8-23-2016

Forbush v. Sagecrest Multi Family Respondent's Brief 1 Dckt. 44053

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as a natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL, Plaintiffs-Appellants, vs. SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC., and JON KALSBEEK, individually and as President of the Sagecrest Multi Family Property Owners' Association, Defendants-Respondents.	Supreme Court Case No. 44053 District Court No. CV-PI-2013-04325

RESPONDENT JON KALSBEEK'S BRIEF

Appeal from the District Court of the Fourth Judicial District
Of the State of Idaho, in and for the County of Ada
The Honorable Cheri C. Copsey, Presiding.

John M. Howell
Matthew G. Gunn
BARNUM HOWELL, PLLC
380 S. 4th Street, Suite 104
PO Box 2616
Boise, ID 83701-2616
Attorneys for Jon Kalsbeek

G. Bryan Ulmer
Tyson E. Logan
Michael F. Lutz
THE SPENCE LAW FIRM
PO Box 548, 15 S. Jackson St.
Jackson, WY 83001
Attorney for Plaintiffs-Appellants

Charles F. Peterson, Jr.
PETERSON LAWYERS
913 W. River Street, Ste. 400
Boise, ID 83702
Attorneys for Plaintiffs-Appellants

Michael J. Elia
Craig D. Stacey
MOORE & ELIA, LLP
PO Box 6756
Boise, ID 83707
Attorneys for Sagecrest Multi Family Property Owners' Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Idaho State Cases

Federal Cases

Statutes

Idaho Rules of Civil Procedure

Federal Rules of Civil Procedure

Idaho Appellate Rules

Reference Materials

STATEMENT OF THE CASE

A. *Nature of the Case.*

Plaintiff-Appellant McQuen Forbush died of carbon monoxide poisoning on November 10, 2012 while staying at an apartment located in the Sagecrest Apartment Complex ("Sagecrest") in Meridian, Idaho. Mr. Forbush died in apartment #4624, an apartment in a Sagecrest building owned by the Matthew E. Switzer Trust ("Switzer"). Mr. Forbush and his girlfriend, Plaintiff-Appellant Breanna Halowell, were guests of the Apartment's tenant, Adra Kipper.

The Sagecrest Property Owner's Association ("POA"), a non-profit corporation, is made up of owners of individual Sagecrest apartment buildings, including the Matthew E. Switzer Trust. At all relevant times, Defendant-Respondent Jon Kalsbeek was the president of the POA.

First Rate Property Management ("FRPM" or "First Rate"), a property management company, contracted with the POA to maintain, *inter alia*, the common areas at Sagecrest. First Rate also contracted with individual unit owners, including Switzer, to maintain the interior of individual units.

Forbush/Halowell[1] brought three claims against Mr. Kalsbeek: (1) negligence; (2) negligent infliction of emotional distress; and (3) intentional infliction of emotional distress. On January 15, 2015 the District Court, the Honorable Cheri Copsey presiding, granted summary judgment with regards to all three claims in favor of Mr. Kalsbeek. Forbush/Halowell timely appealed.

[1] Mr. Kalsbeek utilizes the reference "Forbush/Halowell" to be consistent with the District Court's characterization of the Plaintiff-Appellants and to comply with I. A. R. 35(d).

B. *Factual History.*

The POA Officers do not dispute the facts as recited by Forbush/Halowell in their brief. As was their wont before the District Court below, however, Forbush/Halowell omit integral, undisputed facts, including numerous undisputed facts relied upon by the District Court to render its decision. Accordingly, the facts set forth herein are not disputes of the facts cited by Forbush/Halowell; rather, they represent supplementation of the undisputed facts necessary to understand the lengthy and complete factual history of this case and the basis of the District Court's decision. Additionally, to the extent Forbush/Halowell editorialize and insert legal argument and conclusions into their recitation of the facts, Mr. Kalsbeek does not concede the efficacy of such.

Forbush/Halowell's factual recitation does not tell the complete narrative of the events at issue, but rather selective facts are presented from a much greater universe thereof. Mr. Kalsbeek supplements and fills in the narrative gaps left by Forbush/Halowell's factual recitation with further undisputed facts.

1. **Control of Unit Interiors**.

Forbush/Halowell state that "Mr. Kalsbeek and the POA exercised actual control over unit interiors." (*Appellants' Br.*, 3-4.) In their supporting facts, however, Forbush/Halowell omit the undisputed text of Article III of Sagecrest's Declaration of Covenants, Conditions and Restrictions ("CC&Rs"), which differentiates between the areas of Sagecrest to be maintained by the POA from those to be maintained by individual owners. Section 3.3 governs "Maintenance of Lots and Four Plexes" and states in relevant part:

A. The [Property Owner's] Association shall maintain the following:

1. The following portions of the **exterior of each Four Plex**: siding, structural portions of the Four Plexes, street lamps mounted on the Four Plexes, and all other exterior surface areas, including the entry way, exterior stairs, railings and decks and roofs.

2. All Sidewalks on the Property.

3. All landscaping on the Property, including, without limitation, all grass areas, shrubs, trees and bushes that are on Residential Lots and the Recreational Center Lot, and all planters, whether they are on Residential Lots or in the common areas.

4. Drainage Facilities, including the Drainage Lot.

5. The Common Areas.

6. Any perimeter fence.

7. The main lines, service lines, valves, and sprinkler heads of the PUIS [pressurized irrigation system] on the Property to the extent that they are not maintained by the Nampa Meridian Irrigation District.

B. The Owner shall maintain the following:

1. The following portions of the exterior of each Four Plex: windows, doors, exterior air conditioning units and all other exterior maintenance not performed by the Association; and

2. The **entire interior of the Four Plexes**, including but not limited to flooring, ceilings, walls and wall coverings, appliances, plumbing and plumbing fixtures, all interior components of the heating and air conditioning system.

(R., 000539-000540 (emphasis added).)

Section 3.5 of the CCRs similarly delegates responsibility for unit interiors to owners: "Each Owner shall have the exclusive right to . . . , repair, . . . or otherwise maintain, . . . the interior portions of their Four Plex, . . ." (R., 000540.)

In accordance with the division of control between unit interiors and exteriors, First Rate had two distinct agreements: (1) an agreement with the POA to manage exterior areas of

Sagecrest for which the POA was responsible (R. 000098-000102); and (2) separate agreements with individual owners such as Switzer to manage interior areas of units for which the individual owner thereof was responsible (R. 000104-000113).

