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Swafford v. Huntsman Springs, Inc. Respondent's Brief Dckt. 44240

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD L. SWAFFORD AND MARGARET SWAFFORD, PLAINTIFFS/APPELLANTS, v. HUNTSMAN SPRINGS, INC., an Idaho Corporation, DEFENDANT/RESPONDENT.	Supreme Court Docket No.: 44240 Trial Court Case No.: CV-2015-203

RESPONDENT'S BRIEF

Appeal from the District of the Seventh Judicial District of the State of Idaho, in and for the County of Teton

Honorable Gregory W. Moeller, District Judge

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STATEMENT OF CASE

This is a statute of limitations case. The Swaffords' filed their Complaint in July 2015 alleging that Huntsman Springs restricted access to the Swaffords' lot from Primrose Street: The Swaffords incorrectly understood from marketing materials that their property would be adjacent to Primrose Street and Huntsman Springs built a physical divide between the Swaffords' lot and Primrose Street.

This alleged breach occurred no later than August 2008. The Swaffords' filed their Complaint in July 2015—seven years after the alleged breach.

The trial court dismissed the Swaffords' untimely Complaint because the breach of contract occurred in 2008 and the language of the Complaint itself showed the Swaffords knew or could have known of the breach of contract in 2008. There are no genuine issues of material fact that the pertinent statutes of limitations bar the Swaffords' Complaint.

STATEMENT OF FACTS

1. The Swaffords considered lack of access to their lot from Primrose Street as a breach of contract.

The Swaffords claimed that Huntsman Springs breached a contract when Huntsman Springs restricted access to the Swaffords' lot from Primrose Street. In a letter dated August 2014, and attached to the Swaffords' Complaint, Ron Swafford wrote that Huntsman Springs allegedly breached its agreement as follows:

> "Huntsman Springs has seriously neglected the development of these lots, and has seriously damaged their value and marketability by building a dividing partition consisting of a tree line and a roadway on the Huntsman Springs side, which now separates my lot from Huntsman Springs. The development has changed the address, ingress and egress, as the lot has absolutely no access from Primrose."

...

> "You have effectively changed the address, as well as the access to my lot from the Primrose paved roadway to a gravel road appearing outside of Huntsman Springs."[1]

In August 2014 Ron Swafford considered restriction of access to his lot from Primrose Street a breach of contract. Huntsman Springs built the dividing partition in 2008 restricting access to the Swaffords' lot in 2008. Huntsman Springs changed the ingress and egress from the Swaffords' lot in 2008.

The Swaffords' Complaint alleges that Huntsman Springs breached its contract by restricting access from Primrose Street:

- Huntsman Springs allegedly represented on marketing materials that the Swaffords' lot would be "directly adjacent to Primrose Street."[2]
- Huntsman Springs allegedly failed to provide the Swaffords' lot with "ingress and egress from Primrose Street."[3]
- Huntsman Springs allegedly breached its contract by "visually partitioning" the Swaffords' lot from the remainder of Huntsman Springs.[4]
- Huntsman Springs allegedly breached its express warranties to the Swaffords by failing to access to their lot from Primrose Street.[5]
- Huntsman Springs failed to provide "access to lot 50 from Primrose Street, through a park on the west boundary."[6]
- Huntsman Springs failed to place "entrance access to the lot from Primrose Street."[7]
- Huntsman Springs misrepresented that "commercial ingress and egress would be from Primrose Street as ingress or egress could not reasonably be placed across a family walk and bike path."[8]

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[1] Complaint, Attachment F, R. pp.48-49 (August 20 2014).
[2] Complaint, ¶ 6, R. pp.2-3.
[3] Complaint, ¶ 24, R. p.5.
[4] Complaint, ¶ 27, R. p.6.
[5] Complaint, ¶¶ 31-32, R. pp.6-7.
[6] Complaint, ¶ 13, R. p.3.
[7] Complaint, ¶ 18, R. p.4.

