety. Id. at Ex. M. According to their complaint in Bonner County Case No. CV-12-0917, Gary, Kathy, and Randy alleged that the following acts had occurred:

- Jeanne Green was legally incapacitated and/or suffered from a legal disability.
- Ralph and Jim knew of Jeanne's disability and incapacity and had taken advantage of the situation.
- Ralph and Jim had exploited the vulnerability of Jeanne to their own benefit.

Id.

On June 25, 2012, with Bonner County Case No. CV-12-0917 pending, the Court in the guardianship/conservatorship matter entered a Stipulated Order, adopting the parties' agreement that Dr. John Wolfe would be the Examining Physician. The Court's Order further provided:

> 9. If the Examining Physician's Report opines or concludes that the Proposed Ward [Jeanne Green] is either not cognitively impaired or not cognitively impaired to such a degree as to lack sufficient understanding or ability to make or communicate responsible decisions concerning her person, then the Court shall order this proceeding dismissed.
>
> . . .
>
> 13. The Proposed Ward has consensually agreed, subject to the parties' agreement, that her physician-patient privilege has not or will not be waived by said consent, to disclose to Dr. Wolfe her medical records from Bonner General Hospital and Lifecare Center of Sandpoint on or before June 26, 2012. . . .
>
> 14. The Proposed Ward does not desire to waive her physician-patient privilege, whether under state or federal law. She will only produce the designated records to Dr. Wolfe to facilitate his review subject to the terms and conditions of the parties' Stipulation and this Order, based upon entry of this Order. The materials to be provided to Dr. Wolfe, as described herein, shall not be deemed to be exceptions to the physician-patient privilege, as described by IRE 503(d) or any other applicable law.

See Magnuson Declaration at Ex O.

In July of 2012, Ralph Green informed Jim that he [Jim] was "now the only beneficiary" of his parents' Trust. See Green Declaration at ¶15. Prior to that time, Jim had no specific knowledge of what, if anything, his parents had done by way of estate planning, including the terms of any Trust

that they had established, other than that his dad could vote the shares of the Corporation that were held by the Trust. Id.

On July 30, 2012, Dr. Wolfe filed his "Examining Physician's Report" (under seal) with the Court. See Magnuson Declaration at Ex. P, ¶5. On August 28, 2012, the Bonner County District Court, the Honorable Barbara A. Buchanan, District Magistrate presiding, entered an Order which granted Jeanne Green's Motion to Dismiss, on the merits, holding as follows:

> The Court's August 28, 2012 Order further provided:
>
> > The Court further finds and orders that the Proposed Ward is not an "incapacitated person" as that phrase is defined in I.C. §15-5-101(a). The Court's finding is based upon the conclusions and determinations made and set forth in the Examining Physician's Report.
> >
> > The Court further finds and orders that neither a guardianship nor a conservatorship is appropriate based upon this Court's finding that the Proposed Ward is not an "incapacitated person" as that phrase is defined in I.C. §15-5-101(a).
> >
> > The dismissal herein is with prejudice to the extent that Petitioners [Gary, Kathy, and Randy] have sought a determination as to the Proposed Ward status as an "incapacitated person" based in facts or matters occurring prior to August 17, 2012.
> > . . .

Id. at Ex. P. The Appellants failed to file any appeal, timely or otherwise, from Judge Buchanan's August 28, 2012 "Order of Dismissal."

Shortly after entry of the Court's Order, Jeanne suffered some falls at her home that resulted in her being transported to a care facility in Sandpoint. See Declaration of James Green (filed October 25, 2013) at ¶10. It was the opinion of Drs. Burgstahler and Cope that Jeanne's condition

had worsened as a result of her injuries and that she was no longer capable of making her own medical decisions or handling her own finances. Id. at Ex. D.

In November of 2012, Ralph Green, then co-Trustee of the Green Trust, through counsel, Paul Fitzpatrick, initiated a proceeding in Bonner County District Court under the Trust and Estate Dispute Resolution Act (TEDRA), I.C. § 15-8-301, *et seq.* On November 21, 2012, in that proceeding (Bonner County Case No. CV-12-2039), the Court (the Honorable Debra Heise, District Magistrate, presiding) entered an order appointing attorney William F. Boyd as the special representative for Jeanne Green. See Affidavit of William F. Boyd (filed November 1, 2013) at Ex. B. Mr. Boyd has been a member of the Idaho State Bar for fifty (50) years. It was not until the TEDRA proceeding was initiated that Jim Green had ever even seen the "Sixth Amendment" to the Green Trust. See Green Declaration at ¶16.

On December 19, 2012, the parties entered into a Mediation Agreement with respect to the claims at issue in Bonner County Case No. CV-12-917. See Magnuson Declaration at Ex. Q. On January 9, 2013, the Honorable Steve Verby, District Judge, entered a Stipulated Order dismissing the claims at issue in Bonner County Case No. CV-12-917 (the shareholder derivative proceeding). Id. at Ex. R.

On December 19, 2012, the TEDRA Agreement was filed with the Court in Bonner County Case No. CV-2012-2039. R., Vol. I, p. 138. The Agreement was entered into to avoid the anticipated reduction in the Federal lifetime exemption from estate and gift tax. Id. The Agreement

provided for the sale and distribution of the Trust's shares in the Corporation to James. Id. Approximately nine months later, Gary, Kathy, and Randy filed this proceeding, alleging, inter alia, that Jim had exercised undue influence over his parents so as to cause them to execute the "Sixth Amendment" and their revised wills, as well as the TEDRA Agreement. The Appellants simultaneously moved the Court in the TEDRA proceeding to set aside the TEDRA Agreement, arguing that the same was void because they did not receive notice. R., Vol. I, p. 136.