Section 9 of the agreement between First Rate and owners such as Switzer governed maintenance and repairs of the interior of a unit. Section 9 defines bi-annual preventative maintenance, including dryer vents and smoke detectors, as an owner responsibility and grants First Rate authority to incur expenses less than $250.00 without gaining prior approval of the owner:

> 9.1 AGENT is authorized to make or cause to be made, through contracted services or otherwise, all ordinary repairs and replacements reasonably necessary to preserve and maintain the PREMISES in an attractive condition and in good state of repair for the operating efficiency of the PREMISES, and all alterations required to comply with lease requirements, governmental regulations, or insurance requirements. AGENT is also authorized to purchase or rent, on OWNER'S behalf, all equipment, tools, appliances, materials, supplies, and other items necessary for the management, maintenance, or operation of the PREMISES. Such maintenance expenses will be paid by the OWNER and through the OPERATING ACCOUNT. AGENT shall not be liable to OWNER for any act, omission, or breach of duty of such independent contractors or suppliers.
>
> ...
>
> 9.4 AGENT shall contract for bi-annual Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs . . .
>
> 9.5 The expense incurred for any one transaction shall not exceed **$250.00**, except monthly or recurring operating charges and emergency repairs, unless otherwise authorized by the OWNER, typically done via email.

(R., 000108 (emphasis in original).) First Rate possessed a power of attorney to effect an owner's repair duties: "to order, direct, superintend, and manage all repairs, alterations, and

improvements . . . in general, to do and perform all acts and things incident to management of the PREMISES . . . ." (R., 000112, ¶ 19.2.)

2. **Management of First Rate by the POA**.

Forbush/Halowell state that "Mr. Kalsbeek and the POA's ability to micromanage [First Rate Property Management] is explained in part by the POA's power to hire, fire, and set FRPM's compensation for managing unit interiors." (*Appellants' Br.*, 4-6.) In their supporting facts, however, Forbush/Halowell omit the undisputed fact that the POA and First Rate jointly set unit rental rates based on First Rate's recommendations and premised on a comparative market analysis: "Rental amount shall be determined by mutual agreement between the Sagecrest POA and AGENT. OWNER understands that the AGENT recommends rental amounts based on a Comparative Market Analysis of similar properties within the areas of the OWNER'S property." (R., 000106, ¶ 5.3.) Forbush/Halowell also omit the undisputed fact that First Rate had methods of compensation other than rental receipts in its contract with individual owners: "At AGENTS discretion, a 5% fee of gross invoices for all labor and material arranged for and contracted by AGENT for remodeling or repair of the PREMISES may be charged." (R., 000108, ¶ 9.2.)

Regarding compensation of First Rate employees, it is undisputed that the POA compensated only those First Rate employees who were "fully assigned to the ASSOCIATION'S premises and fully dedicated to the ASSOCIATION'S business." (R., 000106, ¶ 5.1.)

Forbush/Halowell also omit the undisputed fact that, pursuant to the contract between the POA and First Rate, "the President of the [POA] is hereby designated as the authorized

representative of [POA] to give and receive notices, approvals, and instructions hereunder." (R., 000101, ¶ 7.2.) It is undisputed that Mr. Kalsbeek as the President of the POA at all times relevant hereto.

3. **POA's Power to Repair Sagecrest Unit Interiors**.

Forbush/Halowell state that the Sagecrest "CCRs specifically grant the POA power to repair, maintain, and restore unit interiors, including through its agent, FRPM." (*Appellants Br.*, 6-7.) This statement is not an undisputed fact; rather, it is a legal argument and conclusion. The undisputed facts relevant to this issue and omitted by Forbush/Halowell are set forth in Section B.1 of this Statement of the Case, discussing control of unit interiors, *supra*.

4. **Awareness of CO Issues**.

Forbush/Halowell state that "Mr. Kalsbeek and the POA were long aware of the deadly CO threat." (*Appellants' Br.*, 7-8.) In their supporting facts, however, Forbush/Halowell omit the undisputed fact that First Rate and the POA recognized and proceeded with the understanding that replacement of faulty water heaters was an interior, and thus owner, issue. In mid to late July 2011, the POA officers had a string of emails related to the replacement of water heaters wherein Jon Kalsbeek noted to the other POA officers that "FRPM is working with each owner that has this brand of water heater – to deal with replacement." (R. 000897.)

On July 20, 2011, Tara Gaertner of First Rate confirmed that the water heater was an interior, owner issue:

> I talked to Jon about this last night, he said since this is an owner expense that I'll have to send something to the owners and have them decide what they want to do. . . If the owners decide they do not want to then they will have to sign a waiver basically stating that if a tenant dies FRPM & Intermountain Gas is not held liable for it . . . I am delivering notices to all doors today.

(R., 000368.) *See also* July 21, 2011 email from Sheila Thomason of First Rate regarding water heater replacement ("We definitely don't want to kill the owners pockets.") (R., 000366.)

On July 29, 2011 Ms. Thomason sent owners an email regarding the CO issues and confirmed that replacement of water heaters was an interior, owner issue:

> As owners you are required to provide a safe living environment . . . I will need a written response from each of you for documentation purposes . . . Please let me know which building you own and if I have approval to replace your water heater(s) listed.

(R., 691-693.)

On August 3, 2011 Mr. Kalsbeek wrote to Tony Drost of First Rate and reiterated that "the water heaters are interior items of each unit and is therefore an owners [sic] choice on how to handle this situation, not the POA. This makes the costs for inspections and evaluations an owner may request, owner responsibility." (R., 000786.) Tony Drost, President of First Rate, responded by affirming that "[e]veryone understands that" water heater replacement was an owner issue. (*Id.*)

Sagecrest held an annual meeting on October 31, 2011 which Switzer attended. (R., 000221.) The minutes thereof reflect that the replacement of water heaters was discussed and characterized as an owner issue:

> C. SMELL OF GAS AND WATER HEATER REPLACEMENT
>
> ...
>
> President Kalsbeek requested FRPM to send a report showing which units have had the above work done. This list should show which units have had the work done as well as the name of the new water heater and current cost to include parts and labor.
>
> It was requested that the Sagecrest Resident Managers test for CO at the time they are replacing the filters and notify the appropriate owner should there be concerns to discuss options.

