

5-10-2017

Fischer v. Croston Clerk's Record Dckt. 44887

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IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM R. FISCHER and M. ANN)
FISCHER, Trustees of the William and)
Ann Fischer Revocable Trust,)

Case No. CV-2016-2894

Plaintiffs-Respondents,)

Docket No. 44887

v.)

JAMES F. CROSTON and MARJORIE)
C. CROSTON, husband and wife, and)
ALL UNKNOWN OWNERS AND/OR)
OTHER PERSONS OR ENTITIES)
CLAIMING ANY INTEREST IN THE)
FOLLOWING DESCRIBED REAL)
PROPERTY, (see file for property)
description),)

Defendants/ Appellants.)

CLERK'S RECORD ON APPEAL

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

HONORABLE JOEL E. TINGEY, District Judge.

Karl R. Decker
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Attorney for Respondents

Robin D. Dunn
477 Pleasant County Ln .
P.O Box 277
Rigby, ID 83442
Attorney for Appellants

William Fischer, Margaret Ann Fischer vs. James Croston, Majorie C. Croston, Unknown Owners

Date	Code	User	Judge
5/31/2016	SMIS	BJENNINGS	Summons Issued
	NCOC	BJENNINGS	New Case Filed-Other Claims
	NOAP	BJENNINGS	Plaintiff: Fischer, William Notice Of Appearance Karl R. Decker
	NOAP	BJENNINGS	Plaintiff: Fischer, Margaret Ann Notice Of Appearance Karl R. Decker
		BJENNINGS	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Decker, Karl R. (attorney for Fischer, William) Receipt number: 0023387 Dated: 6/3/2016 Amount: \$221.00 (Check) For: Fischer, William (plaintiff)
	COMP	BJENNINGS	Verified Complaint to Quiet Title
	MOTN	BJENNINGS	Motion to Effect Service by Publication
	AFFD	BJENNINGS	Affidavit in Support of Motion to Effect Service by Publication
6/6/2016	ORDR	SOUTHWIC	Order Granting Motion to Effect Service by Publication
	SMIS	SOUTHWIC	Summons Issued
6/27/2016		TCORONA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Croston, James (defendant) Receipt number: 0027598 Dated: 6/28/2016 Amount: \$136.00 (Check) For: Croston, James (defendant)
6/28/2016	NOAP	TCORONA	Defendant: Croston, James Notice Of Appearance Robin D. Dunn
	NOAP	TCORONA	Defendant: Croston, Majorie C. Notice Of Appearance Robin D. Dunn
	ASRV	TCORONA	Affidavit of Service - 06/11/16 James and Marjorie Croston
	NTTD	TCORONA	Notice Of Intent To Take Default
7/1/2016	ANSW	CPETERSON	Defendant's Answer to Complaint Counterclaim Of The Defendants
7/13/2016	PPUB	TCORONA	Proof Of Publication June 16, 23, 30 and July 7, 2016
7/14/2016	RQST	JNICHOLS	Plaintiff's Request For Trial Setting
	ANSW	JNICHOLS	Plaintiff's Answers To Counterclaims
7/20/2016	ORDR	SOUTHWIC	Order for Telephonic Status conference
	HRSC	SOUTHWIC	Hearing Scheduled (Status Conference 08/23/2016 08:30 AM)
8/23/2016	HRHD	SOUTHWIC	Hearing result for Status Conference scheduled on 08/23/2016 08:30 AM: Hearing Held in chambers off the record
	ORDR	SOUTHWIC	Order and Notice Setting Court Trial

William Fischer, Margaret Ann Fischer vs. James Croston, Majorie C. Croston, Unknown Owners