Magistrate Heise entered a December 2, 2013 Order which denied the Appellants' motion to set aside the TEDRA Agreement. Id. Judge Heise reasoned that since Ralph and Jeanne had amended the Trust to remove Gary, Kathy, and Randy as beneficiaries, that said parties were not entitled to notice of the TEDRA proceeding and the TEDRA Agreement was valid. Id.. Gary, Kathy, and Randy appealed Judge Heise's decision to the District Court. On September 8, 2014, Judge Brudie entered his Opinion and Order on Appeal, affirming Judge Heise. See Magnuson Affidavit (filed September 11, 2014). Judge Brudie, like Judge Heise, concluded that Ralph and Jeanne had validly amended the Trust to remove Gary, Kathy, and Randy as beneficiaries and, as such, those parties were not entitled to notice of the TEDRA proceeding. Id. Neither Gary, Kathy, nor Randy appealed from Judge Brudie's September 11, 2014 Opinion and Order on Appeal, and the same is now final.

II. ISSUES PRESENTED ON APPEAL.

1. Whether The District Court Erred When It Dismissed the Appellants' Claims

Against Jim on Summary Judgment?

2. Whether the District Court Erred When it Struck the Declaration of Bennett Blum, M.D.?

3. Whether this Case Should Be Reassigned to a Different District Judge on Remand?

III. STANDARD OF REVIEW.

The District Court's Judgment was entered upon Jim's successful Motion for Summary Judgment. The governing standard of review in this regard is as follows:

> On appeal from an order granting a party's motion for summary judgment, this Court employs the same standard of review that the trial court uses in ruling on the motion. Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust, 147 Idaho 117, 123, 206 P.3d 481, 487 (2009). Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the Court indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); Banner Life Ins. Co., 147 Idaho at 123, 206 P.3d at 487. The moving party carries the burden of proving the absence of a genuine issue of material fact.

Losee v. Idaho Co., 148 Idaho 219, 222, 220 P.3d 575 (2009). When an action is tried before a Court without a jury, as here, the Court may, when ruling on a motion for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. Id.

IV. ARGUMENT.

A. Standards Applicable to a Claim of Undue Influence.

A party seeking to validate a testamentary instrument on the basis of undue influence must

establish four (4) elements:

> Generally, undue influence is demonstrated through proof of four elements: "(1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence."

In Re Estate of Conway, 152 Idaho 933, 939, 277 P.3d 380, 386 (2012) (quoting Gmeiner v. Yacte, 100 Idaho 1, 6-7, 592 P.2d 57, 62-63 (1979)). A party claiming undue influence must produce evidence that establishes all four (4) elements. Quemada v. Arizmendez, 153 Idaho 609, 614, 288 P.3d 826 (2012) ("[F]ailure by a party to support one of the elements of a claim will result in a dismissal of the entire claim.").

Where a beneficiary of the testamentary instrument is also a fiduciary of the testator, a rebuttable presumption of undue influence is created. In re Estate of Conway, 152 Idaho at 938. The proponent of the testamentary instrument bears the burden of rebutting the presumption. Id.

> To rebut the presumption, the proponent must come forward with that quantum of evidence that tends to show that no undue influence existed. Once that burden has been met, the matter becomes one for the trier of fact. The existence of undue influence will be determined accordingly, and on appeal such determination will only be disturbed if not supported by substantial, competent evidence.

In re Estate of Conway, 152 Idaho at 938 (quoting In re Estate of Roll, 115 Idaho 797, 799, 770 P.2d. 806, 808 (1989)).

This Court has set forth the type of evidence relevant to establishing a claim of undue influence. That evidence includes:

> the age and physical and mental condition of the one alleged to have been influenced, whether he had independent or disinterested advice in the transaction, the providence

> or improvidence of the gift or transaction, delay in making it known, consideration or lack of inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his predisposition to make the transfer in question, the extent of the transfer in relation to his whole worth, failure to provide for his own family in the case of a transfer to a stranger or failure to provide for all of his children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties.

In re Estate of Conway, 152 Idaho at 386 (quoting Gmeiner v. Yacte, 100 Idaho 1, 7, 592 P.2d 57, 63).

The significance of each of these considerations will depend upon the unique facts of each particular case. In Gmeiner v. Yacte, the Court held "that undue influence is less likely to be found where it can be shown that the grant was not made at the request, suggestion or direction of the grantee; where the grantee was not active in the preparation or execution of the document; or where disinterested advice was sought and third parties were informed of the grantor's intentions." Gmeiner v. Yacte, 100 Idaho at 8 (citations omitted). The significance of the testator's engagement of independent counsel as a circumstance vitiating a claim of undue influence has been noted by other jurisdictions as well. See, e.g., In re Bennett, 865 P.2d 1062 (Ct. App. Ks. 1994); In re Dion, 623 NW.2d 720 N.D. (2001); Elloin v. Elloin, 95 NE.2d 574 (Ct. App. Mass. 2010).

This Court has also held that a disposition alleged to be "unnatural" must be respected, even if "unequal" or "unjust," if it reflects the intent of the testator. Gmeiner v. Yacte, 100 Idaho at 7, 592 P.2d at 63 (citing Englesby v. Nisula, 99 Idaho 21, 576 P.2d 1055 (1978)).