> Upon turnovers, Resident Managers are to encourage owners to replace the smoke detectors near the water heater area with a dual CO and smoke detector that hooks up to the current electrical plug with a battery as back up.
>
> It was requested that FRPM send out a master list showing exactly which units have had what work done on them. Additionally, they would like a list of pricing and manufacturer and model number for all major appliances (refrigerators, stove, microwaves, dishwashers, washers and dryers) as some owners state that they were able to find them cheaper, which should not be the case. This list should include the pricing for Freeze stats, PRV, expansion tank, water heater replacement, fresh air vent replacement, installation of louvers on closet doors, and cost of CO/smoke detectors. Also, include the cost to install the A/C condenser locks to protect from huffing?

(R., 000222-000223.)

On November 9, 2011 Ms. Gaertner of First Rate emailed all unit owners regarding maintenance matters, including water heater replacement options and hard-wired CO detector installation options, and asked the owners to "let me know what you would like to have done and I can get that scheduled as soon as possible." (R., 000228-000229.) Switzer responded to Ms. Gaertner's email the same day, stating that he was "trying to weigh costs vs benefits." (R., 000231.)

In early 2012 First Rate posted a written notice regarding CO issues on individual unit doors, including Unit #4624. The notice informed tenants that the "owner of your property has been informed of the situation. [Water heaters] are scheduled for replacement starting on Monday until the job is complete." (R., 000239.) Furthermore, it is undisputed that Ms. Kipper removed the batteries from the CO detector in Unit #4624 approximately two to three weeks before the death of Mr. Forbush, and that there were no batteries in the CO detector when Mr. Forbush's death occurred. (R., Aug. p. 42.)

5. **Hard-Wired CO Detector Installation**.

Forbush/Halowell state that "Mr. Kalsbeek and the POA controlled hard-wired CO installation." (*Appellants' Br.*, 8-11.) In their supporting facts, however, Forbush/Halowell omit the undisputed text of the agreement between First Rate and property owners which permitted First Rate to perform interior repairs not exceeding $250.00 without owner approval:

> 9.5 The expense incurred for any one transaction shall not exceed **$250.00**, except monthly or recurring operating charges and emergency repairs, unless otherwise authorized by the OWNER, typically done via email.

(R., 000108 (emphasis in original).) Forbush/Halowell further omit the undisputed fact that on November 9, 2011 Ms. Gaertner of First Rate emailed Switzer as the owner of Unit #4624 and informed Switzer of options for dealing with the CO issues, including replacing the water heater at a cost of $650.00 and installing a hard-wired CO detector at a cost of $62.48. (R., 000228-000229). It is undisputed that Mr. Switzer declined both options. (R., 000231; *see also* R.000964.)

6. **Professional Preventive Maintenance**.

Forbush/Halowell state that "Mr. Kalsbeek and the POA controlled whether a professional plumber would be hired to perform preventive maintenance." (*Appellants' Br.*, 11.) In their supporting facts, however, Forbush/Halowell omit the undisputed text of the agreement between First Rate and property owners such as Switzer which permitted First Rate to contract for bi-annual preventive maintenance at an owner's expense:

> 9.4 AGENT shall contract for bi-annual Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs . . .

(R., 000108 (emphasis in original).) Furthermore, Forbush/Halowell editorialize by stating that Mr. Kalsbeek "objected" to professional maintenance on April 15, 2011, but the plain language of Mr. Kalsbeek's email speaks for itself. (R., 000424.)

7. **CO Warnings**.

Forbush/Halowell state that "Mr. Kalsbeek and the POA controlled whether owners and tenants would receive adequate warnings of the deadly CO threat." (*Appellants' Br.*, 12-13.) In their supporting facts, however, Forbush/Halowell omit the undisputed text of the warning posted on all units, including Unit #4624, by First Rate in early 2012 regarding CO issues, which reiterated that replacement of water heaters was an owner issue and was pending: "The owner of your property has been informed of the situation. [Water heaters] are scheduled for replacement starting on Monday until the job is complete." (R., 000239.) Furthermore, it is undisputed that Ms. Kipper removed the batteries from the CO detector in Unit #4624 approximately two to three weeks before the death of Mr. Forbush, and that there were no batteries in the CO detector when Mr. Forbush's death occurred. (R., Aug. p. 42.)

C. ***Procedural History***.

Forbush/Halowell brought diverse and numerous claims against diverse and numerous defendants: Sagecrest POA; POA officers Jon Kalsbeek, Jay Arla, Chris Schwab, David Meisner; First Rate Property Management; First Rate President Tony Drost; Sagecrest Development, LLC; Park Center Plumbing, Inc.; Widgeon Mechanical, LLC; A. O. Smith, Inc.; Matthew Switzer; Matthew E. Switzer, Trust; Anfinson Plumbing, LLP; Goodman Manufacturing Company, LP; Anfinson Plumbing, LLP; Daniel Bakken; H&H Properties, LLC; and Intermountain Gas Company. (R., 000001.)

It is undisputed that Forbush/Halowell asserted only three claims against Mr. Kalsbeek as an individual: (1) negligence (R., 000620-000621.); (2) negligent infliction of emotional distress (R., 000622-000623.); and (3) intentional infliction of emotional harm (R., 000612-000613.). Indeed, Forbush/Halowell's Fourth Amended Complaint, the operative complaint in this case, makes only four factual allegations regarding the individual POA Officers in its 190 paragraphs:

> On information and belief, First Rate informed the president and officers of the Sagecrest POA and building owner the trustee of the Matthew E. Switzer, Trust of the dangerous conditions caused by the defective water heaters well before November 10, 2012. However, despite this knowledge, none of these defendants took the appropriate action to rectify or alleviate the deadly situation that existed in Building 46 and throughout the Sagecrest complex. (R., 000606, ¶ 33.)

> Following PFC Forbush's death, the Sagecrest POA, and each of its officers named herein sent a letter to First Rate prohibiting First Rate from warning other tenants of the dangers at the complex. 'I am instructing you to make no comments and to have no discussion with anyone, whether media representatives, tenants, owners, or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning.' (R., 000608, ¶ 42.)