Date	Code	User	Judge
8/23/2016	HRSC	SOUTHWIC	Hearing Scheduled (Trial 03/21/2016 10:00 AM) 2 - 3 days
	HRSC	SOUTHWIC	Hearing Scheduled (Pretrial Conference 02/22/2017 08:45 AM)
9/8/2016	NTOS	TCORONA	Notice Of Service Plaintiff's Forst Set Of Interrogatories, Requests For Production, And Requests For Admission
10/11/2016	NTOS	BJENNINGS	Notice Of Service - Response to Plaintiff's First Set of Interrogatories, Requests for Production, and Requests for Admission
11/29/2016	HRSC	SOUTHWIC	Hearing Scheduled (Motion 01/18/2017 09:00 AM) Decker - Mo SJ
12/20/2016	MOTN	JNICHOLS	Plaintiffs' Motion For Summary Judgment
	MEMO	JNICHOLS	Memorandum In Support of Plaintiffs' Motion For Summary Judgment
		JNICHOLS	Declaration Of W. Forest Fischer In Support OF Plaintiffs' Motion For Summary Judgment
		JNICHOLS	Declaration Of M. Ann Fischer
		JNICHOLS	Declaration Of Sharon Anderson
		JNICHOLS	Declaration Of Larry Kennedy
	NOTH	JNICHOLS	Notice Of Hearing RE: Motion For Summary Judgment 01/18/2017 9:00AM
12/30/2016	MOTN	BJENNINGS	Defendant's Motion to Continue Trial
	AFFD	BJENNINGS	Affidavit of Robin D. Dunn in Support of Motion to Continue Trial
1/4/2017		TCORONA	Verification
	MEMO	TCORONA	Memorandum Of the Defendants In Opposition To Plaintiffs' Motion For Summary Judgment
	AFFD	TCORONA	Affidavit Of Linda D. Penning In Opposition Of Plaintiffs' Motion For Summary Judgment
1/10/2017	RESP	TCORONA	Plaintiff's Response To Motion To Continue Trial
1/11/2017	MEMO	BJENNINGS	Plaintiff's Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment
	MOTN	BJENNINGS	Plaintiff's Motion to Strike Affidavit of Linda D. Penning
	MEMO	BJENNINGS	Plaintiff's Memorandum in Support of Plaintiffs' Motion to Strike Affidavit of Linda D. Penning
		BJENNINGS	Declaration of W. Forrest Fischer in Support of Plaintiffs' Motion to Strike
	NOTH	BJENNINGS	Notice Of Hearing - Plaintiffs' Motion to Strike Affidavit of Linda D. Penning - 01/18/2017 at 9:00 AM
	MOTN	BJENNINGS	Plaintiffs' Motion to Shorten Time to Hear Motion to Strike Affidavit of Linda D. Penning

William Fischer, Margaret Ann Fischer vs. James Croston, Majorie C. Croston, Unknown Owners

Date	Code	User	Judge
1/11/2017	NOTH	BJENNINGS	Notice Of Hearing - Plaintiffs' Motion to Shorten Time to Hear Motion to Strike Affidavit of Linda Penning - 01/18/2017 at 9:00 AM
1/18/2017	DCHH	SOUTHWIC	Hearing result for Motion scheduled on 01/18/2017 09:00 AM: District Court Hearing Held Court Reporter: Jack fuller Number of Transcript Pages for this hearing estimated: Decker - Mo SJ -- under 100
	MINE	SOUTHWIC	Minute Entry Hearing type: Motion Hearing date: 1/18/2017 Time: 9:01 am Courtroom: Court reporter: Jack Fuller Minutes Clerk: Marlene Southwick Tape Number: 5
1/19/2017	ORDR	SOUTHWIC	Memorandum Decision and ORDER
	JDMT	SOUTHWIC	Judgment -- title in property is quieted and vested in Fischer//Defs' counterclaim is dismissed with prejudice
	CDIS	SOUTHWIC	Civil Disposition entered for: Croston, James, Defendant; Croston, Majorie C., Defendant; Unknown Owners,, Defendant; Fischer, Margaret Ann, Plaintiff; Fischer, William, Plaintiff. Filing date: 1/19/2017
	HRVC	SOUTHWIC	Hearing result for Pretrial Conference scheduled on 02/22/2017 08:45 AM: Hearing Vacated
	HRVC	SOUTHWIC	Hearing result for Trial scheduled on 03/21/2016 10:00 AM: Hearing Vacated 2 - 3 days
	STATUS	SOUTHWIC	Case Status Changed: closed
1/24/2017		TCORONA	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Fischer, William Receipt number: 0005814 Dated: 1/24/2017 Amount: \$1.00 (Check)
		TCORONA	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Fischer, William Receipt number: 0005814 Dated: 1/24/2017 Amount: \$1.00 (Check)
1/31/2017	AFFD	BJENNINGS	Affidavit of W. Forrest Fischer in Support of Memorandum of Attorneys' Fees and Costs
	MEMO	BJENNINGS	Memorandum of Attorneys' Fees and Costs
2/2/2017		TCORONA	Objection to the Plaintiff's Requests For Fees And Costs
2/6/2017		BJENNINGS	Reply in Support of Memorandum of Attorneys' Fees and Costs
2/23/2017	BNDC	TCORONA	Bond Posted - Cash (Receipt 10221 Dated 2/23/2017 for 100.00)