- Huntsman Springs breached the contract because "access to and from the commercial lots would be from Primrose Street, due to the family walk way and bike path being on the east side of Lot 50."[9]

- Huntsman Springs allegedly breached a duty of good faith and fair dealing when it "intentionally created a barrier between the remainder of Huntsman Springs and the commercial lots," and Huntsman Springs "segregated" the Swaffords' lot from the rest of the development.[10]

- "The Master Plan represented that access to and from 195 Primrose Street. Further, it would not be reasonable nor feasible to place commercial access and ingress across family walk ways and bike paths."[11]

Central to the Swaffords' breach of contract claims is their lot's lack of access to Primrose Street. They claim that Huntsman Springs failed to follow the Master Plat and effectively partitioned the lot from the rest of the development.

2. Access to the Swaffords' lot from Primrose Street was obstructed no later than August 2008.

There are no genuine issues of material fact that the Swaffords' lot was segregated from Primrose Street by August 2008. The Swaffords had actual or constructive knowledge of the following facts:

- ***July 20, 2007***—The Swaffords' plat was recorded in Teton County showing a park separating the Swaffords' lot from Primrose Street.[12]

- ***September 21, 2007***—The Swaffords closed on their property and received a warranty deed and title insurance policy that showed a park separating their property from Primrose Street.[13]

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[8] Complaint, ¶13, R. p.3.
[9] Complaint, ¶ 31, R. pp.6-7.
[10] Complaint, ¶¶ 37, 38, R. pp.7-8.
[11] Complaint, ¶17, R. p.4.
[12] Complaint, Exhibit E, R. p.45-46; Affidavit of Todd Woolstenhulme, ¶ 6, R. p.87.
[13] Affidavit of Todd Woolstenhulme, ¶ 6, R. p.87.

- **September 21, 2007**—The warranty deed for the Swaffords' lot was recorded in Teton County, Instrument #191809.[14]

- ***October 31, 2007***—Primrose Street was prepped or paved consistent with the recorded plat; the park separated the Swaffords' property from Primrose Street.[15]

- ***August 13, 2008***—Huntsman Springs completed the bike path and family walkway on the west side of the Swaffords' lot.[16]

- ***August 13, 2008***—"[T]he landscaping, walking paths, and trees directly adjacent to and the west of Lot 4 of Block 50, also identified on the recorded plat as Park 3, were completed on or before August 13, 2008."[17]

Huntsman Springs submitted facts in the form of the Affidavit of Todd Woolstenhulme, the construction manager for Huntsman Springs and the individual who oversaw all aspects of the installation, completion, and approval of the Huntsman Springs infrastructure.

STANDARD OF REVIEW

When reviewing the grant of a motion for summary judgment, this Court applies the same standard as does the trial court. *Jones v. Starnes*, 150 Idaho 257, 259, 245 P.3d 1009, 1011 (2011). Specifically, summary judgment is proper when "the pleadings, depositions, admissions and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citing I.R.C.P. 56(c)). The principle and purpose of a summary judgment rule is to isolate and dispose of factually unsupportable claims. *Sparks v. St. Lukes Regional Medical Center*, 115 Idaho 505, 768 P.2d 768 (1988). "If the evidence reveals no disputed issues of material fact, then

[14] Affidavit of Todd Woolstenhulme, Exhibit 1, R. pp.89-91.
[15] Affidavit of Todd Woolstenhulme, ¶7, R. pp.87-88.
[16] Affidavit of Todd Woolstenhulme, ¶ 7, R. pp.87-88.
[17] Affidavit of Todd Woolstenhulme, ¶ 8, R. p.88.

only a question of law remains over which this Court exercises free review." *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005).

ARGUMENT

1. The statute of limitations began to run no later than August 2008 when the alleged breach of contract "accrued."

Counts 1, 2, and 3 of the Swaffords' Complaint are all founded on breach of a written contract: Count I Breach of Contract; Count II Breach of Express Warranty; Count III Breach of Duty of Good Faith and Fair Dealing. In Idaho, "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" must be commenced within five years. I.C. § 5-216. The statute of limitations does not begin to run "until the cause of action accrues," or in other words, a claim "accrues upon the breach of the contract." *Spence v. Howell,* 126 Idaho 763, 770, 890 P.2d 714, 721 (1995). The Idaho Court of Appeals put it another way in *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct.App.1982): "The cause of action accrues, and the statute of limitations begins to run, when a party may sue another."