Finally, where a testator does not subsequently change a testamentary instrument alleged to

be the product of undue influence, despite the passage of time, the Court may infer that the execution of the instrument was not the product of undue influence. See, e.g., Quemada v. Arizmendez, 153 Idaho at 615.[6]

B. The TEDRA Proceeding Conclusively Resolved the Issues at Bar.

The Appellants' singular contention is that the Sixth Amendment to the Trust was the product of undue influence on the part of Jim. Appellants' complaint prays for relief as follows:

> 2. A declaration that Gary Green, Kathy Lefor, and Randy Green were improperly disinherited from the Trust and Estates of Jeanne Green and Ralph Green;
>
> 3. A declaratory judgment that the TEDRA action was improper and should be set aside . . . .

R., Vol. I, p. 86. The TEDRA proceeding has been conclusively and finally resolved in a manner adverse to Appellants, barring them from any claim for relief "that the TEDRA Action was improper and should be set aside." Given the same, Appellants' remaining claim for relief, that the Sixth Amendment was the product of undue influence, has been rendered moot. In other words, the

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[6]In Quemada v. Arizmendez, supra, the decedent executed a deed on December 30, 2008. The decedent's personal representative sought to set aside the deed, alleging undue influence. The decedent passed away on November 13, 2009. The Court found it significant that the decedent had eleven (11) months within which to revise or correct the deed. In the facts at bar, Ralph and Jeanne executed the Sixth Amendment on October 28, 2011 in the presence of attorney Wallace and his wife. Gary, Kathy, and Randy then unsuccessfully sought the appointment of a guardian and conservator over their mother Jeanne. Gary, Kathy, and Randy also brought suit against their father Ralph and their brother Jim. The Sixth Amendment remained unmodified and unchanged until December 19, 2012, when the TEDRA Agreement was filed with the Bonner County Court in Case No. CV-2012-2039. R., Vol. I, p. 138.

provisions of the Sixth Amendment were subsequently modified by the TEDRA Agreement, which is in and of itself now conclusive.

Under TEDRA, if the parties to a trust execute a Non-Judicial Resolution Agreement to modify the trust, compliant with the Act, then the Agreement is binding and conclusive. See I.C. § 15-8-302. The parties to the TEDRA proceeding consisted of Ralph, Jeanne, and Jim.

In November of 2012, Ralph sought the advise of independent legal counsel (Paul Fitzpatrick) to address the then uncertainty in federal tax law relative to estate and gift taxes. See Affidavit of John F. Magnuson (filed September 11, 2014) at Ex. A., p. 2. Mr. Fitzpatrick is an estate planning attorney with thirty-eight (38) years of experience and an AV rating from Martindale Hubbell.

Mr. Fitzpatrick petitioned the Court, pursuant to I.C. § 15-8-305, for the appointment of a special representative to represent the interests of Jeanne, who by then had suffered a series of falls at her home which resulted in her being transported to a care facility in Sandpoint. See Declaration of James Green (filed October 25, 2013) at ¶ 10. The Court appointed attorney William F. Boyd as Special Representative for Jeanne in matters associated with the TEDRA proceeding. R., Vol. I, pp. 125-26. Mr. Boyd has earned an AV rating from Martindale Hubbell and has fifty (50) years of experience. Id. at p. 117.

In his capacity as Special Representative for Jeanne, Mr. Boyd executed the Non-Judicial Resolution Agreement modifying the Trust as previously amended by the Sixth Amendment. See

I.C. § 15-8-305(b). Ralph, with the advice and counsel of Mr. Fitzpatrick, also executed the Agreement, as did Jim. The Agreement was filed with the Court on December 29, 2012.

As summarized by Magistrate Debra Heise:

> By its terms, the Resolution Agreement was entered into to avoid the anticipated reduction in the federal life-time exemption from estate and gift tax. The Agreement states that the liquid assets of Ralph and Jeanne "are inadequate to pay the federal estate tax should the exemption and rates change . . ." and that the tax burden "could be several million dollars." The Agreement provides for the sale and distribution of shares [of] Green Enterprises, Inc., the primary Trust asset, from Ralph and Jeanne to James.

R., Vol. I, p. 138 (footnote omitted). Accordingly, it was the TEDRA Agreement under which Ralph and Jeanne sold and gifted the Trust assets to Jim, not the Sixth Amendment.

Gary, Kathy, and Randy unsuccessfully sought to challenge the Non-Judicial Resolution Agreement. In so doing, they claimed that any challenge to the Sixth Amendment was not a factual or legal predicate to their challenge to the Non-Judicial Resolution Agreement. R., Vol. I, p. 140. Magistrate Heise entered the Court's December 2, 2013 Order which held that Gary, Kathy, and Randy had "failed to establish that there was any procedural defect in the Non-Judicial Resolution Agreement that would render the Agreement void." Id. at p. 143.

Gary, Kathy, and Randy appealed Judge Heise's Order to District Judge Brudie. As part of that appeal, Gary, Kathy, and Randy conceded "their parents, the Settlors of the Trust, amended the Trust to specifically omit [them] as beneficiaries." See Affidavit of John F. Magnuson (filed September 11, 2014) at Ex. A., pp. 4-5. Judge Brudie entered the Court's September 11, 2014 Order

affirming the Order of Magistrate Heise. Id. Gary, Kathy, and Randy took no appeal and Judge Brudie's Order is now final.