William Fischer, Margaret Ann Fischer vs. James Croston, Majorie C. Croston, Unknown Owners

Date	Code	User		Judge
2/23/2017	STATUS	TCORONA	Case Status Changed: Closed pending clerk action	Joel E. Tingey
		TCORONA	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Dunn, Robin D. (attorney for Croston, James) Receipt number: 0010222 Dated: 2/23/2017 Amount: \$129.00 (Check) For: Croston, James (defendant)	Joel E. Tingey
	NOTC	TCORONA	Notice Of Appeal	Joel E. Tingey
	APSC	TCORONA	Appealed To The Supreme Court	Joel E. Tingey
2/24/2017	ORDR	SOUTHWIC	Order	Joel E. Tingey
		SOUTHWIC	Judgment of Costs and Attorney Fees -- Pls are awarded a total jdmt of \$2936.50 plus interest	Joel E. Tingey
	CDIS	SOUTHWIC	Civil Disposition entered for: Croston, James, Defendant; Croston, Majorie C., Defendant; Unknown Owners,, Defendant; Fischer, Margaret Ann, Plaintiff; Fischer, William, Plaintiff. Filing date: 2/24/2017	Joel E. Tingey
3/2/2017	APSC	ABIRCH	Appealed To The Supreme Court	Joel E. Tingey
	CERTAP	ABIRCH	Clerk's Certificate of Appeal	Joel E. Tingey
3/8/2017	RQST	JNICHOLS	Plaintiff's Request For Additional Record	Joel E. Tingey
3/30/2017		TCORONA	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: holden Receipt number: 0015641 Dated: 3/30/2017 Amount: \$2.00 (Check)	Joel E. Tingey

Karl R. Decker, ISB #3390
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Telephone 208-523-0620
Facsimile 208-523-9518

CASE ASSIGNED TO
HON. JOEL E. TINGEY
BONNEVILLE COUNTY, IDAHO
2016 MAY 31 PM 4:39

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN FISCHER,
Trustees of the William and Ann Fischer Revocable
Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MAJORIE C.
CROSTON, husband and wife;

AND ALL UNKOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES CLAMINING
ANY INTEREST IN THE FOLLOWING
DESCRIBED REAL PROPERTY:

Beginning at the Northeast corner of Lot 4, Block 12,
of the Original Ammon Townsite, Bonneville
County, Idaho; running thence N. 88°33'58" W.
330.00 feet to the Northwest corner of said Lot 4;
then S. 00°00'21"W. along the West line of said Lot
4 a distance of 8.99 feet to an existing fence line;
thence S. 89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said Lot 4;
thence N. 00°00'21" E. along said East line 2.50 feet
to the POINT OF BEGINNING

Defendants.

Case No. CV-2016- 2894

**VERIFIED COMPLAINT TO QUIET
TITLE**

Fee Category: A.A.
Fee: \$221.00

COME NOW Plaintiffs William R. Fischer and M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“Plaintiffs”), by and through their attorneys of record, Karl R. Decker and W. Forrest Fischer of Holden, Kidwell, Hahn & Crapo, P.L.L.C., and for cause of action against the above-captioned Defendants, allege as follows:

PARTIES

1. Plaintiffs own real property in Bonneville County, Idaho located at 3000 S. Western Avenue, Ammon, Idaho.

2. Defendants James F. Croston and Marjorie C. Croston (“Defendants”) are residents of Spokane County, Washington and own real property located at 3020 S. Western Avenue, Ammon, Idaho.