According to the Complaint, Huntsman Springs, Inc. misrepresented to the Swaffords the nature of the Swaffords' lot relative to the rest of the subdivision: their lot was not "adjacent" to Primrose Street, bike paths and landscaping interfered with ingress and egress to the lot, trees and landscaping created a "barrier" between the Swaffords' lot and the rest of the subdivision, and bike paths and walkways were constructed on the wrong side of the Swaffords' lot. These alleged breaches happened in 2007 and 2008. As a matter of law, they have waited too long to make the allegations they now make.

The Swaffords argued before the trial court, and repeat the argument on appeal, that they failed to fully comprehend the alleged breach of contract until they corresponded with Huntsman Springs via letter in 2014. There is no legal support for the argument that a letter from the defendant tolls the statute of limitations.

In Idaho, the statute of limitations in a contract case begins to run from the alleged "breach," not from when the plaintiff gives the defendant notice and an opportunity to repair. Idaho does have the Notice and Opportunity to Repair Act for construction cases. I.C. §§ 6-2501-2504. This is not a construction case. Even if this framework applied here, it is unclear how any "notice and opportunity to repair" restarts a statute of limitations. The concept of giving opportunity to repair prior to filing a lawsuit is intended to prevent unnecessary lawsuits; notice and opportunity to repair does not provide plaintiffs additional time to file the lawsuit. In this case, it is uncontested that the alleged breaches occurred in 2007 and 2008.

The Swaffords argue that they "were not fully aware of their damages" until they corresponded via letter with Huntsman Springs in 2014. Uncertainty about damages is not a basis for tolling or restarting the statute of limitations. "A cause of action for breach of contract accrues upon the breach even though no damage may occur until later." *Mason v. Tucker & Associates*, 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct. App. 1994) (citation omitted). In this case, the alleged damages occurred in 2007 and 2008 and they were immediately observable to the Swaffords.

2. There is no genuine issue of fact that the Swaffords had actual knowledge of the alleged contract breaches in 2008.

The Swaffords' Complaint is littered with the allegation that Huntsman Springs misrepresented the location of the Swaffords' lot: Huntsman Springs failed to place the

Swaffords' lot directly adjacent to Primrose Street, as they claimed it was depicted on advertising materials;[18] Huntsman Springs failed to provide the Swaffords' lot with "ingress and egress from Primrose Street";[19] Huntsman Springs failed to provide "access to lot 50 from Primrose Street, through a park on the west boundary";[20] Huntsman Springs failed to place "entrance access to the lot from Primrose Street";[21] Huntsman Springs misrepresented that "commercial ingress and egress would be from Primrose Street as ingress or egress could not reasonably be placed across a family walk and bike path";[22] Huntsman Springs breached the contract because "access to and from the commercial lots would be from Primrose Street, due to the family walk way and bike path being on the east side of Lot 50."[23] In short, the Swaffords' central allegation is that Huntsman Springs breached the contract when it failed to make their lot accessible from Primrose Street.

Three months after the final plat was recorded, in October 2007, Primrose Street was prepped and paved.[24] If the Swaffords were unaware of the alleged breach of contract in July 2007 when the plat was recorded, surely they were aware of the alleged breach in October 2007 when Primrose Street was paved and their property was separated from it by a strip of land. In October 2007 Mr. Swafford could have written as he did in August 2014, that a "dividing partition" separated his lot from Primrose Street, and "[t]he development has changed the address, ingress and egress, as the lot has absolutely no access from Primrose."[25] In October 2007 the Swaffords' breach of contract claims "accrued" because

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[18] Complaint, ¶ 6, R. pp.2-3.
[19] Complaint, ¶ 24, R. p.5.
[20] Complaint, ¶ 13, R. p.4.
[21] Complaint, ¶ 18, R. p.4.
[22] Complaint, ¶13, R. p.4.
[23] Complaint, ¶ 31, R. pp.6-7.
[24] Affidavit of Todd Woolstenhulme, ¶ 7, R. pp.87-88.
[25] Complaint, Attachment "F", R. p.48. As stated above, Huntsman Springs finished construction on the alleged "dividing partition" that separates the Swaffords' lot from Primrose Street back in August 2008.

that is when they could have filed this lawsuit with the same complaints they now allege. *Galbraith v. Vangas, Inc.*, 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct.App.1982) ("The cause of action accrues, and the statute of limitations begins to run, when a party may sue another.")

