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Petrus Fam. Trust Dated May 1, 1991 v. Kirk Respondent's Brief Dckt. 44784

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust Dated May 1, 1991, Plaintiffs/Appellants, v. CHRIS KIRK dba KIRK ENTERPRISES, Defendant/Respondent/Cross-Appellant,	)	Supreme Court Docket No. 0044784-2017 Valley County District Court Case No. CV-2014-71-C

RESPONDENT/CROSS-APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Valley County
Honorable Judge Jason D. Scott, Presiding

Amy A. Lombardo, ISB No. 8646
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
Telephone: (208) 562-4900
Attorneys for Appellants, Petrus Family Trust and Edmond A. Petrus, Jr.

John Morris (*Pro Hac Vice*)
Rachel E. Moffitt (*Pro Hac Vice*)
HIGGS FLETCHER & MACK LLP
401 W. A Street, Ste. 2600
San Diego, CA 92101
Telephone: (619) 236-1551
Attorneys for Appellants, Petrus Family Trust and Edmond A. Petrus, Jr.

C. Tom Arkoosh, ISB No. 2253
Daniel A. Nevala, ISB No. 6443
ARKOOSH LAW OFFICES
802 W. Bannock St., Ste. 900
P.O. Box 2900
Boise, ID 83701
Telephone: (208) 343-5105
Attorneys for Respondent/Cross-Appellant Chris Kirk d/b/a Kirk Enterprises

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

I. INTRODUCTION

Under Idaho law, this is a contract case stemming from implied warranty. This is not a tort case and is not a matter of first impression. The issues presented were decided thirty years ago when the Court decided *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) (holding that warranty claims sound in contract, not tort). The Court should affirm.

The case involves a lake home built on Lake Payette in McCall, Idaho. Chris Kirk ("Kirk") built the home for Nancy Gentry-Boyd ("Gentry-Boyd") under an oral contract in 2005. After living in the home for nearly seven years without incident, Gentry-Boyd sold the home to Petrus in 2012. In 2014, Petrus sued Kirk, Gentry-Boyd, and others alleging that the home was uninhabitable due to a latent defect involving water damage beneath the deck. Three of four defendants filed for summary judgment. The district court awarded Kirk summary judgment on Petrus' implied warranty of habitability claim, ruling that the claim was time barred and citing *Tusch.* Shortly after summary judgment and very close to trial, Petrus settled in mediation with the other parties and then filed this appeal against Kirk.

Through this appeal, Petrus asks the Court to transmute his breach of implied warranty of habitability claim from contract to tort, so he can escape application of the contract statute of limitations that barred him from proceeding against Kirk below. For good reasons, this should not happen. The district court carefully considered Petrus' arguments that a breach of implied warranty of habitability claim sounds in tort, not contract, and the corollary that a tort statute of limitations applies, not contract. The district court analyzed and rejected these arguments twice: first on summary judgment, then again following Petrus' request for reconsideration. Both times, the

district court concluded that Petrus' arguments misread controlling Idaho law. We agree.

In concluding that Petrus was incorrect in both instances, the district court analyzed the language of the controlling cases, considered the respective history and development of those cases, and considered the policy implications. The district court correctly concluded that, consistent with this Court's precedent, an implied warranty of habitability claim sounds in contract, and a contract statute of limitations controls. Further, the district court opined that even if it had accepted Petrus' incorrect contention that the implied warranty of habitability claim was a tort claim, the economic loss doctrine would prevent Petrus from recovering economic damages. Resultantly, we ask that the Court affirm the lower court's decision in favor of Kirk. The state of the law in Idaho is fair and on solid ground. Idaho homebuyers are not suffering from catastrophic damages without recourse as Petrus contends, and there is no compelling reason to change existing Idaho law.

II. STATEMENT OF THE CASE

1. Nature of the Case

This civil appeal is before the Court because under the timeline and facts of this case, Petrus has no viable legal theory against Kirk. Petrus initially sued Kirk for negligence. He dropped this claim in his *First Amended Complaint* and added two new counts: (1) conspiracy to commit fraud and (2) breach of implied warranty of habitability. At the summary judgment hearing, Petrus conceded that he had no supporting evidence and acceded to entry of summary judgment on his frivolous conspiracy claim. This left his implied warranty claim. After hearing argument from both sides, the district court granted Kirk summary judgment on the implied warranty claim, holding

that the applicable statute of limitations had run and the claim was time barred. Petrus appealed that decision.