> In September 2011, the Sagecrest Board of Directors approved a contract with Engineering Consultants Incorporated "ECI," a local engineering firm, to conduct a 'Water Heater Site Investigation' at Sagecrest. ECI confirmed the problem was with the 'flame arrestor' or intake vent clogging on A.O. Smtih water heaters and reported its findings to the Sagecrest Board of Directors and First Rate. (R., 000609, ¶ 49.)

> Defendant Kalsbeek interceded after the March 2012 meeting with Intermountain Gas and directed First Rate personnel to disregard the testing procedures as instructed by Intermountain Gas. Kalsbeek directed First Rate not to test the water heater flu, but to test in the apartment. (R., 000610, ¶ 53.)

ISSUES ON APPEAL

As characterized by Forbush/Halowell, there exist four issues on appeal:

1. Genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek and the POA owed premises liability duties.

2. Genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek and the POA owed duties resulting from voluntary undertakings.

3. Genuine issues of material fact preclude summary judgment on whether the POA is vicariously liable for FRPM's acts and omissions.

4. Genuine issues of material fact preclude summary judgment on whether Mr. Kalsbeek is liable for his own acts and omissions-regardless of capacity.

ADDITIONAL ISSUE PRESENTED ON APPEAL - ATTORNEY'S FEES AND COSTS

5. Pursuant to Idaho Appellate Rules 35(b)(5), 40, and 41(a), Idaho Code § 12-121, and I. R. C. P. 54, Mr. Kalsbeek is entitled to an award of his costs and attorney fees incurred on appeal.

ARGUMENT

A. ***Standard of Appellate Review.***

"Appellate review of a district court's ruling on a motion for summary judgment is the same as that required of the district judge when ruling on the motion." *Steele v. Spokesman–Review*, 138 Idaho 249, 251, 61 P.3d 606, 608 (2002). Under I. R. C. P. 56(c), summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I. R. C. P. 56(c). This Court must "liberally construe ... the record in favor of the party opposing the motion and draw ... all reasonable inferences and conclusions in that party's favor." *Steele*, 138 Idaho at 251, 61 P.3d at 608. Summary judgment is not appropriate "[i]f the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions." *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Additionally, the Idaho Supreme Court has clarified the standard of review utilized in reviewing a district court's denial of a motion to reconsider. "[W]hen the district court grants summary judgment and then denies a motion for reconsideration, 'this Court must determine

whether the evidence presented a genuine issue of material fact to defeat summary judgment.' This means the Court reviews the district court's denial of a motion for reconsideration *de novo*." *Bremer, LLC v. E. Greenacres Irrigation Dist.*, 155 Idaho 736, 744, 316 P.3d 652, 660 (2013) (*quoting Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012)).

One of the principal purposes of the summary judgment rule "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986) (interpreting Fed. R. Civ. P. 56, analogous to I. R. C. P. 56); *see also Chacon v. Sperry Corp.*, 111 Idaho 270, 275, 732 P.2d 814 819 (1986) ("[P]art of the reason for adopting the Federal Rules of Civil Procedure in Idaho, and interpreting our own rules adopted from the federal courts as uniformly as possible with the federal cases, was to establish a uniform practice and procedure in both the federal and state courts in the State of Idaho."). Summary judgment is not "a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp.,* 477 U.S. at 327.

Forbush/Halowell scantly discussed the appellate standard of review in their opening brief, but such standard is of heightened criticality in this case for two reasons. First, a dispute of material fact must be both genuine and material in order to defeat a properly supported motion for summary judgment. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment ...." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Rather, there must be no genuine dispute as to any material fact in order for a case to survive summary judgment. Material facts

are those "that might affect the outcome of the suit." *Id.* at 248. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Thus, a dispute of fact that is either conjured from the ether or irrelevant to the issues at hand is insufficient to defeat a motion for summary judgment. Forbush/Halowell have taken a scattershot approach to their appeal, eliciting numerous facts that do not create genuine issues and are not relevant to the issues before the Court, presumably in the hope that simply by stating enough facts, a genuine issue of material fact will be presumed, when in truth no such genuine, material factual dispute exists.

Second, only reasonable inferences may be drawn from the undisputed facts. Unreasonable and unsupported inferences may not be permissibly drawn and are likewise insufficient to defeat a properly supported motion for summary judgment. Where a party opposing summary judgment fails to produce "substantial factual evidence to combat summary judgment and there is 'overwhelming evidence' favoring the moving party, it may be unreasonable to draw an inference contrary to the movant's interpretation of the facts, and therefore a summary judgment would be appropriate even when [state of mind] is at issue." *Barnes v. Arden Mayfair*, Inc., 759 F.2d 676, 681 (9th Cir.1985) (citations omitted).

For example, a party opposing a motion for summary judgment may not reasonably infer that a party was negligent simply based on an undisputed fact that the party was driving a vehicle that was involved in a collision. Such inference stretches a lone undisputed fact beyond its breaking point. In this case Forbush/Halowell have drawn a number of significant inferences

which cannot be supported by the undisputed facts underlying them, and such unreasonable inferences are insufficient to defeat a properly supported motion for summary judgment.

B. ***Mr. Kalsbeek Owed Forbush/Halowell No Individual Premises Liability Duties.***

Forbush/Halowell's first assigned error concerns premises liability duties. (*Appellants' Br.*, 14-17.) Forbush/Halowell, however, did not raise a premises liability theory of negligence with regards to Mr. Kalsbeek individually before the District Court. (Tr., 92-112; R., 000645-000664.) It is important to bear in mind the difference between (1) a premises liability-based negligence claim against the POA as an entity; and (2) a premises liability-based negligence claim against Mr. Kalsbeek as an individual. The first claim requires a right to control the premises on the part of the POA as an entity. The second claim requires a right to control the premises on the part of Mr. Kalsbeek as an individual.