Given the foregoing, the Sixth Amendment is no longer at issue and the TEDRA Agreement governs. The TEDRA Agreement is final. For Appellants to prevail on a claim of undue influence, in light of the foregoing, they would have to show that the TEDRA Agreement (as contrasted to the Sixth Amendment) was the product of undue influence on the part of Jim. This would require evidence that Jim unduly influenced Mr. Boyd, the Court-appointed Special Representative for Jeanne, who was acting on her behalf in the TEDRA proceeding pursuant to the Court's Order entered under I.C. § 15-8-305. It would also require evidence that Jim unduly influenced both Ralph and his independent counsel, Mr. Fitzpatrick. There has been no allegation of such undue influence nor could there be. There is no evidence nor was any offered that Jim somehow unduly influenced two (2) members of the Idaho State Bar as well as his father, who has not been shown by any facts offered on summary judgment to have been an individual "subject to influence." See, e.g., Gmeiner v. Yacte, 100 Idaho at 7.

C. The Sixth Amendment to the Trust Was Valid Without Jeanne's Signature.

Both Ralph and Jeanne executed the Sixth Amendment which attorney Wallace had prepared at their request. See Declaration of Richard P. Wallace (filed August 29, 2014) at Ex. G. Appellants claimed that Jeanne was unduly influenced by Jim to execute the Sixth Amendment. While said contention is vigorously disputed, at the end of the day, it is of no moment. Under the terms of the

Trust, either Ralph or Jeanne could have validly executed the Sixth Amendment and the Non-Judicial Resolution Agreement. Whether or not Jeanne joined in the execution of the Sixth Amendment under undue influence (a point not conceded) matters not.

Article 28 of the Trust grants the Trustee broad discretionary powers. Those powers include the ability to sell, gift, or dispose of Trust assets to the same extent as an individual who is dealing "in his or her own right." See Hull Declaration (filed August 29, 2014) at Ex. B., p. 37, Article 28. Further, Article 22 of the Trust allows either Ralph or Jeanne to execute the duties of Trustee individually. Id. at p. 32, Article 22.

> Either RALPH MAURICE or JEANNE GREEN may execute the duties of the Trustee of this Trust either individually or jointly in the sole discretion of either or both from time to time during their joint lifetimes. Upon the death of one Trustee, the survivor Trustee shall continue to serve as sole Trustee except as otherwise provided herein.

Id.

Given the foregoing, whether or not Jeanne executed the Sixth Amendment under undue influence is irrelevant. There has been no showing by any admissible facts, offered in opposition to Jim's Motion for Summary Judgment, that Ralph was a person susceptible to undue influence or that he executed the Sixth Amendment as a product of any undue influence from Jim. To the contrary, the undisputed material facts show that Ralph requested that independent counsel prepare both the Sixth Amendment and the Non-Judicial Resolution Agreement, that three (3) independent members of the Idaho State Bar (Wallace, Boyd, and Fitzpatrick) represented and dealt with Ralph

to the exclusion of Jim, and that Jim has not been shown (nor could he be shown) to have influenced any of those attorneys' decisions in matters regarding the representation of Ralph or Jeanne.

D. Appellants Have Failed to Establish Material Issues of Fact With Respect to Each of the Four (4) Elements Necessary to Establish a Claim for Undue Influence.

1. A Result Indicating Undue Influence.

One of the four (4) required elements to establish a claim of undue influence is a showing of "a result indicating undue influence." Gmeiner v. Yacte, 100 Idaho at 6-7, 592 P.2d at 62-63. A result is suspicious if it appears "unnatural, unjust, or irrational." In re Lunders' Estate, 74 Idaho 448, 451, 362 P.2d 1002 (1953).

If undisputed material facts sufficiently explain an unnatural disposition, the law must respect the same, as the intent of the grantor or testator, even though the same may be considered an "unequal and unjust disposition." Gmeiner v. Yacte, 100 Idaho at 63 (citation omitted). The fact that the grantors' natural heirs received sizeable bequests will make it difficult for them to challenge grants to another. Id. The same holds true where the grantor was known to be displeased with those who were disinherited. Id.

a. Evidence Regarding Sheila Green.

The Appellants assert that"the most important factor in this case is the unnatural disposition" with respect to Sheila Green. See Appellants' Brief at p. 39. Appellants further assert, "The problem with the District Court's theory is that it fails to account for Sheila, the developmentally

disabled special needs child who also lost her equal share of the Trust by the Sixth Amendment." Id. Appellants' claim is unsupported by the record. More importantly, Appellants never advanced any argument or claim regarding Sheila in proceedings before the District Court.

Appellants did not make Sheila a party to this proceeding. Their Verified Complaint, although containing more than fifty (50) pages and two hundred forty-eight (248) paragraphs, does not include any allegation with respect to Sheila except for the following. First, Paragraph 15 of the Complaint alleges that Sheila receives Social Security income, lives in a home owned by Ralph and Jeanne, and that she did not receive shares in Green Enterprises, Inc. like her four (4) siblings. R., Vol. I, p. 36. Second, Paragraph 21 of the Complaint alleges, "The Trust also provided for Sheila. She was to receive a life estate in real property in Oregon." Id. at p. 37. Making no claim by or on behalf of Sheila, the Appellants sought the following form of relief: "A declaration that Gary Green, Kathy Lefor, and Randy Green were improperly disinherited from the Trust and Estates of Jeanne Green and Ralph Green." Id. at p. 86.

In proceedings on summary judgment, Appellants filed their initial opposing Memorandum on September 17, 2014. Said Memorandum does not even mention Sheila, let alone advance any argument or claim based upon "facts" pertaining to Sheila. Further, after successfully moving the Court for an enlargement of time within which to submit more materials in opposition to Jim's Motion for Summary Judgment, the Appellants filed their November 4, 2014 Supplemental Memorandum. This Supplemental Memorandum included no facts or argument predicated upon any

claim related to Sheila.