In August 2008, the Swaffords could have stood on their lot and observed that family walk way and bike path blocked access to their lot in the manner they now allege in the Complaint. In August 2008, the Swaffords could have observed from their property that a paved Primrose Street was not adjacent to their lot.

The Swaffords' breach of contract claim also claims that Huntsman Springs breached the contract by its placement of landscaping between the Swaffords' lot and Primrose Street. "Defendant segregated and partitioned the commercial lot from the east side of Huntsman Springs with trees and a ditch not represented in the plan."[26] The landscaping was completed by August 13, 2008.

Todd Woolstenhulme, the construction manager who oversaw the construction of the infrastructure of Huntsman Springs Subdivision stated by affidavit,

> the landscaping, walking path, and trees directly adjacent to and the west of Lot 4 of Block 50, also identified on the recorded plat as Park 3, were completed on or before August 13, 2008. Plaintiff would have had visual knowledge that the actual construction of the bike path and park landscaping did not match their expectations, as included in their Complaint, on or before August 13, 2008.[27]

If Swaffords' breach of contract claims had not accrued when Huntsman Springs recorded the plat in July 2007, and if the claims had not accrued by October 2007 when Primrose Street was paved, then surely the Swaffords' claims accrued when the landscaping was completed in the park separating their lot from Primrose Street in August 2008. With trees

[26] Complaint, ¶ 18, R. p.4.
[27] Affidavit of Todd Woolstenhulme, ¶ 8, R. p.88.

and landscaping "segregating" and "partitioning" their property from the rest of the subdivision, surely the Swaffords could have filed this very lawsuit in August 2008.

The Swaffords could have alleged in August 2008 as they now allege that Huntington Springs prevented ingress and egress to the commercial lot from Primrose Street by installing a bike path and family walkway on the west side of their lot rather than on the east side of their lot. According to the Swaffords' Complaint, "The Master Plan represented that access to and from 195 Primrose Street. Further, it would not be reasonable nor feasible to place commercial access and ingress across family walk ways and bike paths."[28] The Swaffords could have literally written this exact statement in August 2008—they could have filed this breach of contract allegation seven years ago.

Additionally, the construction of the walkways and paths in August 2008 constituted the alleged breach because the bike paths and family walk ways were not in the place the Swaffords had anticipated—the path and walkway was installed on the west side of the Swaffords' lot rather than the east side of the Swaffords' lot.[29] Again, this language from the Complaint could have been written in August 2008: "Defendant has breached the contract ... by failing to install a family walk way and bike path as identified on the Master Plan."[30] That alleged breach happened when the walkways and pathways were installed, in August 2008.

There is no genuine issue of material fact that the Swaffords knew or could have known of the alleged contract breaches in August 2008 by observing their own lot.

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[28] Complaint, ¶ 17, R. p.4.
[29] Affidavit of Todd Woolstenhulme, ¶ 8, R. p.88.
[30] Complaint, ¶ 27, R p.6.

3. There are no genuine issues of material fact that the Swaffords had constructive knowledge of the alleged contract breaches no later than 2007.

The Swaffords mistate Idaho law regarding constructive knowledge.[31] Idaho law presumes that the Swaffords knew on July 20, 2007 that Huntsman Springs was not going to place their lot adjacent to Primrose Street. The "Final Plat" that Huntsman Springs recorded in Teton County on July 20, 2017 clearly shows that a .76 acre park, Park 3, separated the Swaffords' lot from Primrose Street. The Swaffords attached this recorded plat to their Complaint as Attachment "E."