3. Defendants “all unknown owners and/or other persons or entities claiming any interest in the property” are unknown individuals or entities who have an interest in, or who may claim an interest in, the Croston Property as defined below.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action, pursuant to Idaho Code §§ 1-705 and 10-1201, because the controversy centers on real property located in Bonneville County, Idaho.

5. This Court has jurisdiction over the Defendants pursuant to Idaho Code § 5-514(c), because they own the real property that is subject to this lawsuit which is located within the State of Idaho.

6. Venue in this action properly lies in this Court, pursuant to Idaho Code § 5-401, because this action seeks to quiet title to real property located in Bonneville County, Idaho.

STATEMENT OF FACTS

7. Plaintiffs own real property in Bonneville County, Idaho located at 3000 S. Western Avenue, Ammon, Idaho (“Fischer Property”) which is legally described as:

Lot 3, and the South 59 feet of Lot 2, Block 12, Ammon Townsite, Bonneville County, State of Idaho, according to the recorded plat thereof.

8. Plaintiffs acquired the Fischer property in their fiduciary capacity on November 2, 2001, via Warranty Deed from themselves, William R. Fischer and M. Ann Fischer, in their individual capacity (the “Fischers”).

9. Defendants’ own real property located at 3020 S. Western Avenue, Ammon, Idaho (“Croston Property”) which is legally described as:

Lot number four (4), Block number twelve (12) of the Ammon Townsite, Bonneville County, State of Idaho as per recorded plat thereof.

10. The North boundary of the Croston Property is the South boundary of the Fischer Property. Since at least 1991, when the Fischers built a home on the Fischer Property, the structures on the Croston Property have been vacant and in a constant state of disrepair.

11. When the Fischers acquired the Fischer Property in 1991, there was an existing post-and-wire fence (“Old Fence”) running along the Fischer Property’s southern boundary, dividing the Fischer Property and Croston Property. Since that time, the Fischers and Plaintiffs have always recognized the Old Fence as the southern property boundary of the Fischer Property.

12. When the Fischers acquired the Fischer Property in 1991, there existed an access road (“Access Road”) located immediately north of the Old Fence, running parallel to the Old Fence for approximately 230 feet until ending at an old tin shed with a concrete foundation

(“Shed”). This Access Road existed prior to the Fischers’ purchase of the Fischer Property and has existed since that time.

13. From 1991 to 1996, the Fischers used the Access Road to access the western part of the Fischer Property and the Shed.

14. In approximately 1996, the Fischers constructed a large garage (“Garage”) approximately 140 feet to the west of the easternmost boundary, and approximately 15 feet north of the Old Fence.

15. Collectively, the Fischers and Plaintiffs have exclusively used the Access Road for access to the western portion of the Fischer Property and the Garage for over 24 years.

16. In or about 1996, the Fischers removed the Shed in order to utilize the space it occupied, but left the Shed’s concrete foundation intact.

17. Until 2015, neither the Fischers nor Plaintiffs have ever witnessed Defendants or anyone else, maintaining the Old Fence. As a result, the Old Fence decayed to a point that certain portions of it had failed and fallen onto the Fischer Property.

18. During or about August 2015, the Plaintiffs decided to replace the dilapidated Old Fence with a new fence. While in the midst replacing the Old Fence, Defendants sent the Fischers a letter dated September 4, 2015, wherein they threatened to sue the Fischers for trespass and malicious injury to the Croston Property (“Demand Letter”) for their work on the Old Fence. This Demand Letter also required that the Fischers “restore [the] property to [Defendants’] satisfaction.”

19. Upon receiving the Demand Letter, Plaintiffs immediately ceased replacing the Old Fence in order to investigate the veracity of Defendants’ claims.