In fact, the only time in this proceeding when Appellants have sought to challenge their own disinheritance based on facts relating to Sheila was in their opening Brief on appeal. This Court has repeatedly held that, "Issues not raised below but raised for the first time on appeal will not be considered or reviewed." Mountainview Land Owners Cooperative Association, Inc. v. Cool, 142 Idaho 861, 866, 136 P.3d 332, 337 (2006) (citation omitted).

Not only is Sheila not a party to this proceeding, Appellants likely chose not to advance any argument related to Sheila, in proceedings before the District Court, because the undisputed material facts do not support a finding of undue influence. In this regard, the Court should consider the following.

First, the Trust created by Ralph and Jeanne specifically provides Sheila with a residence for her lifetime. See Hull Declaration (filed August 29, 2014) at Ex. A, pp. 19-20. Second, Sheila's lifetime interest in her home was unaffected by the Sixth Amendment. Third, Ralph and Jeanne made specific provision that any benefits under the Trust inuring to Sheila would terminate if they served to make Sheila ineligible for state or federal public benefits or medical assistance. Id. at p. 22. Fourth, Sheila was not given shares in Green Enterprises because Ralph and Jeanne were of the belief that said shares would make Sheila ineligible to participate in Oregon's public assistance programs. See Affidavit of Counsel (filed September 17, 2014) at Ex. 1, pp. 74-75 (Deposition of Steven Klatt).

In this regard, the Court should also consider the Fourth and Fifth Amendments to the Trust. See Wallace Declaration (filed August 29, 2014) at Exs. F and J. Both Amendments sought to remove all five (5) Green children (including Jim and Sheila) as beneficiaries of the Trust in the event they could not agree on a conservation easement. While the Fourth and Fifth Amendments were superseded by the Sixth Amendment, the point is that Ralph and Jeanne, as part of a conscious and deliberative process, with the assistance of third-party professionals (such as Wallace), were continuing to consider all options, including the removal of Sheila as a beneficiary with respect to any shares in Green Enterprises.

The District Court correctly concluded that, despite an unequal distribution of the Estate, "The evidence is Ralph and Jeanne were exacerbated with their children, knew exactly what they were doing, and sought and received professional legal advice to accomplish a different outcome, and executed such." See Memorandum Decision and Order (entered November 20, 2014) at p. 38. Gary, Kathy, and Randy unsuccessfully demanded more money from the Corporation. They then publicly insulted and embarrassed their parents before their parents' neighbors and peers. Unbowed, they lobbied the Clark Fork Pend Oreille Conservancy not to move forward with a conservation easement on any portion of the Company's property. For good measure, they unsuccessfully sued to appoint a guardian and conservator over their mother and then sued their father for good measure. On appeal they simply claim that Sheila didn't join them in their efforts, and therefore, with respect to them, their disinheritance must be the product of undue influence. There are no material facts

which support such a claim.

b. Evidence Regarding Jim's Expressed Desires for the Property.

Appellants infer that Jim had some unexpressed intentions with regard to the property, and that he kept those intentions from his parents so as to unduly influence them in their determination to execute the Sixth Amendment. Once again, this is an argument borne of conjecture and speculation. It flies in the face of the undisputed material facts.

For example, Appellants allege at Paragraph 39 of their Complaint that Jim (in October of 2007) provided Ralph and Jeanne with "a binder containing 600 pages of negative articles about conservation easements." R., Vol. I, p. 41. Appellants further allege that their parents were aware in October of 2010 that Jim believed the property should at least be developed in part. Id. at pp. 52-53.

When Ralph and Jeanne initially met with Wallace (in the company of Klatt, attorney Hull, and Jim), Jim expressed to those in attendance that he believed that there were some areas on the property that should be developed. See Wallace Deposition at p. 40. According to Wallace, Jim did not say that he supported a conservation easement, just that he would at least be open to it. Jim's "vision," as made known to his parents, Klatt, Hull, and Wallace, included "saving the lakefront," and putting a Conservation easement on the forest, with the partial development and sale of the property. See Wallace Deposition at Ex. 2. Jim has affirmed that he has every intention of seeing that Green Enterprises places a Conservation easement on a portion of the property. See Declaration

of Plaintiffs' counsel (filed November 4, 2014) at Ex. A, p. 211.[7]

The undisputed material facts show that in October of 2011, Ralph and Jeanne, in Wallace's words, "were frustrated and tired of the process of dealing with Gary, Kathy, and Randy." See Wallace Declaration at p. 7. By that point in time, the Appellants had maligned their parents before their parents' neighbors, refused to cooperate with the Conservancy in executing the LOI with respect to a Conservation easement, polled all of the Company's shareholders (including their parents) as to their individual histories of "dementia," sent representatives of Adult Protection Services to their parents' home, and engaged independent counsel (Mr. Finney) to continue to fan the fires of discontent. Based upon the Appellants' own sworn allegations in this case, their parents were aware that Jim was of the belief that portions of the property should be developed and that only portions should be placed in a Conservation easement. Mr. Wallace, a member of the Idaho State Bar for forty-five (45) years, testified that, "Ralph advised [him] to prepare a Sixth Amendment to the Trust, giving everything to Jim, because Ralph and Jeanne were worried about the other children and thought that Jim was best able to follow his parents' wishes." See Wallace Declaration at pp. 7-8. In so doing, Wallace never discussed the same with Jim nor did he take any direction from anyone

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[7]As with many factual "allegations" made in Appellants' opening Brief before this Court, there are no citations to the record and liberties are taken. For example, Appellants claim that Jim "has submitted an application to put somewhere between 40-60 homesites on the same 280 acres that were designed for a Conservation easement when he signed the LOI [with the Conservancy]." See Appellants' Brief at p. 42. The citation for this statement is to page 6 of Jim Green's August 29, 2014 Declaration, which is an illustrative map of the property that has nothing to do with any such application as alleged by Appellants.

other than Ralph and Jeanne. Id. These undisputed facts show that there is no evidence of a result indicating undue influence.