Not only did the Final Plat explicitly show the alleged breaches the Swaffords now assert, the Swaffords received a warranty deed and title insurance policy when they closed on the property in September 2007.[32]

This Court has ruled that the statute of limitations begins running based on what the plaintiffs *could have* known of the breach, not when the actually knew of the breach. *Chapin v. Stewart*, 71 Idaho 306, 310, 230 P.2d 998, 1001 (1951). If the recording of the Final Plat was insufficient to give the Swaffords constructive knowledge of the alleged contract breaches, then the warranty deed and title insurance policy they received at closing would have been sufficient.

In *Chappin*, the Idaho Supreme Court found that a deed recorded in Ada County was sufficient to begin the running of the statute of limitations. The Court reasoned,

> While it is stipulated that the appellants did not know of their interest in those lots until about a year before this suit was brought, that makes no difference, for they had the means of acquiring that knowledge, as the deed conveying the title to said lots to their father was of record during all that time in the office of the county recorder of Ada county, where said lots were situated. The means of acquiring this knowledge was open to them, and, under the facts of this case, that places them in the same position as though they had such knowledge. When one by his

[31] Appellants' Opening Brief, pp. 17-18.
[32] Affidavit of Todd Woolstenhulme, ¶ 6, R. p.87.

> own carelessness or negligence fails to acquire knowledge that is within his reach, and such information is upon the proper records which impart constructive notice, the person cannot protect himself behind the plea that he did not know facts of which the law imputes knowledge to him and thus suspend the running of the statute.

Chapin v. Stewart, 71 Idaho at 311, 230 P.2d at 1001.

In this case, Huntington Springs recorded the "Final Plat," and that recorded document contains the alleged breach of contract complained of in the Swaffords' Complaint—it clearly shows that a park prevents the Swaffords' lot from being adjacent to Primrose Street. The Swaffords also received notice at closing in September 2007 when they received their warranty deed and title insurance policy. If they did not know that there lot was not adjacent to Primrose Street in 2007, it was because by their "own carelessness or negligence they failed to acquire knowledge that was within their reach." *Id.*

In *Chapin*, the knowledge necessary to begin the running of the statute of limitations was filed away in an Ada County office building. That was sufficient "knowledge" to begin the running of the statute of limitations. In this case, the Swaffords *could have known*—and almost certainly *did* know—of the alleged breaches in 2008 because those alleged breaches were visually observable on their own property.

The following table compares the Swaffords' own allegations in their Complaint compared to what they knew or could have known in 2007 and 2008 when their claims accrued:

Allegations in Swaffords' Complaint	Swaffords' Actual or Constructive Knowledge
Huntington Springs represented to the Swaffords that their lot had a Primrose Street address and was "adjacent" to Primrose Street.[33]	***July 20, 2007***—Plat was recorded in Teton County showing a park separating the Swaffords' lot from Primrose Street.[34] ***September 21, 2007***—The Swaffords closed on their property and received a warranty deed and title insurance policy with exemptions referencing the final plat, which showed a park separating their property from Primrose Street.[35] ***October 31, 2007***—Primrose Street was prepped or paved consistent with the recorded plat; the park separated the Swaffords' property from Primrose Street.[36]
Huntsman Springs represented that it would build the bike path and family walk on the east side of the Swaffords' lot, but instead the path and walk were built on the west side of the Swaffords' lot.[37]	***August 13, 2008***—Huntsman Springs completed the bike path and family walkway on the west side of the Swaffords' lot.[38]
Huntsman Springs allegedly blocked ingress and egress to the Swaffords' lot from Primrose Street by constructing the bike path and landscaping on the west side, in "Park 3."[39]	***August 13, 2008***—Huntsman Springs completed the bike path and family walkway on the west side of the Swaffords' lot.
The Swaffords allege that Huntsman Springs "intentionally created a barrier between the remainder of Huntsman Springs and the commercial lots."[40]	***August 13, 2008***—"[T]he landscaping, walking paths, and trees directly adjacent to and the west of Lot 4 of Block 50, also identified on the recorded plat as Park 3, were completed on or before August 13, 2008."[41]