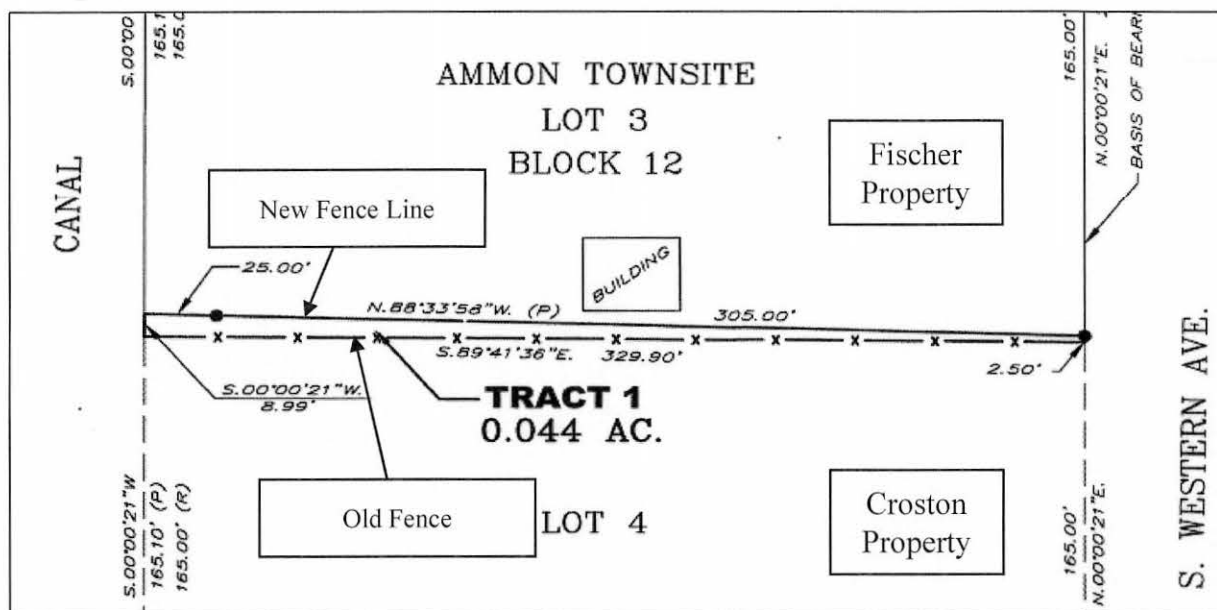
20. Following receipt of the Demand Letter, Plaintiffs commissioned Ellsworth & Associates, PLLC to conduct a survey of the boundary line between the Fischer Property and Croston Property. During this survey, the surveyor made several survey marks on the Fischer Property to mark Ellsworth's understanding of the location of the lot boundaries according to the recorded plat of the Ammon Townsite. ("Plat")

21. Upon visual review of the survey markers, it appeared that the location of the Old Fence did not follow the lot line shown on the Plat. Instead, the easternmost post of the Old Fence appeared to begin approximately two feet and a half south of the north lot line of the Croston Property shown on the Plat, with the Old Fence running in a straight line to a westernmost point approximately 8 feet south the lot line of the Croston Property shown on the Plat.

22. The area located between the Old Fence and the platted boundary, as shown by the Ellsworth survey, consists of 1,896 square feet and is legally described as follows:

Beginning at the Northeast corner of Lot 4, Block 12, of the Original Ammon Townsite, Bonneville County, Idaho; running thence N. 88°33'58'' W. 330.00 feet to the Northwest corner of said Lot 4; then S. 00°00'21''W. along the West line of said Lot 4 a distance of 8.99 feet to an existing fence line; thence S. 89°41'36'' E. along said existing fence line 329.90 feet to a point on the East line of said Lot 4; thence N. 00°00'21'' E. along said East line 2.50 feet to the POINT OF BEGINNING

(hereinafter referred to as "Tract 1"). Tract 1 is illustrated as follows:



23. After reviewing the survey and identifying the Tract, Plaintiffs sent their own demand letter to Defendants on September 24, 2015, notifying them of the fence line discrepancy, asserting their legal right to Tract 1, and offering settlement of any potential issues between the Parties.