2. Susceptibility to Undue Influence.

The District Court held that when viewing the evidence and inferences in a light most favorable to the Appellants, a genuine issue of material fact existed as to whether Jeanne Green was subject to undue influence because of her difficulty in handling her business affairs. See Memorandum Decision and Order (entered November 20, 2014) at p. 24. However, there was no evidence offered that Ralph was susceptible to undue influence. As set forth in Section IV.C, supra, the Sixth Amendment was valid with either the signature of Ralph or Jeanne. Hence, the existence of an issue of fact as to Jeanne's susceptibility to undue influence is of no substantive significance.

Appellants argue that "Ralph was taken advantage of," but offer no evidence of the same. To withstand a motion for summary judgment, the Plaintiffs' case must be anchored in something more solid than speculation. Edwards v. Conchemco, Inc., 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986). Appellants suggest that Ralph must have been susceptible to undue influence because the Corporation, while Ralph was President, executed a long-term lease of a cabin site to Jim at a below market rate. In actuality, the same offer which Ralph caused the Corporation to present to Jim was presented to all shareholders, including the Appellants. See Magnuson Declaration (filed August 29, 2014) at Ex. H. Independent professional advice confirmed to both the Corporation and to Jim that the transaction was appropriate and, based on the same, Ralph and Jeanne caused the

Corporation to extend the same lease offer to the Appellants. Id. The Appellants not only spurned the offer, they caused attorney Finney to send his April 18, 2011 letter, which questioned the competency of Ralph and Jeanne directly with their neighbors. See Magnuson Declaration (filed August 29, 2014) at Ex. H and Hull Declaration at Ex. G.

Despite being angered and hurt, Ralph and Jeanne caused the Corporation to again extend the offer of a below-market lease of corporate property to the Appellants. See Magnuson Declaration (filed August 29, 2014) at Ex. H. In response, Ralph received another letter from Finney which said that Ralph's proposal raised more questions "over competency" and "capacity to serve." See Declaration of Eric Swartz (filed November 4, 2014) at Ex. B. (Ex. 9). Ralph's general feeling, after receiving Finney's letter, was anger and frustration. Id. at Ex. B (Klatt Deposition), p. 241.

The ultimate irony of Appellants' undue emphasis on Jim's Lease from the Corporation is evident from the record. Appellants brought suit against Ralph, Jim, and the Corporation. See Magnuson Declaration (filed August 29, 2014) at Ex. M. As Plaintiffs, the Appellants raised numerous shareholder claims, including the propriety of Jim's below-market Lease. Id. On December 19, 2012, the same month in which Ralph executed the TEDRA Agreement, and fourteen (14) months after Ralph executed the Sixth Amendment, the Appellants and Ralph entered into a "Mediated Settlement Agreement." Id. at Ex. Q. As part of that Agreement, the Appellants' claims related to Jim's Lease were fully, finally, and completely released. Id. at Ex. Q, p. 2, ¶ G. Apparently, Appellants took no issue with Ralph's ability to exercise independent judgment,

uninfluenced by any third-party or person, in executing a Mediated Settlement Agreement, a fact which wholly-vitiates their otherwise unsupported allegation that Ralph was otherwise subject to undue influence.

3. Opportunity to Exert Undue Influence.

Appellants assert, "Jim had the opportunity to exert undue influence over his parents." See Appellants' Brief at p. 45. They then proceed to fail to establish any material fact that supports the allegation. For example, Appellants state, "[H]e [Jim] was around his parents more than the other children." Id. Yet there is no supporting citation of evidence.

Similarly, Appellants claim that Jim attended five (5) Board meetings in 2011 with his parents. Id. at p. 46. Since Jim, Ralph, and Jeanne were serving as the Corporation's three (3) Board members at the time, Jim's conduct constitutes no nefarious activity. There are no allegations of what exactly Jim was doing at a Board meeting that somehow constituted an opportunity to exercise undue influence.

The Appellants' next claim that "Jim had access to his parents' agents." Id. Apparently, the Appellants would have this Court believe that four (4) members of the Idaho State Bar (Hull, Wallace, Boyd, and Fitzpatrick) were all unduly influenced by Jim or that they all neglected their independent professional duties to Ralph and Jeanne solely to advance an agenda only of Jim's urging. Appellants make much of the fact that Jim attended his parents' first meeting with Rich Wallace on April 29, 2011. They neglect to note that attorney Tevis Hull was also present, as was

Steve Klatt. Moreover, they do not note that Wallace never again met with Jim until Wallace was deposed three (3) years later in this proceeding. Nor do they note that Wallace had numerous subsequent meetings and phone conversations with Ralph and Jeanne (perhaps ten (10) to fifteen (15)), all outside of Jim's presence. See Wallace Declaration at ¶¶ 14 and 18.

Appellants make no mention of the following additional undisputed facts. First, Ralph (not Jim) hired Klatt to represent the Corporation. See Klatt Declaration (filed August 29, 2014) at ¶ 9. Second, Ralph (not Jim) asked Klatt if he knew an estate planning lawyer. Id. at ¶ 11. Third, Hull testified that Ralph (not Jim) also asked him for an estate planning attorney referral. See Hull Declaration (filed August 29,2 014) at pp. 6-7. Finally, Appellants claim that Klatt falsely informed the Clark Fork Pend Oreille Conservancy that the Appellants opposed the concept of a Conservation easement. See Appellants' Brief at p. 48. Yet, the Conservancy's representatives themselves testified that the Appellants opposed the concept of a Conservation easement based upon the Appellants' own communications to the Conservancy. See Magnuson Declaration at Ex. D, pp. 30-32. Simply put, Appellants failed to offer any material facts showing any opportunity on the part of Jim to exercise undue influence.