[33] Complaint, ¶ 6, R. pp.2-3.
[34] Complaint, Exhibit E, R. p.46; Affidavit of Todd Woolstenhulme, ¶ 6, R. p.87.
[35] Affidavit of Todd Woolstenhulme, ¶ 6, R. p.87
[36] Affidavit of Todd Woolstenhulme, ¶7, R. pp.87-88.
[37] Complaint, ¶¶ 31, 32, R. pp. 6-7.
[38] Affidavit of Todd Woolstenhulme, ¶ 7, R. pp.87-88.
[39] According to the Swaffords' Complaint, Huntsman Springs represented that "commercial ingress and egress would be from Primrose Street as ingress or egress could not reasonably be placed across a family walk way and bike path," and "access to and from the commercial lots would be from Primrose Street, due to the family walk way and bike path being on the east side of Lot 50." Complaint, ¶¶ 13, 31, 32, R. pp.6-7.
[40] Complaint, ¶¶ 13, 37, R. p.4.
[41] Affidavit of Todd Woolstenhulme, ¶ 8, R. p.88.

4. The Swaffords conceded that the alleged breach of contract occurred no later than August 2008 prior to filing their Complaint.

The trial court found it persuasive, though not dispositive, that the Swaffords conceded to knowing that their breach of contract claims "accrued" no later than 2008. The Swaffords sent a letter to Huntsman Springs in August 2014 and attached the letter to the Complaint they later filed. In the letter, the Swaffords acknowledged that they believed Huntsman Springs breached their contract when they separated the Swaffords' lot from Primrose Street. This is the language from the Swaffords' letter:

> Huntsman Springs has seriously neglected the development of these lots, and has seriously damaged their value and marketability by building a dividing partition consisting of a tree line and a roadway on the Huntsman Springs side, which now separates my lot from Huntsman Springs. The development has changed the address, ingress and egress, as the lot has absolutely no access from Primrose.
>
> ...
>
> You have effectively changed the address, as well as the access to my lot from the Primrose paved roadway to a gravel road appearing outside of Huntsman Springs.[42]

The trial court reasoned that this letter served as acknowledgment by the Swaffords that the breach of contract occurred many years prior. These are the words of the trial court:

> Swaffords contend that the statute of limitations only accrued when they received a letter dated September 3, 2014, informing them that Huntsman Springs did not intend to allow access to their lot from Primrose Street. However, the facts show that Huntsman Springs sent the letter in response to a letter sent by Swaffords on August 20, 2014, already alleging a breach of contract. By suggesting in their letter that they would sue if they did not receive a response, Swaffords have essentially conceded to knowing that an alleged breach of contract had already occurred.[43]

[42] Complaint, Attachment F, R. pp.47-49.
[43] Memorandum Decision on Defendant's Motion for Summary Judgment, p.5, R. p.341.

5. The Swaffords' private action claims pursuant to the Idaho Consumer Protection Act are time barred pursuant to a two-year statute of limitations.

According to the Idaho Consumer Protection Act, "[n]o private action may be brought under this act more than two (2) years after the cause of action accrues." I.C. § 48-619. As stated above, in Idaho, a cause of action accrues when one party may sue another. *See Singleton v. Pichon,* 635 P.2d 254, 256 (Idaho 1981); *Galbraith v. Vangas, Inc.,* 655 P.2d 119, 122–23 (Idaho Ct.App.1982).

The Swaffords' Complaint alleges that Huntsman Springs violated the Idaho Consumer Protection Act in the following ways: "Defendant's marketing and sales conduct for the sale of the undeveloped lots in Teton County as they relate to Plaintiffs consists of unfair and deceptive practices of conduct in trade or commerce."[44] "The conduct of Defendant through its agents and representatives was deceptive in that Defendant provided the Master Plan, recorded plat, website and promotional materials outlining future developments of undeveloped lots, with no intention of compliance."[45] While the Complaint gives no specifics, it seems reasonable to assume that the Swaffords allege that Huntsman Springs' marketing materials violated I.C. § 48-603.