In reaching its decision on summary judgment, the district court properly treated the statute of limitations holding as dispositive and ended its analysis. The district court did not consider any of Kirk's additional arguments in support of summary judgment. These additional arguments, combined with the fact that the economic loss doctrine prevents Petrus from recovering against Kirk even if successful on appeal, illustrate the frivolous nature of this appeal. An appeal without hope of recovery lacks sense. In this light, we invite the Court to consider these additional arguments and consider awarding Kirk fees for defending this appeal.

The final issue addressed in this brief is Kirk's appeal of the district court's decision apportioning fees to Kirk. The district court specifically held that after carefully reviewing Kirk's itemization of attorney fees, pertinent portions of the record, and the factors set forth in I.R.C.P. 54(e)(3), the court arrived at a reasonable apportionment. The court opined that it perceived the work incurred by Kirk's attorneys in defending against Petrus' frivolous conspiracy-to-defraud claim also necessary to defend against the implied-warranty claim. The court stated the two were indivisible. However, these statements do not comport with the court's actions. In apportioning fees to Kirk, the district court apportioned Kirk less than seven percent of the total fees incurred. For this, we ask the Court to remand the district court's decision on apportionment of fees to Kirk with instruction to review and reapportion the fee award consistent with an exercise of reason and applicable law.

2. Statement of Facts

In reviewing *Appellants' Opening Brief*, we agree that the district court fairly considered the facts on summary judgment. However, outside of simply calculating a timeline indicating when Kirk completed construction and when Gentry-Boyd sold the home to Petrus, some additional facts may assist the Court. In her seven years of ownership, Gentry-Boyd never experienced water problems with the house. R. Vol. 1, p. 223, L 130:10-11; p. 228, L 150:10-17; L 152:16-19; p. 229 L 154:21-22; L 155:15-19; p. 233 L 171:1-3. Petrus's expert testified at his deposition that none of the problems he discovered or repaired affected the home's habitability. R. Vol. 1, p. 391, L 145:12-22. Petrus testified that his damages were all purely economic damages and consisted of the repair costs, possible loss of use, and possible lost rent. R. Vol. 1, pp. 301-303, L 180:22-188-10. In August 2013, Petrus, through counsel, sent Kirk a notice letter under the Notice and Opportunity to Repair Act complaining of problems with the home's south-facing French doors. R. Vol. 1, pp. 871-872. Shortly thereafter, Kirk arranged and conducted an inspection of the doors. Kirk, through counsel, responded to Petrus' letter and reported a number of problems with the doors. R. Vol. 1, pp. 117-119. Kirk denied responsibility for the door problems and carefully listed in his response letter what he noticed was wrong with the door. Specifically, he mentioned:

- The locking mechanism on the operable door had been removed and reinstalled in an inappropriate manner;
- The locking mechanism on the stationary door had been pried to the extent that it was not functional;
- Markings on the overhead trim board indicated that the locking mechanism was

engaged to lock when someone had tried to close the door;

- Weather stripping on the astragal of the operable door had been completely removed;
- Weather stripping on the bottom of the operable door had been trimmed and was not intact;
- Weather stripping on the stationary door could not be verified or inspected because the door would not open;
- Non-factory screws were installed into the threshold and not in the correct area, several screws had been added to the threshold, especially to the weep channel;
- The ice and water shield installed in the crawl space had been altered and displaced; and,
- The foam insulation had been removed.

R. Vol. 1, pp. 117-119, 563-564.

During this visit, Kirk limited his inspection to the French doors as the notice letter specified was the problem. R. Vol. 1, p. 564. Petrus later invited Kirk back to the property to inspect more than just the doors. R. Vol. 1, p. 564-565. In the spring of 2014, during a second visit and prior to demolition, Petrus allowed Kirk to inspect the crawlspace, interior, and French doors, but prevented Kirk from inspecting the home's roof, gutter system, and exterior. R. Vol. 1, p. 564. Petrus stopped the inspection and ordered Kirk to leave with the threat of calling the Sheriff if Kirk did not leave. R. Vol. 1, p. 564. Kirk attended social functions at the home between 2005 and 2009 and witnessed no problems with the French doors. R. Vol. 1, p. 565. Kirk's first inspection of the home revealed that at some point after construction was completed, the home had been severely

altered and damaged. R. Vol. 1, p. 565. Petrus contractually waived the implied warranty of habitability in his purchase contract with Gentry-Boyd. R. Vol. 1, p. 482, L. 39.