Not only did Forbush/Halowell fail to argue a theory of premises liability before the District Court, they did not even assert a claim of premises liability against Mr. Kalsbeek as an individual. In asserting their negligence claim against Mr. Kalsbeek, Forbush/Halowell alleged that "Defendant[ ] . . . Jon Kalsbeek . . . owed PFC Forbush and Breanna Halowell a duty to exercise reasonable care under the circumstances." (R., 000612, ¶ 66.) In alleging a "duty to exercise reasonable care under the circumstances" on the part of Mr. Kalsbeek, Forbush/Halowell are affirmatively declining to allege premises liability because reasonable care under the circumstances is not the standard of care owed under a premises liability theory of negligence. Rather, the standard of care owed under a premises liability-based negligence theory is determined by the status of the plaintiff:

> Idaho courts have maintained that the duty of owners and possessors of land is determined by the status of the person injured on the land (i.e., whether the person is a

> invitee, licensee or trespasser) . . . A landowner owes an invitee the duty to keep the premises in a reasonably safe condition, or to warn of hidden or concealed dangers . . . The duty owed to a licensee is narrow. A landowner is only required to share with the licensee knowledge of dangerous conditions or activities on the land.

Holzheimer v. Johannesen, 125 Idaho 397, 399–400, 871 P.2d 814, 816–17 (1994). To validly plead a premises liability claim against Mr. Kalsbeek, Forbush/Halowell were obligated to allege their status on the premises, allege the corresponding duty of care, and allege how Mr. Kalsbeek breached that specific standard of care. By pleading only a general "duty to exercise reasonable care under the circumstances", Forbush/Halowell failed to plead a premises liability-based negligence claim, as well as the requisite status of the plaintiffs and corresponding duty of care owed.

Forbush/Halowell are thus foreclosed from now advancing a premises liability-based negligence claim against Mr. Kalsbeek as an individual because appellate court review is "limited to the evidence, theories and arguments that were presented . . . below." *State v. Vierra*, 125 Idaho 465, 469, 872 P.2d 728, 731 (Idaho Ct. App.1994). *See also Dominguez ex rel. Hamp v. Evergreen Resources, Inc.*, 142 Idaho 7, 14, 121 P.3d 938, 945 (2005). (appellate courts will not consider new arguments or claims raised for the first time on appeal.)

Enriquez v. Idaho Power Co., 152 Idaho 562, 272 P.3d 534 (2012) is directly on point and forecloses Forbush/Halowell from asserting a premises liability-based negligence claim against Mr. Kalsbeek as an individual for the first time on appeal. Enriquez asserted on appeal that Idaho Power was negligent "in two respects: (1) by permitting the power line to fall; and (2) by failing to have adequate safety measures in place to prevent injuries from the fallen power line." *Id.* at 565, 272 P.3d at 537. Idaho Power moved for a directed verdict, and Enriquez argued only the second negligence theory in opposition thereto. *Id.* at 566, 272 P.3d at 538. The

Supreme Court ruled that Enriquez was precluded from asserting the first negligence theory raised on appeal: "As this Court has long held that it will not consider issues raised for the first time on appeal and Enriquez did not advance a theory of negligence based upon line failure before the district court, we will address only the second theory of negligence." *Id.*

Applied to this case, *Enriquez* precludes Forbush/Halowell from asserting a premises liability-based negligence claim against Mr. Kalsbeek as an individual because such claim was not argued, or even pled, below. *See also KEB Enterprises, L.P. v. Smedley*, 140 Idaho 746, 752, 101 P.3d 690, 696 (2004) ("This Court's longstanding rule is that it will not consider issues raised for the first time on appeal."); *Grasmick v. Otis Elevator Co.*, 817 F. 2d 88, 89 (10th Cir. 1987) ("Mr. Grasmick may not raise a theory here which he failed to raise in the trial court" because a party "generally cannot lose in a trial court on one theory and thereafter prevail on appeal on a different theory." (*quoting United States v. Lattauzio*, 748 F.2d 559, 561 (10th Cir. 1984))).

Should the Court substantively consider Forbush/Halowell's premises liability-based negligence claim against Mr. Kalsbeek as an individual, Forbush/Halowell allege that it was the POA as an entity, and not Mr. Kalsbeek as an individual, that "actually exercised control over important aspects of unit interiors . . . ." (*Appellants' Br.*, 15.) Forbush/Halowell cite three areas in which the POA exercised some manner of control: "(a) hard-wired CO detector installation; (b) professional preventative maintenance; and (c) warnings to owners and tenants." (*Id.*) Forbush/Halowell cite the fact that the Sagecrest CCRs "gave the POA Board absolute discretion to deem an owner's maintenance of his or her property unsatisfactory", but such limited right of

entry undisputedly did not inure to Mr. Kalsbeek as an individual, only to the POA as an entity. (*Appellants' Br.*, 16.)

Forbush/Halowell's argument fails with regards to Mr. Kalsbeek individually because the undisputed facts support no reasonable inference that Mr. Kalsbeek, as an individual and distinct from the POA, exercised control over the interior of Unit #4624. The plain language of the CCRs limited right of entry did not inure to Mr. Kalsbeek as an individual, only to the POA as an entity. Furthermore, it is undisputed that under the CCRs, Sagecrest owners were responsible for "[t]he entire interior of the Four Plexes," and "[e]ach Owner shall have the exclusive right to . . . , repair, . . . or otherwise maintain, . . . the interior portions of their Four Plex, ..." (R., 000540.)

Furthermore, Forbush/Halowell's argument wholly ignore the corporate form in concluding that because the POA allegedly exercised control, Mr. Kalsbeek individually exercised the same control simply by virtue of his role as an officer thereof. *See., e.g.,* Idaho Code § 30-30-406 (A member of a corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation.). Using this logic, Forbush/Halowell must necessarily agree that a director of Wal-Mart individually controls real estate owned by Wal-Mart as an entity, simply by virtue of holding office, and is personally susceptible to premises liability-based negligence claims for injuries suffered thereon. Forbush/Halowell's argument renders the corporate form a nullity, a legal fiction. Forbush/Halowell are, in effect, yet again trying to make a veil-piercing claim without having so pled. Piercing the corporate veil is "[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." BLACK'S LAW DICTIONARY 1184 (8th

ed.2004). The theory allows the fact finder to disregard the corporate form, thereby making individuals liable for corporate debts or making corporate assets reachable to satisfy obligations of the individual. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 917, 591 P.2d 1078, 1084 (1979).

The District Court committed no error in concluding that Mr. Kalsbeek owed Forbush/Halowell no duty as an individual.