4. A Disposition to Exert Undue Influence.

In Gmeiner v. Yacte, this Court discussed at length the factors to be examined as part of the "disposition to exert undue influence" element. The Court noted that a "beneficiary of a grantor's largesse will be viewed more suspiciously if he has been active in encouraging the transfer, in

contacting the attorney or in preparing and typing the documents." Gmeiner v. Yacte, 100 Idaho at 8.

> While none of the above factors is per se indicative of undue influence . . . , it is clear that undue influence is less likely to be found where it can be shown that the grant was not made at the request, suggestion or direction of the grantee . . . ; where the grantee was not active in the preparation or execution of the documents . . . ; or where disinterested advice was sought and third parties were informed of the grantor's intentions.

Id.

Ralph and Jeanne communicated their desires to no less than three (3) independent professionals who are members of the Idaho State Bar. Jim did not prepare his parents' estate documents, including the Sixth Amendment. For purposes of summary judgment, other than being advised that his parents' Trust held their shares in Green Enterprises, Jim had no knowledge of what, if anything, his parents had done by way of estate planning. See Declaration of James Green (filed August 29, 2014) at ¶¶ 15-16. Jim never saw the Sixth Amendment, nor was he aware of it, until November of 2012, over one year after its execution. Under the Gmeiner factors, there are no disputed issues of material fact that show or can show that Jim had a disposition to exert undue influence with respect to the Sixth Amendment.

The remainder of Appellants' argument with respect to the "disposition" element is simply a rehash of all other factually-unsupported arguments advanced by Appellants. Appellants bemoan that Jim has cast them "as the horrible children who antagonized their parents until they finally disinherited them." See Appellants' Brief at p. 49. Regrettably, if the shoe fits, wear it. The

undisputed facts at bar show a callous indifference on the part of Appellants, if not a malevolent intent, with respect to their elderly parents. Appellants publicly embarrassed their parents, made unreasonable demands, attempted to interfere with their independence, rebuffed their desires and requests, sarcastically-inquired about the existence of "dementia," and topped it all off by unsuccessfully suing for the appointment of a guardian and a conservator over their mother while separately suing their father for corporate mismanagement. What makes this sordid tale all the more incredible is that Appellants' conduct was undertaken after attorney Reubens offered the following advice:

> [Y]ou currently only own slightly more than ten percent (10%) of the total Corporation. Your parents have no obligations to leave any other assets to you, and you may find out that in pursuing this matter, you will be "cut out" of any further inheritance. If as a result of your activity, your parents decide to leave everything to the 'favored children,' your interests will never exceed the ten percent (10%) value that you now have.

See Magnuson Declaration at Ex. A, pp. 1598-1599.

E. The District Court Did Not Ignore "Circumstantial Evidence."

Appellants argue that the District Court erred by ignoring circumstantial evidence offered as to the elements of undue influence. Appellants' argument should be rejected. While circumstantial evidence can create a genuine issue of material fact, in order to withstand a motion for summary judgment, the evidence, even if circumstantial, must be something more solid than speculation. Edwards v. Conchemco, 111 Idaho at 853. In the face of undisputed facts conclusively establishing that Ralph and Jeanne's wishes were communicated to independent professionals who documented

those wishes to the exclusion of Jim and without his knowledge or participation, Appellants are left with nothing more than speculation about unsupported phantoms and conspiracies. To some degree, one can understand that this is a natural product of the Appellants' conduct. They lack the independence or self-awareness to appreciate or accept responsibility for the method and manner by which they treated their parents. Yet their parents were not mistaken. Their parents, hurt, angered, and exasperated, turned to professionals for assistance. Those are the undisputed material facts.

To simply respond by claiming "my parents would never do that" does not in and of itself create an issue of fact. The Appellants' beliefs are not objectively verified by any admissible fact. The District Court acted properly in granting summary judgment. In this regard, even if there was some minuscule issue of fact (a point not conceded by Jim), it was within the District Court's province, as the finder of fact, to arrive at the most probable inference.

> When an action, as here, will be tried before the Court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences . . . .

Big Wood Ranch, LLC v. Water Users' Assn. of Broadford, 152 Idaho 225, 229, 345 P.3d 1015 (2015).

F. The District Court Properly Struck the Declaration of Bennett Blum, M.D.

On December 30, 2013, the Court entered its Scheduling Order, requiring that Plaintiffs disclose all expert witnesses by July 28, 2014. R., Vol. I, p. 154. Pursuant to the parties'

Stipulation, Plaintiffs' expert witness disclosure date was extended to October 31, 2014. R., Vol. II, pp. 351-52.

On November 4, 2014, prior to the November 18, 2014 hearing on the Defendants' Motion for Summary Judgment (which had been continued at the Plaintiffs' request), Plaintiffs filed the Declaration of Bennett Blum, M.D. Defendants timely objected to the Blum Declaration, and moved to strike the same. Appellants now assign error to the District Court's Order striking the Blum Declaration.

First, there is no question that Appellants failed to comply with the terms of the Court's Scheduling Order, as amended at their request, by disclosing Dr. Blum as an expert before October 31, 2014. See Supplemental Memorandum (filed November 13, 2014) at p. 3.