3. Course of Proceedings

Petrus filed suit against Kirk, Gentry-Boyd, and others on March 11, 2014. R. Vol. 1, pp. 15-27. The original *Complaint* asserted negligence against Kirk. R. Vol. 1, pp. 21-23. On September 8, 2014, Petrus filed his *First Amended Complaint*. R. Vol. 1, pp. 28-43. Against Kirk, this complaint asserted breach of the implied warranty of habitability and conspiracy to commit fraud. R. Vol. 1, pp. 36-39. The negligence claim against Kirk was not included in the *First Amended Complaint*. On September 21, 2015, Petrus filed a *Second Amended Complaint*. R. Vol. 1, pp. 71-90. This complaint reasserted the two claims from the first amendment against Kirk. R. Vol. 1, pp. 80-82. Kirk filed for summary judgment on May 20, 2016. During the summary judgment hearing, Petrus conceded that he had no supporting evidence to continue with the conspiracy to commit fraud claim against Kirk and acceded to entry of summary judgment on that claim. On July 7, 2016, the district court issued a *Memorandum Decision and Order,* awarding summary judgment to Kirk on the implied warranty of habitability claim. R. Vol. 1, pp. 967-997. The district court determined that the claim sounds in contract, subjecting it to I.C. § 5-241(b)'s completion-of-construction accrual rule, as well as I.C. § 5-217's four-year statute of limitations based on oral contract. Based on this ruling, the *Judgment* was entered for Kirk on November 15, 2016. R. Vol. 1, pp. 1003-1005. Petrus filed a *Motion for Reconsideration* on November 28, 2016. R. Vol. 1, pp. 1006-1008. The district court denied that motion on December 5, 2016. R. Vol. 1, pp. 1069-1075. On November 29, 2016, Kirk filed a request for attorney fees and award of costs.

R. Vol. 1, pp. 1025-1027. Petrus filed an objection on December 13, 2016 and a *Notice of Appeal* on January 13, 2017. R. Vol. 1, pp. 1076-1087, 1092-1096. A hearing on the attorney fee motion was held on February 6, 2017. On February 13, 2017, the district court issued its *Order Awarding Costs and Attorney Fees*. R. Vol. 1, pp. 1150-1157. Also on February 13, 2017, the court issued an *Amended Judgment.* R. Vol. 1, pp. 1158-1159. On March 7, 2017, Petrus filed an *Amended Notice of Appeal.* R. Vol. 1, pp. 1160-1165. On March 23, 2017, Kirk filed a *Notice of Cross-Appeal.* R. Vol. 1, pp. 1177-1181.

III. ISSUES PRESENTED

1. **Examined as a whole, is Petrus barred from recovering against Kirk by reasons of waiver, statutory non-compliance, and the economic loss doctrine, such that this appeal is frivolous and entitles Kirk to fees on appeal because, even if the Court decides that a claim for breach of implied warranty of habitability claim sounds in tort, Petrus cannot recover against Kirk?**

2. **Did the district court err in its apportionment of attorney fees to Kirk?**

IV. STATEMENT OF APPEALABILITY

Kirk asserts the first issue presented on appeal under Idaho Appellate Rules 35(a)(4) and 35(b)(4) as additional or subsidiary issues. Kirk asserts the second issue presented on appeal as a cross-appeal of the district court's *Order Awarding Costs and Attorney Fees* and *Amended Judgment* entered on February 13, 2017, pursuant to Idaho Appellate Rule 11. Kirk timely filed a *Notice of Cross-Appeal* on March 23, 2017.

V. SUMMARY OF THE ARGUMENT

The Court should affirm the summary judgment decision below. Absent a tolling statute, a

statute of limitations acts as an absolute bar against an action. Because no tolling statute applies to Petrus' breach of implied warranty of habitability claim, and because the claim sounds in contract, Petrus' claim is time barred.

VI. APPLICABLE STANDARDS OF REVIEW

We agree that free review is the appropriate standard for the questions presented by Petrus, however, we would ask the Court to review carefully the legal analysis conducted by the district court in reaching its conclusion that Petrus' argument fails. Additionally, we would ask the Court to remain mindful of the doctrine of *stare decisis* in considering Petrus' argument that Idaho law has been incorrect for the past thirty years.

The appropriate standard of review for examining the district court's decision in apportioning attorney fees to Kirk is "abuse of discretion" and requires a three-pronged inquiry. Because an award of attorney fees is a discretionary decision, on review we examine the trial court's decision to determine whether it correctly perceived the issue as one of discretion, acted within the boundaries of its discretion and consistently with applicable legal standards, and reached its decision by an exercise of reason. *Nguyen v. Bui*, 146 Idaho 187, 193, 191 P.3d 1107, 1113 (Ct. App. 2008).