The marketing materials were provided to the Swaffords in May 2007. As argued above, all of the defects alleged by the Swaffords had come to fruition by August 2008. By August 2008 the Swaffords could stand on their property with the marketing materials in hand and could observe that the property was not as they had anticipated. Again, Huntsman Springs does not concede that it misled the Swaffords, and certainly does not concede that it violated the Idaho Consumer Protection Act. All Huntsman Springs is saying is that the misrepresentations that the Swaffords now allege could have been pleaded back in August 2008 because that is when their

[44] Complaint, ¶ 43, R. pp.8-9.
[45] Complaint, ¶ 43, R. pp.8-9

claims accrued. Accordingly, that is when the statute of limitations, Idaho Code § 48-619, began to run.

6. The Swaffords' "Misrepresentation" cause of action is time barred by a three year statute of limitations.

The Swaffords' fifth cause of action is "misrepresentation." Huntsman Springs was unable to find a cause of action in Idaho for misrepresentation, so it assumes that this is a claim of "fraud." In Idaho, a cause of action for fraud is "not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Idaho Code Ann. § 5-218(4).

"Defendant provided extensive promotional material, a website, brochures and a Master Plan to Plaintiffs to influence the purchase of undeveloped real property in Huntsman Springs Phase 1."[46] "The representations were false."[47]

Again, as stated above, the marketing materials were provided in May 2007. By August 2008 the Swaffords had discovered or could have discovered the facts constituting the alleged fraud. The three year statute of limitations, Idaho Code § 5-218(4), has long since run.

ATTORNEY FEES AND COSTS ON APPEAL

Huntsman Springs moves the Court for an award of attorney fees and costs on appeal pursuant to Idaho Code § 12-120(3), 12-121, and Idaho Rule of Civil Procedure 54, and Appellate Rules 40 and 41. Section 12-120(3) provides that a prevailing party "shall be

[46] Complaint, ¶ 46, R. p.9.
[47] Complaint, ¶ 48, R. p.10.

allowed reasonable attorney's fees" in civil actions involving "commercial transactions." A "commercial transaction" includes "all transactions except transactions for personal or household purposes." I.C. § 12–120(3).

In this case, the subject of the lawsuit is a contract for a "commercial lot." The Swaffords refer to the lot at issue throughout his Complaint as a "commercial lot." At the end of the Complaint, the Swaffords petition the Court for attorney's fees pursuant to Section 12-120(3).

The Idaho Supreme Court has granted attorney fees pursuant to Idaho Code § 12-120(3) when a party prevailed at summary judgment on statute of limitations grounds. *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 154 Idaho 21, 27, 293 P.3d 645, 651 (2013). If the Court rules in Huntsman Springs' favor, Huntsman Springs moves the Court for an award of attorney's fees and costs.

Huntsman Springs is entitled to an award of attorney's fees pursuant to Idaho Code § 12-121. As stated above, Huntsman Springs is the "prevailing party." Rule 54(e)(1) states, "attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." The trial court ruled that the Swaffords' Complaint was three years too late.[48] Additionally, the trial court concluded that the Swaffords' letter, "essentially conceded to knowing that an alleged breach of contract had already occurred."[49] The Swaffords lacked any basis in law or fact to file their untimely Complaint.

Huntsman Springs moves the Court for an award of costs pursuant to Rule 54(d).

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[48] Memorandum Decision on Defendant's Motion for Summary Judgment, p.5, R. p.341.
[49] Id.

CONCLUSION

The Swaffords could have filed their Complaint in 2008 because that's when the alleged breach of contract occurred: the paving of Primrose Street, the installation of the bike and walking path, the installation of landscaping, the alleged blockage of ingress and egress from Primrose Street, and the visual and conceptual barrier between the Swaffords' lot and the rest of the development. There are no genuine issues of material fact that the breaches alleged by the Swaffords happened in 2007 and 2008. It is now too late for them to file their Complaint.

DATED this 5th day of December, 2016.

MOULTON LAW OFFICE

Sean Moulton, attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served a true and correct copy of the foregoing *Brief* on the following individual via the method(s) indicated below:

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Via:
(✓) U.S. Mail
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) Email (pdf attachment)

DATED this 5th day of December, 2016.

Sean Moulton