C. *Mr. Kalsbeek Assumed No Individual Duties.*

Forbush/Halowell's second assigned error concerns voluntarily assumed duties. (*Appellants' Br.*, 18-22.) The District Court concluded that Mr. Kalsbeek owed Forbush/Halowell no duties in any regard: "So I'm granting summary judgment to Mr. Kalsbeek. . . . There is no evidence and I want to emphasize that. Not just a dispute of fact that's material. There are no facts here showing that there is a duty to Ms. Kipper." (Tr., 109-111.)

Forbush/Halowell argue that Mr. Kalsbeek voluntarily undertook three duties: (1) installation of hard-wired CO detectors; (2) preventative maintenance; and (3) CO warnings. (*Appellants' Br.*, 18-19.)

Under Idaho law, the elements of a negligence claim are "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." *Shea v. Kevic Corp.*, 156 Idaho 540, 328 P.3d 520, 528 (2014). "Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability. Idaho law recognizes two circumstances in which a person has an affirmative duty of care to another: a special relationship or an assumed duty based on an undertaking." *Beers v. Corp. of*

Pres. of Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 686, 316 P.3d 92, 98 (2013).

Forbush/Halowell contend only that Mr. Kalsbeek assumed a duty based on an undertaking, and do not allege the existence of a special relationship between themselves and Mr. Kalsbeek such as would give rise to a duty. "Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so." *Baccus v. Ameripride Servs.*, Inc., 145 Idaho 346, 350 (2008). "In such a case, the acting party has a duty to perform that act in a non-negligent manner." *Beers*, 316 P.3d at 100. "When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed." *Martin v. Twin Falls Sch. Dist. No. 411*, 138 Idaho 146, 150 (2002). For example, "[a] beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so, but that same beach-goer has no obligation to rescue anyone else." *Beers*, 316 P.3d at 100.

In the three contexts cited by Forbush/Halowell, the undisputed facts do not support a reasonable inference that Mr. Kalsbeek, as an individual, aside and apart from his role as an officer of the POA, voluntarily assumed a duty of care vis-à-vis Forbush/Halowell. The District Court committed no error in so concluding: "So I'm granting summary judgment to Mr. Kalsbeek. . . . There is no evidence and I want to emphasize that. Not just a dispute of fact that's material. There are no facts here showing that there is a duty to Ms. Kipper." (Tr., 110-111.)

It is important yet again to bear in mind the distinction between claims against the POA as an entity, of which Mr. Kalsbeek was undisputedly and officer and played an active role in the affairs thereof, and claims against Mr. Kalsbeek as an individual. A member or officer of a

corporation is generally not liable for corporate acts. *See., e.g.,* Idaho Code § 30-30-406 (A member of a corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation.). It is axiomatic that a plaintiff who slips on ice walking into Amazon's corporate office does not have a cause of action against Jeff Bezos as an individual based solely on Mr. Bezos's status as CEO of Amazon. Conversely, an officer of a corporation is not immune from individual liability for his individual and personally tortious conduct simply because of his officer status. If Mr. Bezos chose to personally drive an Amazon order to a customer, Mr. Bezos is individually and personally liable to the extent he negligently fails to yield at a stop sign and strikes a pedestrian in a crosswalk. In such instances the corporate officer has personally acted and in so doing caused a tort.

In this case the undisputed facts lead to no reasonable inference other than the inference that Mr. Kalsbeek took no personal and individual actions constituting a voluntary assumption of a duty of care vis-à-vis Forbush/Halowell. As they did below to attempt to avoid this fatal flaw, Forbush/Halowell repeatedly and unavailingly attempt to hold Mr. Kalsbeek personally and individually liable for corporate actions of the Sagecrest POA. Mr. Kalsbeek's undisputed actions were the actions of an active corporate officer and did not constitute a personal and individual assumption of a duty of care.

1. Installation of Hard-Wired CO Detectors.

Forbush/Halowell allege that Mr. Kalsbeek voluntarily assumed a personal, individual duty with regards to the installation of hard-wired CO detectors. (*Appellants' Br.,* 15.)

As factual support, Forbush/Halowell cite First Rate's Liz Loop's characterization of Sagecrest's CO detector installation policies and procedures as "Jon's Way". (*Appellants' Br.,* 8-

11.) Forbush/Halowell do not allege that Mr. Kalsbeek personally installed or attempted to install a CO detector in Unit #4624.

Forbush/Halowell ignore essential, undisputed facts. It is undisputed that Section 3.3 of the CCRs placed responsibility for unit interiors with the owners thereof. It is undisputed that Section 9.5 of the agreement between Mr. Switzer and First Rate permitted First Rate to perform repairs costing less than $250.00 without first obtaining Switzer's approval. It is undisputed that on November 9, 2011 First Rate informed Switzer of the cost of water heater replacement, as well as the cost of hard-wired CO detector installation which was less than $250.00, and that Switzer declined to take action. It is undisputed that, pursuant to the contract between the POA and First Rate, "the President of the [POA] is hereby designated as the authorized representative of [POA] to give and receive notices, approvals, and instructions hereunder."

Given the entirety of the undisputed facts, it cannot be reasonably inferred that Mr, Kalsbeek personally and individually assumed a duty, owed to Forbush/Halowell, to install a CO detector in Unit #4624. Mr. Kalsbeek, as the president of the POA, was appropriately and reasonably involved in the information gathering process related to CO detector installation, but such involvement does not reasonably support an inference of voluntary assumption of a personal duty by Mr. Kalsbeek.

2. Preventive Maintenance.

Forbush/Halowell allege that Mr. Kalsbeek voluntarily assumed a personal, individual duty with regards to the performance preventive maintenance in Unit #4624. (*Appellants' Br.*, 15.)

As factual support, Forbush/Halowell allege that on April 15, 2011 Mr. Kalsbeek "objected" to professional maintenance. (*Appellants' Br.,* 11.) Forbush/Halowell do not allege that Mr. Kalsbeek personally performed, or attempted to perform, professional maintenance in Unit #4624.

The undisputed, plain language of Mr. Kalsbeek's April 15, 2011 speaks for itself insofar as Mr. Kalsbeek asked questions regarding the cost of professional maintenance. (R., 000424.) Furthermore, it is undisputed that, pursuant to Section 9.4 of the contract between Mr. Switzer and First Rate, First Rate had the authority to, and was responsible for, scheduling bi-annual professional maintenance at Mr. Switzer's expense. It is undisputed that, pursuant to the contract between the POA and First Rate, "the President of the [POA] is hereby designated as the authorized representative of [POA] to give and receive notices, approvals, and instructions hereunder."