VII. ARGUMENT

1. The district court correctly rejected Petrus' argument that a claim for breach of the implied warranty of habitability sounds in tort, not contract.

I.C. § 5-241(b) states that, "[c]ontract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement

[to real property.]" *Id.* In contrast, I.C. § 5-241(a) states that, "[t]ort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement [to real property.]" *Id.* These statutes are clear on their face. They distinguish the application of contract and tort statutes of limitations in the context of improvements to real property. They drive a large part of the analysis in this appeal.

The statute specifically states:

> Actions will be deemed to have accrued and the statute of limitations shall begin to run as to actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property, as follows:
>
> (a) Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.
>
> (b) Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement.
>
> The times fixed by these sections shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of an injury or death for which it is proposed to bring an action.
>
> Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.... Idaho Code Ann. § 5-241.

Section (a) of the statute controls tort claims and section (b) controls contract claims. For his claim to have any fighting chance of survival, Petrus has to argue that his implied warranty of habitability claim against Kirk sounds in tort. If he argues otherwise, he loses, and the claim does not survive application of this statute.

In reaching its decisions favoring Kirk on this issue, both on summary judgment and

reconsideration, the district court analyzed these statutes along with the Idaho cases that have considered their application; namely, *Tusch*. The timeline in *Tusch* is condensed into three years, whereas, the timeline in our case is closer to nine. Coffin completed building the duplexes for the Vander Boeghs in 1976. *Id.*, at 1024. Three years later, in 1979, the Vander Boeghs sold the duplexes to Tusch Enterprises. One month later the walls started cracking and the windows and doors would not close properly. *Id.*, at 1025. In our case, Gentry-Boyd owned and lived in the home from 2005 to 2012. Petrus discovered the dry rot he complained of a year and a half after his purchase from Gentry-Boyd in late 2013. Given the timeframe in *Tusch*, the court there did not have to consider the statute of limitations question directly because it was not at issue. Here, the district court analyzed the timing question very carefully.

The district court correctly stated the Kirk and Petrus disagreed as to when purchasers of the home Kirk built lost the ability to sue Kirk for breach of the implied warranty of habitability. R. Vol. 1, p. 1107. It compared the arguments made by Kirk and Petrus and agreed the Kirk had the better argument. Beginning with a discussion of the role of privity of contract, the district court properly explained that Petrus did not lose on summary judgment because of a lack of privity between Petrus and Kirk. R. Vol. 1, p. 1107. The court dissected *Tusch* and concluded that a claim for breach of implied warranty of habitability was clearly, or at least readily inferable, from *Tusch*, a contract claim. R. Vol. 1, p. 1108. The district court stated:

> In not requiring privity, the court [in *Tusch*] didn't suggest privity need not be required because the claim wasn't contractual in nature. To the contrary, the court plainly regarded the claim as contractual in nature. In that regard, the court observed, first, that the purpose of the "economic loss rule" is "to allow the law of contracts to resolve disputes concerning economic losses" and, second, that

> "[i]f...the area of pure economic losses, negligence is to be preempted by contract principles,... then contract principles must be given a freer hand to deal with injuries the law has typically redressed." *Id.* (emphasis added).

R. Vol. 1, p. 1108-1109.

The district court went on to explain: "Thus, by not requiring privity, the court deliberately made a contract action available to 'deal with' injuries for which there was no tort remedy in light of the 'economic loss rule.'" The court's intention to authorize a contract action is made quite clear in the *Opinion's* footnote 8. There the court quoted the recommendation of the venerable treatise *The Law of Torts* by Prosser and Keeton to eliminate the privity requirement to allow "recovery on a contract-warranty theory:"

> Historically, ...the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action of deceit for fraud and the only contract action has been for breach of warranty, express or implied. This remains the generally accepted view. A few courts in recent years have permitted either a tort action for negligence or one in strict liability. Usually, the reason for so doing has been to escape the requirement of privity of contract as a prerequisite to recovery on a warranty theory. But the elimination of this requirement for recovery on a contract-warranty theory would seem to constitute the more satisfactory technique.

Tusch, at 50 n.8 (quoting Prosser and Keeton, *The Law of Torts*, § 101 (5th ed. 1984) (footnotes omitted)). R. Vol. 1, p. 1109.

The court characterized this treatise as "respected authority" and indisputably followed its recommendation. *Id.* R. Vol. 1, p. 1109.