24. Additionally, Plaintiffs posted two "No Trespassing" signs along the Old Fence.

25. On September 27, 2015, Linda Penning ("Penning"), allegedly acting on behalf of Defendants, constructed a new wired fence along what they assumed to be the boundary line ("New Fence"). As Penning prepared to construct the fence, Plaintiffs provided her with a copy of Plaintiffs' September 24, 2015, demand letter and requested that she cease building the New Fence. Penning refused and proceeded to complete the New Fence by the end of the day.

26. When the Plaintiffs inspected the New Fence the following day, they discovered that their "No Trespassing" signs on the Old Fence had been removed.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment - I.C. §10-1201)

27. Plaintiffs incorporate by reference paragraphs 1 through 26 of this Complaint as if set forth in full at this point.

28. Pursuant to Idaho Code §10-1201, this Court has jurisdiction to determine the rights, status, and legal relations of Plaintiffs and Defendants with respect to (1) the ownership of Tract 1; (2) the boundary between the Fischer Property and Croston Property; and (3) the location of the fences which have been constructed along said boundary.

29. Pursuant to Idaho Code §10-1202 and Idaho Code §10-1213, Plaintiffs have standing to bring this petition for a declaration of their rights.

SECOND CLAIM FOR RELIEF
(Boundary by Agreement or Acquiescence)

30. Plaintiffs incorporate by reference paragraphs 1 through 26 of this Complaint as if set forth in full at this point.

31. The boundary line between the Fischer Property and the Croston Property was established to be the location of the Old Fence by construction of the Old Fence at a time when the legal boundary line between the properties was either not surveyed and/or was either unknown, uncertain, or in dispute.

32. By agreement between Plaintiffs' predecessors in interest and Defendants' predecessors in interest, the Old Fence was placed on the boundary line between the Fischer Property and Croston Property.

33. The Old Fence has been historically treated as the true boundary line between the Fischer Property and Croston Property for more than two decades and all the owners of the

respective properties have either agreed or acquiesced to this boundary until the events of the fall of 2015.

34. On information and belief, at the time that the Old Fence was constructed, the legal boundary line between the Fischer Property and the Croston Property was uncertain, not surveyed, unknown, or in dispute.

35. All prior owners of the Fischer Property and Croston Property have, from the time that the Old Fence was erected, believed and treated the Old Fence as the true boundary line between the Fischer Property and Croston Property.

36. The Old Fence was constructed pursuant to an agreement fixing the boundary line between the Fischer Property and the Coston Property.

37. Pursuant to Idaho Code §§ 6-401, *et seq.*, Plaintiffs are entitled to have legal title to Tract 1 quieted in their favor, and are entitled to a judgment determining that Plaintiffs' right, title, claim and interest in Tract 1 is superior to any right, title, claim, or interest of Defendants in Tract 1.

38. The Old Fence has existed for well over 24 years, since before the Fischers first purchased the Fischer Property

THIRD CLAIM FOR RELIEF
(Quiet Title – I.C. §6-401)

39. Plaintiffs incorporate by reference paragraphs 1 through 26 and 30 through 38 of this Complaint as if set forth in full at this point.

40. Tract 1 has been usually cultivated or improved by Plaintiffs and their predecessors in conformity with the requirements of Idaho Code § 5-208(1)(a); and/or Tract 1 has been

protected by a substantial enclosure in conformity with the requirements of Idaho Code § 5-208(1)(b); and/or although not enclosed, Tract 1 has been used for the ordinary use of the occupant in conformity with the requirements of Idaho Code § 5-208(1)(c); and/or Tract 1 is part of a known farm or single lot, which has been partially improved in conformity with the requirements of Idaho Code § 5-208(1)(d).