The undisputed facts do not allow for a reasonable inference that Mr. Kalsbeek voluntarily assumed a personal, individual duty to perform professional maintenance in Unit #4624. Mr. Kalsbeek, as the president of the POA, was appropriately and reasonably involved in the information gathering process related to professional maintenance, but such involvement does not support an inference of voluntary assumption of a personal duty by Mr. Kalsbeek. Mr. Kalsbeek's April 15, 2011 email regarding professional maintenance does not present a genuine disputed fact as the plain language thereof undisputedly speaks for itself. There is no evidence that Mr. Kalsbeek personally performed, or attempted to perform, professional maintenance in Unit #4624. It is undisputed that First Rate was contractually obligated to schedule such preventative maintenance at Mr. Switzer's expense.

3. **CO Warnings.**

Forbush/Halowell allege that Mr. Kalsbeek voluntarily assumed a personal, individual duty with regards to CO warnings in Unit #4624. (*Appellants' Br.,* 15.)

In support, Forbush/Halowell cite two instances in which Mr. Kalsbeek precluded First Rate from sending CO information directly to owners or tenants: (1) a March 9, 2012 email exchange with Ms. Gaertner of First Rate (R., 000738); and (2) the Ben Davis letter (R., 407-408, 702.) Forbush/Halowell do not allege that Mr. Kalsbeek personally provided, or attempted to provide, any warnings to Unit #4624.

Forbush/Halowell omit the undisputed fact that on October 31, 2011 CO issues were presented to and discussed at the Sagecrest POA annual meeting. Forbush/Halowell also omit the undisputed fact that on November 9, 2011 Ms. Gaertner of First Rate emailed Mr. Switzer regarding CO issues and presented Mr. Switzer options for water heater replacement and hard-wired CO detector installation. Forbush/Halowell also omit the undisputed fact that in early 2012 First Rate provided notice to all tenants, including those in Unit #4624, regarding CO and CO detector issues. It is undisputed that, pursuant to the contract between the POA and First Rate, "the President of the [POA] is hereby designated as the authorized representative of [POA] to give and receive notices, approvals, and instructions hereunder."

The undisputed facts do not allow for a reasonable inference that Mr. Kalsbeek voluntarily assumed a personal, individual duty to warn regarding CO issues in Unit #4624. Mr. Kalsbeek, as the president of the POA, was appropriately and reasonably involved in the information gathering process related to CO issues, but such involvement does not support an inference of voluntary assumption of a personal duty to warn by Mr. Kalsbeek. The undisputed

facts demonstrate that owners and tenants were, in fact, warned of CO issues and, in the case of owners, presented with options to address the same.

D. ***Mr. Kalsbeek is Not Vicariously Liable for FRPM's Acts and Omissions.***

Forbush/Halowell's third assigned error concerns assumed duties. (*Appellants' Br.*, 22-25.) The District Court did not rule regarding this claim as related to Mr. Kalsbeek (Tr., 92-112), for reasons discussed in greater detail, *ante*.

As a threshold issue, it does not appear Forbush/Halowell intend to advance this argument against Mr. Kalsbeek as an individual. "A reasonable juror could find that FRPM was the POA's agent . . . ." (*Appellants' Br.*, 22 (emphasis added).) "The POA exercised control over FRPM's activities and prevented FRPM from taking specific actions . . . ." (*Appellants' Br.*, 24 (emphasis added).)

Furthermore, it is undisputed that Forbush/Halowell asserted a claim of vicarious liability against other defendants but not Mr. Kalsbeek: "Defendant First Rate is vicariously liable for the negligence and/or recklessness of its President Drost." (R., 000615, ¶ 80.); "Defendant Tony Drost was personally negligent and/or reckless, or knew of and approved and/or ratified the negligence and/or recklessness of First Rate's employees. Such breaches and violations are imputed to the Defendants Sagecrest POA and Matthew E. Switzer, Trust, as at all times First Rate was acting as the agent for these Defendants." (R., 000615, ¶¶ 75-76.) Forbush/Halowell did not present a vicarious liability argument against Mr. Kalsbeek to the District Court. (Tr., 97-106.)

As discussed *supra*, appellate court review is "limited to the evidence, theories and arguments that were presented . . . below." *State v. Vierra*, 125 Idaho 465, 469, 872 P.2d 728,

731 (Idaho App.1994). Consequently, appellate courts will not consider new arguments raised for the first time on appeal. *Dominguez ex rel. Hamp v. Evergreen Resources, Inc.*, 142 Idaho 7, 14, 121 P.3d 938, 945 (2005).

Substantively, assuming *arguendo* that the Forbush/Halowell asserted a claim of vicarious liability against Mr. Kalsbeek and raised it below, such claim fails as the undisputed facts support no reasonable inference that Mr. Kalsbeek was First Rate's master with regards to Unit #4624. It is undisputed that First Rate, in accordance with the division of control between unit interiors and exteriors, had two distinct agreements: (1) an agreement with the POA, not Mr. Kalsbeek as an individual, to manage exterior areas of Sagecrest for which the POA was responsible (R. 000098-000102); and (2) separate agreements with individual owners to manage interior areas of units for which the individual owner thereof was responsible (R. 000104-000113). Thus, to the extent Mr. Kalsbeek as an individual had a contract with First Rate, the subject matter of such agreement was limited to units owned by Mr. Kalsbeek. Specifically regarding the Unit #4624, First Rate's agreement was with Matthew Switzer, not Mr. Kalsbeek. (R. 000104-000113). First Rate's agreement regarding the exterior areas of Sagecrest was undisputedly with the POA as entity and not with Mr. Kalsbeek as an individual.

E. *Mr. Kalsbeek is Individually Immune as an Officer of a Non-Profit Corporation.*

Forbush/Halowell's fourth assigned error concerns Mr. Kalsbeek's individual immunity as an officer of a non-profit corporation. (*Appellants' Br.*, 25-30.) At the outset, it should be noted that the District Court never reached the immunity issue (Tr., 92-112), because it ruled that Mr. Kalsbeek owed Forbush/Halowell no individual duties. Immunity is not implicated absent

liability. Accordingly, unless and until Forbush/Halowell establish liability on the part of Mr. Kalsbeek, any inquiry into immunity is premature and unripe.