The district court echoed this analysis for Petrus a second time in its *Order Denying Motion for Reconsideration.* There, the court stated that, "had the *Tusch* court's intention been to recognize a new tort claim, eliminating the privity requirement wouldn't have been necessary, as privity of

contract isn't a requirement of tort law." R. Vol. 1, p. 1137. It went on to explain that the legislature has the power to adopt an accrual rule that has the effect of rendering an implied warranty of habitability claim unavailable to a subsequent home purchaser who purchases several years after completion of construction. R. Vol. 1, p. 1138. The district court's analysis is sound. It creates ample support to logically conclude in Kirk's favor and affirm the decision below.

2. Idaho's economic loss rule bars Petrus from recovering against Kirk because all of Petrus' damages are pure economic loss.

Our case involves a residential home constructed by Kirk in 2005 with modern building techniques and modern materials. This is not a products liability case involving personal injury, a strict liability claim involving property damage, or a UCC sales case involving goods. Petrus did not suffer personal injury or damage to any other property besides the home he purchased. This fact alone implicates the economic loss doctrine and further stands in the way of Petrus recovering anything from Kirk.

Tusch Enterprises sued Coffin for both negligent construction and breach of implied warranty of habitability. Petrus also sued Kirk for both. Petrus sued Kirk for negligence in his original complaint and then amended to sue Kirk for breach of implied warranty of habitability. The *Tusch* court held that that negligence claim was barred by the "economic loss rule," which prohibits recovering purely economic losses -- a category into which the damage to the duplexes fell on a negligence theory. The *Tusch* court also held that the claim for implied warranty of habitability survived the "economic loss rule." This is consistent with the fact that the *Tusch* court viewed that claim as a contract claim. Without knowing what prompted Petrus to drop the

negligence claim against Kirk, one might surmise it was the realization that the economic loss doctrine would prevent recovery. This highlights the untenable argument Petrus makes that his appeal has merit. If the district court is correct in its analysis and conclusion that a claim for breach of implied warranty of habitability is a contract claim, Petrus is time barred and this Court should affirm. If Petrus is successful in convincing the Court that the district court got it wrong, and a claim for breach of implied warranty of habitability is a tort claim, this Court should rule that Petrus is precluded from recovery by the economic loss doctrine. This conundrum is insurmountable for Petrus.

As touched on above, the economic loss rule in Idaho is seemingly simple: absent personal injury or property damage, recovery is not available in tort. Tort damages come in three varieties: personal injury, property damage, and economic loss. Dale D. Goble, *All Along the Watchtower: Economic Loss in Tort (the Idaho Case Law)*, 34 Idaho L. Rev. 225, 234 (1998). Petrus' damages all add up to economic loss. The facts, coupled with his deposition testimony on damages establish this. R. Vol. 1, pp. 301-303, L 180:22-188-10. He suffered water damage to some boards beneath the deck of his home. The home was the subject of the sale transaction and, thus, his only damage is pure economic damage, not recoverable in tort.

The Court in *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995) defined the economic loss rule and its nuance. In *Duffin*, the Court stated that economic loss is recoverable in tort as a loss parasitic to an injury to person or property. *Duffin* at 1007. The Court went on to state:

We have defined "economic loss" as including "costs of repair and replacement of

> defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975) (citations omitted), *rev'd on other grounds.* Conversely, "property loss" encompasses "damage to property other than that which is the subject of the transaction." *Id. See also Tusch Enterprises v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *State v. Mitchell Constr. Co.*, 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984); *Clark v. International Harvester Co.*, 99 Idaho 326, 332, 581 P.2d 784, 790 (1978). Since the losses claimed here are purely economic, this exception is inapplicable.

Duffin v. Idaho Crop Imp. Ass'n, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995).

Petrus cannot escape application of the economic loss rule if the Court finds that his claim for breach of implied warranty of habitability sounds in tort.

3. Petrus's failure to comply with the statutory prerequisites to filing suit under Idaho's Notice and Opportunity to Repair Act required dismissal of his claims against Kirk.

As argued below but not considered, any action commenced by a claimant prior to compliance with the requirements of Idaho's Notice and Opportunity to Repair Act ("NORA") shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section. I.C. § 6-2503. In short, compliance is an absolute prerequisite to filing suit. Here, Petrus failed to comply with the NORA prior to commencing suit.

Petrus attempted to comply by providing Kirk with notice in 2013 that there was a problem with the south-facing French doors of the Home. Petrus invited Kirk to inspect the doors. Kirk inspected the doors and reported to Petrus his findings. Because Kirk's findings at the time did not indicate to Kirk any evidence of a construction defect, he denied responsibility for the cause, but outlined to Petrus all of what he saw during his inspection.