Second, Blum's Declaration indicates that he was provided with a copy of Dr. Wolfe's examining report of Jeanne Green, which was conducted as part of the guardianship/conservatorship proceeding (Bonner County Case No. CV-12-0244) under stipulated terms adopted by Court Order. Under the terms of said Order (entered June 26, 2012), the Appellants to this proceeding agreed that Dr. Wolfe's report "shall be filed with the Court under seal." See Magnuson Declaration (filed August 29, 2014) at Ex. D. The Order contains additional provisions acknowledging that any information provided by Jeanne to Dr. Wolfe would not constitute a waiver of Jeanne's physician-patient privilege. Id. Notwithstanding the same, Appellants then provided Dr. Blum with a copy of Dr. Wolfe's report without Jeanne's consent and without obtaining permission from Judge

Buchanan, who had previously sealed the report.

According to the remainder of the Blum Declaration, Blum essentially limited his review to the pleadings the parties had filed on summary judgment, including the deposition transcripts appended thereto. It is perhaps more telling to note what Blum did not review. Blum made no independent inquiry of any independent professional advisor who had assisted Ralph or Jeanne in the implementation of their objectives (Hull, Wallace, Fitzpatrick, or Klatt). Blum made no inquiry of Mr. Boyd, appointed as Special Representative for Jeanne in the TEDRA proceeding and as guardian ad litem in this proceeding. Blum made no inquiry of Jeanne or Jim. In other words, Blum looked at the same materials submitted to the Court for its consideration on summary judgment, with no additional investigation or analysis, and attempted to substitute his opinion for that of the Court.

The admissibility of expert testimony is within the trial court's discretion. Clair v. Clair, 153 Idaho 278, 290, 281 P.3d 115 (2012). On appeal, a District Court's decision will not be overturned absent an abuse of discretion. Id.

For an expert opinion to be admissible, there must be reasons, or factual bases, set forth to support the opinion. In J-U-B Engineers v. Security Ins. Co. of Hartford, 146 Idaho 311, 316, 193 P.3d 858 (2008), this Court decided that opinions which "were silent as to the basis" were properly excluded from evidence. "We have held that it is incumbent upon an expert to set forth specific facts upon which an opinion is based." Id.

In Coombs v. Curnow, 148 Idaho 129, 140, 219 P.3d 453 (2009), this Court held:

> In determining whether expert testimony is admissible, a Court must evaluate "the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion."

Id. (citations omitted). Blum's Declaration is utterly devoid of any reasoning whatsoever. Blum simply states that he has reviewed the matters on file and that he opines that Ralph and Jeanne were subject to undue influence and that the disinheritance of the Appellants was the result of Jim's undue influence. The District Court struck Blum's Declaration, reasoning:

> Blum's Affidavit completely fails [to offer any factual basis in support of Blum's opinions]. Blum does not set forth one single fact, one shred of evidence, to support any of his opinion. Admissibility of an expert's opinion depends on the validity of the expert's reasoning and methodology, rather than his or her ultimate conclusion .... Blum's opinion sets forth no reasoning, no methodology. Blum's opinions are entirely baseless. Blum's opinions are the epitome of conclusory.

See Memorandum Decision and Order (entered November 20, 2014) at p. 15. In light of the applicable standards, Appellants have failed to demonstrate that the District Court's Order, striking the Blum Declaration, constituted an abuse of discretion.

G. Appellants Have Shown No "Bias" Meriting the Appointment of a Different Judge on Remand.

Appellants suggest that Judge Mitchell was somehow predisposed or biased because he ordered the Appellants to pay for defense counsels' time in attending depositions necessitated solely by Appellants' last minute request to continue the summary judgment hearing. The Court will note that the Defendants' Motions for summary judgment were filed in a timely manner under the Court's Scheduling Order. Appellants filed their opposing materials, consisting of a Memorandum and four

(4) Affidavits. Then, on a Friday, three (3) days before the hearing set on the Motion for Summary Judgment, the Appellants moved to continue the hearing. R., Vol. I, pp. 385-87. The District Court expressed concern that the Appellants had made the motion at the last minute when the reasons that they relied upon in support of the requested extension were known to them the day they received the Motion. Tr., September 29, 2014, p. 12. Because the Defendants were prepared to proceed, and because the Appellants had acted in a dilatory manner, the Court conditioned the continuance upon the Appellants' payment of the fees incurred by defense counsel in attending the depositions for which Appellants had sought additional time.

Appellants further claim bias because the District Court took issue with the Appellants' claim that they had been "disinherited." One of the elements the Appellants were required to prove in order to substantiate a claim of undue influence was whether or not there was "a result indicating undue influence." Gmeiner v. Yacte, 100 Idaho at 6-7. In this regard, the Court should consider whether or not the disposition was "unnatural" or otherwise failed to provide for the family of Ralph and Jeanne. To this end, the Court noted that Ralph and Jeanne had not left the Appellants with nothing. In fact, Ralph and Jeanne had given each of the Appellants ten percent (10%) interests in Green Enterprises, Inc. The Court's observations in this regard evidence no bias but rather a practical recognition that despite the Appellants' untoward actions towards their parents, their parents had still taken care of them.

V. CONCLUSION.

Based upon the reasons and authorities set forth above, Respondents respectfully request that the District Court's Judgment be affirmed in its entirety and that Respondents be awarded their costs on appeal.

Dated this 19th day of April, 2016.

JOHN F. MAGNUSON
Attorney for Respondents
James Green and the Ralph
Maurice and Jeanne Green
Revocable Inter Vivos Trust