41. Plaintiffs' possession of Tract 1 is and was open, notorious, continuous, and hostile to the rights of all others.

42. Plaintiffs have managed and used Tract 1 in the usual manner together with the rest of the Fischer Property.

43. Plaintiffs' and Plaintiffs' predecessor's use and possession of Tract 1 has been for more than twenty-five (25) years prior to amendment of Idaho Code § 5-207 or 206.

44. Title to Tract 1 should be quieted in Plaintiffs on the basis of adverse possession, free of all claims of Defendants and any one claiming through or after Defendants.

**FOURTH CLAIM FOR RELIEF
(Waste & Trespass – I.C. §6-202)**

45. Plaintiffs incorporate by reference paragraphs 1 through 26 of this Complaint as if set forth in full at this point.

46. At the time that Defendants constructed the New Fence, Plaintiffs were the legal owners of Tract 1.

47. Prior to constructing the New Fence, Defendants were notified of Plaintiffs' claim to Tract 1.

48. Prior to construction of the New Fence, Plaintiffs erected “No Trespassing” signs along the Old Fence.

49. Defendants willfully and intentionally removed Plaintiffs’ “No Trespassing” signs and constructed the New Fence within Tract 1, causing damages to Plaintiffs and the Fischer Property.

50. Defendants’ actions constitute waste and willful trespass on real property and the presence of the New Fence constitutes a continuing trespass on real property.

51. Plaintiffs are entitled to an award of treble damages and their reasonable attorney’s fees in bringing this action pursuant to I.C. §6-202, awarded against Defendants.

**FIFTH CLAIM FOR RELIEF
IN THE ALTERNATIVE
(Easement by Prescription)**

52. Plaintiffs incorporate by reference paragraphs 1 through 26 of this Complaint as if set forth in full at this point.

53. Plaintiffs have used Tract 1 to access the Garage and the western part of the Fischer Property for more than 5 years.

54. Plaintiffs’ use of Tract 1 has been open and notorious, continuous and uninterrupted, and adverse to the legal owner of Tract 1.

55. Defendants knew, or should have known, of Plaintiffs’ exclusive and continuous use of Tract 1.

56. Plaintiffs are entitled to a prescriptive easement over Tract 1.

CLAIM FOR ATTORNEY'S FEES

57. Plaintiffs were required to retain the services of an attorney to prosecute their claims in this action.

58. Plaintiffs are entitled to recover from Defendants their reasonable attorney's fees and costs incurred in this action pursuant to Idaho Code § 6-202, Idaho Code § 12-121, and Idaho Rule of Civil Procedure 54(d) and 54(e), and other relevant provisions of Idaho law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays the judgment of the court as follows:

A. That the Court order and decree that Tract 1 belongs to Plaintiffs, and that all right, title and interest to such real property currently belongs to and is owned by Plaintiffs free and clear of any right, title and interest of all Defendants;

B. That title to Tract 1 be quieted in fee simple in favor of Plaintiffs against the claims of all Defendants and all unknown claimants and/or owners thereof;

C. That Plaintiffs receive judgment against any defendant(s) who contest(s) this action to quiet title in Plaintiffs to Tract 1 for any and all reasonable costs and attorney fees; and

D. For such other costs and disbursements as may be authorized by law or Court rule, including any advances by Plaintiffs for the preservation, protection, maintenance, or operation of Tract 1 and for any and all other authorized Court costs.

E. In the alternative, for a grant of a prescriptive easement in favor of Plaintiffs for the continued use of the Tract 1.

F. For such other relief as this Court deems just and equitable.

DATED this 31 day of May, 2016.

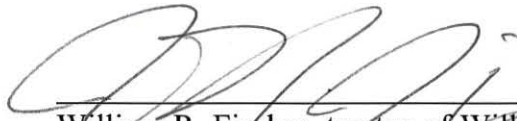


Karl R. Decker
W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs


VERIFICATION OF COMPLAINT

STATE OF IDAHO)
)ss.
County of Bonneville)

WILLIAM R. FISCHER and M. ANN FISCHER Trustees of the William and Ann Fischer Revocable Trust, being first duly sworn on oath, depose and say that they are the Plaintiffs hereto; that they have read the above Verified Complaint to Quiet Title and believe that the facts stated therein are true; and that they are authorized to make this verification.