The failure and statutory breach came when Petrus filed his *Complaint* in March 2014, alleging much more than just a problem with the French doors. The *Complaint* alleges the presence of mold in the crawlspace and significant damaged caused by moisture related to the water damage below. These allegations were much broader than those included in the August 7, 2013, notice letter to Kirk. The allegation of mold damage was significant because it could indicate personal injury and structural catastrophe requiring very expensive remediation or demolition of the entire home.

After improperly filing his *Complaint*, in violation of the statutory requirements, Petrus invited Kirk out to inspect the Home a second time, in April 2014, because the problems with the home were greater than just the French doors. During this second inspection, Kirk, as the person who built the Home and was intimately familiar with what went into its construction, wanted to climb onto the roof, inspect the gutters that had been installed after Gentry-Boyd sold the Home, and look at the entire exterior of the Home. Petrus prevented Kirk from doing so. He allowed Kirk to inspect the crawlspace and interior of the Home, but stopped the inspection short and demanded that Kirk leave the property or he would call the sheriff when Kirk wanted to inspect the other areas of the Home. This action by Petrus effectively denied Kirk the opportunity to complete an inspection in accordance with NORA. The filing of suit claiming excessive damage outside the scope of the August 7, 2013, notice letter, prior to allowing Kirk a second opportunity to inspect the Home, violates the statutory prerequisites and should result in bar to suit against Kirk.

4. As the homebuilder, Kirk is the only logical beneficiary of Petrus' waiver of the implied warranty of habitability in the purchase and sale contract between Petrus and Gentry-Boyd.

Petrus knowingly waived the implied warranty of habitability against Gentry-Boyd through the clear language of the Purchase and Sale Agreement at paragraph 39. The Section 39 disclaimer in the Purchase and Sale Agreement stated as follows:

> ENTIRE AGREEMENT: This Agreement contains the entire agreement of the Parties respecting the matters herein set forth and supersedes all prior agreements between the parties respecting such matters. No warranties, including without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding on either party.

Idaho permits disclaimer of an implied warranty of habitability, provided the disclaimer is clear and unambiguous. *Tusch*, Idaho 113 at 45. As a seasoned attorney, trained to read and understand contract provisions, Petrus should be held to the clear and unambiguous waiver of any implied warranty of habitability claim. This waiver of the warranty against the seller flows to the benefit of the builder as a third-party beneficiary to the Purchase and Sale Agreement. Given the nature of a warranty of habitability, as a builder warranty, and not a seller warranty, the waiver language included in the sale contract contemplates and ultimately benefits the builder.

The waiver language of the sale contract states in part that, "No warranties, including, without limitation, any warranty of habitability, agreements or representations not expressly set forth herein shall be binding on either party." Under Idaho law [I.C. § 29-102], if a party can demonstrate that a contract was made expressly for its benefit, it may enforce that contract, prior to rescission, as a third-party beneficiary. The test for determining a party's status as a third-party beneficiary capable of properly invoking the protection of I.C. § 29-102, is whether the agreement

reflects an intent to benefit the third party. *Am. W. Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 752, 316 P.3d 662, 668 (2013). Again, because a warranty of habitability is a builder warranty, made at the time a builder builds a new home for a first-resident buyer, the inclusion of language waiving this warranty in a sale contract between the first buyer, who was not also the builder, and a subsequent buyer, indicates the intent to benefit the third-party builder because the warranty doesn't exist between the seller and buyer unless the seller also built the home. Thus, the original builder is the only party the warranty waiver can benefit. Because of this, the Court should consider this in determining yet another reason why Petrus could not recover against Kirk.

5. The history of implied warranty and out of state authority recited by Petrus offers the Court no help in deciding this case.

Nowhere in the analysis of this case is it necessary to consider the multitude of unrelated cases Dean Prosser considered when penning his 1960 Yale Law Journal article. Those cases involved food and drink, automobiles, tires, pumps, insecticides, antifreeze compounds, electric blankets, insulating materials, lumber, furnaces, and portable elevators, yet provided no guidance about how to answer the question at issue involving a modern lake home in McCall, Idaho. While the history of implied warranty is mildly interesting, it does little to help the Court. Neither do the Texas and Illinois cases from the 1970's and 1980's Petrus cites. While these cases do show examples where courts decided not to apply a contract statute of limitations to an implied warranty claim, they do not help answer the question at hand. The answer is much closer. Looking to the Idaho statutes and this Court's established precedent provides the answer. The answer is not to create a new tort cause of action in Idaho.