Should the Court, however, choose to substantively address the immunity issue, the undisputed and unrebutted facts lead to only to a reasonable inference that Mr. Kalsbeek is individually immune from Forbush/Halowell's claims pursuant to Idaho Code § 30-30-623.

Idaho Code § 30-30-623(1)[2] sets forth the standards of conduct for officers of a non-profit corporation such as Sagecrest:

> An officer with discretionary authority shall discharge his duties under that authority:
>
> (a) In good faith;
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (c) In a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.

Section 30-30-623(2) permits an officer in discharging his duties to "rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by . . . persons as to matters the officer reasonably believes are within the person's professional or expert competence."

Section 30-30-623 also provides immunity for an officer who complies therewith: "An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer acted in compliance with this section." I.C. § 30-30-623(4). Significantly, the immunity provided by § 30-30-623(4) is not limited to an officer's liability to the corporation or its members, but includes an officer's liability to any "other person." *See also Wisdom v. Centerville Fire Dist., Inc.*, 2008 WL 4372009 *1-*2 (D. Idaho Sept. 22, 2008)

[2] Codified at Idaho Code § 30-3-85 at the time of argument and briefing below.

(adopting Report and Recommendation of magistrate judge concluding "that the officers of the corporation are immune from liability under Idaho's Non-profit Corporation Act, Idaho Code § [30-30-623(4)] . . . .").

In this case, it is undisputed and unrebutted that Mr. Kalsbeek discharged his duties as an officer of Sagecrest in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances. (R, 000531-000532.) It is further undisputed the Mr. Kalsbeek reasonably believed that he was acting in the best interests of Sagecrest and its members. (*Id.*)

Forbush/Halowell argue both that Mr. Kalsbeek's unrebutted testimony is (1) conclusory, and (2) disputed. (*Appellants Br.*, 29-30.) The key, however, is that Mr. Kalsbeek's testimony is unrebutted and states undisputed facts which serve a burden-shifting function. *See Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838, 41 P.3d 263, 266 (2002) ("If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.) Now, long after the fact, Forbush/Halowell argue that the facts set forth in Mr. Kalsbeek's affidavit are actually disputed. Even assuming *arguendo* that assertion to be true, Forbush/Halowell chose not to rebut Mr. Kalsbeek's affidavit below. Thus, on the record before this Court, Mr. Kalsbeek's affidavit is unrebutted and Mr. Kalsbeek has properly supported his claimed immunity pursuant to § 30-30-623.

It bears repeating, however, that the District Court ruled that Mr. Kalsbeek owed no individual duty, and was thus not liable, to Forbush/Halowell. Accordingly, the District Court

did not reach the issue of immunity, as immunity is only implicated if and when liability is established. The District Court cannot have erred with regards to an issue it did not reach or otherwise consider. It is thus premature to consider immunity issues unless and until individual liability on the part of Mr. Kalsbeek is established and, for the reasons set forth herein, the District Court did not err in ruling that Mr. Kalsbeek owed Forbush/Halowell no individual duties.

F. ***Mr. Kalsbeek is Entitled to an Award of Attorney's Fees and Costs on Appeal.***

An award of attorney fees is appropriate where the appellate court is left with an abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation. *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001) (citations omitted). In particular, an award will be made if an appeal does no more than simply invite the appellate court to second guess a trial court on conflicting evidence, or if the law is well settled and the appellant has made no substantial showing that the lower court misapplied the law, *Johnson v. Edwards*, 113 Idaho 660, 662, 747 P.2d 69, 71 (1987) (citations omitted), or on review of discretionary decisions, when no cogent challenge is presented with regard to the trial judge's exercise of discretion. *McPherson v. McPherson*, 112 Idaho 402, 407, 732 P.2d 371, 376 (Ct. App. 1987). An award is also justified where the appellant raises arguments for the first time on appeal. *Turner v. Cold Springs Canyon Limited Partnership*, 143 Idaho 227, 230, 141 P.3d 1096, 1099 (2006).

In this case, Forbush/Halowell appeal the entry of summary judgment entered in favor of Mr. Kalsbeek. The District Court found that there existed no disputed issues of material fact and that Mr. Kalsbeek was entitled to entry of summary judgment in his favor as a matter of law. The

Forbush/Halowell have simply reiterated the same arguments or have presented entirely new arguments not raised before the District Court, and omitted numerous, critical undisputed facts to the point of submitting an openly misleading factual representation. Mr. Kalsbeek has been forced to defend this appeal and incur substantial attorney fees. There is no evidence that the trial court misapplied the law or committed error. Accordingly, Mr. Kalsbeek requests an award of attorney's fees on appeal.

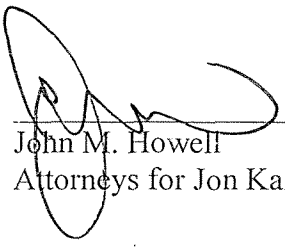
Regarding costs, Idaho Appellate Rule 40 states that costs "shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." The Mr. Kalsbeek is unaware of any other provision of law which would forbid their recovery of costs should they prevail. Accordingly, Mr. Kalsbeek asks the Court to award his costs as the prevailing party.

CONCLUSION

For the reasons stated herein, the District Court did not err in its grant of summary judgment in favor of Mr. Kalsbeek. Accordingly, the District Court's decision is appropriately affirmed. Further, Mr. Kalsbeek should be awarded attorney's fees and costs on appeal.

Respectfully submitted this 23rd day of August, 2016.

BARNUM HOWELL, PLLC



John M. Howell
Attorneys for Jon Kalsbeek

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of August, 2016, two bound copies of this document were served on each party via U.S. Mail at the following addresses:

Charles F. Peterson, Jr.
PETERSON LAWYERS
913 W. River Street, Ste. 400
Boise, ID 83702
Attorneys for Plaintiffs-Appellants

G. Bryan Ulmer
Tyson E. Logan
Michael F. Lutz
THE SPENCE LAW FIRM
PO Box 548, 15 S. Jackson St.
Jackson, WY 83001
Attorney for Plaintiffs-Appellants

Michael J. Elia
Craig D. Stacey
MOORE & ELIA, LLP
PO Box 6756
Boise, ID 83707
Attorneys for Sagecrest Multi Family Property Owners' Association, Inc.

John M. Howell