6. Idaho policy reasons favor limiting a builder's liability for breach of implied warranty of habitability to that of the contract statute of limitations period.

In terms of public policy, consistent with the policy ideal of protecting modern homebuyers, even remote buyers, from the sophistication employed in modern construction, is the policy consideration that modern homebuilders not be held accountable on their projects forever, or even for a decade. Once the builder completes the project, the buyer moves in and becomes responsible for upkeep and maintenance. In this case, we are talking about a house built on the lake in McCall. McCall winters are harsh. There is typically lots of snow and perfect conditions for forming ice, hence the popularity of the McCall Winter Carnival and ice-sculpting contest. It is typical for many residents to remove the snow and ice from their roofs multiple times each winter. Some install electric heat tape to keep their gutters functional. If homeowners do not employ these preventative measures consistently year after year, problems can arise. Problems like the one in this case. Four or five years of poor upkeep and failed snow and ice removal can certainly lead to snow and ice melting and causing damage. This damage could occur even in a perfectly built home, a standard to which builders are not held. Thus, when comparing the realities of responsible modern building and the realities of responsible modern homeownership, it is entirely reasonable from a policy standpoint to limit a builder's responsibility under a contract-warranty theory to four (oral contract) or five (written contract) years. This becomes especially true given the challenge that Mother Nature provides to builders building in Idaho's harsh winter environment. The Idaho legislature understood this dynamic when drafting I.C. § 5-241.

7. **By acknowledging that the time spent defending against the frivolous and non-frivolous claims was indivisible, then awarding Kirk less than seven percent of his total fees incurred, the district court failed to reach its decision by an exercise of reason.**

A court does not abuse its discretion so long as it "perceived the issue as one of discretion; acted within the outer boundaries of this discretion and consistent with applicable legal standards; and reached the decision by an exercise of reason." *Anderson v. Goodliffe*, 140 Idaho 446, 450, P.3d 64, 68 (2004). "An award of attorney fees under I.C. § 12-121 is discretionary; but it must be supported by findings and those findings, in turn, must be supported by the record." *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 910-11, 684 P.2d 307, 312-13 (Idaho Ct. App. 1984)(citing *Bosshardt*, 104 Idaho at 660, 662 P.2d at 241). Because "the court's findings contain a mixture of a legal conclusion and the judge's subjective impression of the landowner's motive for litigating this case," they will not be reversed unless the trial court has abused its discretion. *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 927, 908 P.2d 1228, 1234 (Idaho 1995). Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 Idaho L. Rev. 1, 24 (2001).

In its *Order Awarding Costs and Attorney Fees*, the district court specifically stated that although a precise apportionment is not possible, after carefully reviewing Kirk's itemization of his attorney fees, after reviewing the other pertinent portions of the record, and after considering the factors set forth in I.R.C.P. 54(e)(3), the court arrived at one that is reasonable in its judgment. R. Vol. 1, p. 1155.

The court explained that Petrus' conspiracy claim against Kirk "borders on preposterous" and declared it to have been brought and pursued frivolously, unreasonably, and without

foundation. R. Vol. 1, p. 1155. The court went to explain that in its view Petrus' breach of implied warranty of habitability claim against Kirk raised issues of first impression and, therefore, was not frivolous. The court decided that one claim was frivolous and one was not. In deciding how to apportion fees to Kirk for the work done in defending against the frivolous claim, the court explained that its aim in the apportionment process was to arrive at an award of attorney fees that approximates the amount by which Kirk's attorney fees were increased due to Petrus' pursuit of the frivolous claim. R. Vol. 1, p. 1155.

Next, the court explains how it viewed the work done defending the two claims. Making two contradictory statements that do not add up to an exercise in reason, the court stated that it perceived almost all the work that was necessary to defend against the conspiracy to defraud claim to also have been necessary to defend against the implied warranty claim. R. Vol. 1, p. 1155. Next, it stated that most of the work performed pertained to both claims indivisibly. R. Vol. 1, p. 1155. If the court viewed all the work necessary to defend the conspiracy claim as necessary to defend the warranty claim, and the work performed to be indivisible, the opposite was also true. The work necessary to defend the warranty claim was also necessary to defend the frivolous claim. Counsel had to conduct research and discovery for both claims, draft pleadings, attend depositions, prepare a summary judgment brief on both issues, and then prepare for and attend a summary judgment hearing for both claims, all while attempting to settle and prepare for trial behind the scenes. Petrus did not concede the frivolous conspiracy claim until pressed by counsel during the summary judgment hearing.

The court's award of fees to Kirk amounted to less than seven percent of the total fees

incurred. No exercise of reason, using the approach explained, results in an award of less than seven percent of the total fees incurred. The court stated that it felt justified in its apportionment for the additional reason that Petrus' implied warranty claim failed based on a statute of limitations defense that could have been raised much earlier in the course of litigation and obviated the need to litigate that claim any further. R. Vol. 1, p. 1156. Not filing a preliminary motion to dismiss either of these claims was a strategic decision, and not one the district court should make. First, preliminary motions to dismiss have a low success rate. Second, knowing the attitude of the plaintiffs and their counsel, a successful motion to dismiss would have almost guaranteed an appeal by Petrus. Substituting its judgment for that of counsel, the district court chose to punish Kirk by awarding him less than seven percent of his fees for defending against one frivolous claim and one claim involving issues of first impression. Regarding the frivolous claim, counsel became aware through discovery that it appeared the evidence to support such a claim did not exist. However, rather than go through the trouble of filing a separate motion to dismiss and a motion for summary judgment, at that point in the litigation, counsel decided to file one motion. In addition, as counsel admitted during the fee hearing, given the preposterous nature of Petrus' conspiracy claim, counsel made the strategic decision that if this case were to go to trial, the jury should hear evidence on just how preposterous the conspiracy claim was. This decision should not have been made by the court and Kirk should not have been punished by the court's lack of an exercise in reason in apportioning the fee award.

Given the court's view of the two claims filed by Petrus against Kirk, and the work performed by Kirk's counsel in defending both claims, we ask that this Court remand this issue

back to the lower court for further analysis and a reapportionment of the fee award consistent with an exercise of reason in light of the fact that this case involved multi-year litigation pursued by overly litigious plaintiffs.

8. **As indicated by the arguments presented above, even if Petrus succeeds on appeal and the Court remands this case for further proceedings, Petrus cannot recover against Kirk and, therefore, Kirk should be awarded fees on appeal.**

An award of attorney fees on appeal 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. *Pass v. Kenny*, 118 Idaho 445, 449, 797 P.2d 153, 157 (Ct. App. 1990).

Filing and pursuing an appeal with no hope of prevailing below if successful on remand defines an appeal that was brought and pursued frivolously, unreasonably, and without foundation. Petrus has made no showing that the district court misapplied the law in reaching its conclusion that Petrus' implied warranty of habitability claims was time barred. Petrus' argument is not a good-faith argument for the extension or modification of the law. Instead, it is simply an attempt to drag out the inevitable and force Kirk to incur more fees. *Tusch* is well-settled law, as is the ability for this Court to award fees on appeal. Kirk respectfully requests that the Court consider the overall facts and circumstances presented by Petrus on appeal and accordingly award fees to Kirk.

VIII. CONCLUSION

Kirk prevailed on summary judgment below because the district court held that Petrus was time barred under I.C. § 5-241. Petrus refuses to accept this fate. Instead, he has filed this appeal with hopes of convincing the Court to change existing law simply to serve his limited interest. The

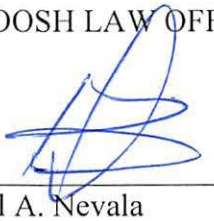
Court should pass on this invitation. Petrus has failed to provide ample support or reason to change the law. The Court should affirm the decision below. We urge the Court not to stray from established precedent that has provided predictability and readily served Idaho builders and homeowners for thirty years.

Finally, we urge the Court to remand the district court's apportionment of fees for further review and application of reason in calculating a fee award that is consistent with the efforts Kirk put forth defending against Petrus' frivolity.

Respectfully submitted,

DATED this 15th day of September, 2017.

ARKOOSH LAW OFFICES



Daniel A. Nevala
Attorney for Chris Kirk d/b/a Kirk Enterprises

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of September, 2017, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

John Morris, Esq. Rachel E. Moffitt, Esq. HIGGS FLETCHER & MACK LLP 401 West "A" Street, Suite 2600 San Diego, CA 92101-7913 *Attorney for Plaintiffs/Appellants*	X X	U.S. Mail, Postage Prepaid Overnight Courier Hand Delivered Facsimile (619) 696-1410 E-mail jmmorris@higgslaw.com moffittr@higgslaw.com
Amy A. Lombardo PARSONS BEHLE & LATIMER 800 W. Main Street, Suite 1300 Boise, ID 83702 *Attorney for Plaintiffs/Appellants*	X X	U.S. Mail, Postage Prepaid Overnight Courier Hand Delivered Facsimile (208) 562-4901 E-mail alombardo@parsonsbehle.com

Daniel A. Nevala