William R. Fischer, trustee of William and Ann Fischer Revocable Trust

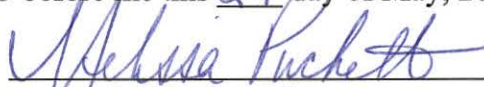


M. Ann Fischer, trustee of William and Ann Fischer Revocable Trust

SUBSCRIBED AND SWORN TO before me this 24 day of May, 2016.

(seal)





Notary Public for Idaho
Residing at Idaho Falls, Idaho
My Commission Expires: 01-26-2021

G:\WPDATA\WFF\18611 (Fischer Property)\Pleadings\Verified Complaint to Quiet Title.docx

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY, IDAHO

16 JUL -1 PM 2:30

DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB #2903
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83442
Telephone: (208) 745-9202
Facsimile: (208) 745-8160
rdunn@dunnlawoffices.com

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN FISCHER,)
Trustees of the William and Ann Fischer)
Revocable Trust,)
Plaintiffs,)

Case No. CV-16-2894

vs.)

ANSWER TO COMPLAINT

JAMES F. CROSTON and MARJORIE C.)
CROSTON, husband and wife;)

COUNTERCLAIM OF THE
DEFENDANTS

AND ALL UNKNOWN OWNERS AND/OR)
OTHER PERSONS OR ENTITIES CLAIMING)
ANY INTEREST IN THE FOLLOWING)
DESCRIBED REAL PROPERTY:)

Beginning at the Northeast corner of Lot 4, Block)
12, of the Original Ammon Townsite, Bonneville)
County, Idaho; running thence N. 88°33'58" W.)
330.00 feet to the Northwest corner of said Lot 4;)
thence S 00°00'21"W. along the West line of said Lot)
4 a distance of 8.99 feet to an existing fence line;)
thence S. 89°41'36" E. along said existing fence line)
329.90 feet to a point on the East line of said Lot 4;)
thence N. 00°00'21" E. along said East line 2.50 feet)
to the POINT OF BEGINNING.)

Defendants.)
_____)

COME NOW, the defendants, JAMES F. CROSTON and MARJORIE C.

CROSTON, husband and wife, by and through the undersigned counsel, and ANSWER that
complaint on file herein as follows:

I.

The complaint herein fails to set forth a cause of action for which relief may be granted because the elements for a quiet title action are lacking. IRCP 12 (b)(6).

II.

These answering defendants deny each and every allegation in the complaint not specifically admitted hereafter.

III.

As to each individual paragraph of the complaint, these answering defendants respond as follows:

1. Admit.
2. Admit.
3. Lack information to form a belief and, therefore, deny.
4. Admit.
5. Deny.
6. Admit that this is a quiet title action with such allegations but deny it is a proper use of the quiet title theory. However, venue is admitted.
7. Upon information and belief admit subject to verification of the legal description.
8. No personal knowledge and, therefore, deny.
9. Admit.
10. Admit that the properties abut and deny the balance.
11. An old fence existed but circumstances changed between the parties. Thus, partially admit and deny the balance.
12. Deny.
13. The plaintiff had turned his large truck on the defendant property which was objectionable to the defendants.

14. Deny the measurements. A garage was built.
15. Deny.
16. Unknown to these answering defendants and, therefore, deny.
17. Admit that the old fence became unusable and it is alleged the plaintiffs removed the old fence.
18. Admit a letter was sent to establish the correct location of the fence.
19. Unknown what the plaintiffs thought or investigated and, therefore, deny.
20. Admit a survey was completed.
21. Admit that the survey did not match the old fence line.
22. Unknown to these answering defendants other than the survey markers were placed in the appropriate location according to the surveyor.
23. A letter was sent to the defendants indicating the proper survey markings. The balance of the letter was self-serving and irrelevant.
24. Admit.
25. The plaintiffs had previously desired that the new fence be placed on the survey markings. The defendants complied. On the day that the fence was being placed, the plaintiffs then desired to suspend the fencing. The defendants needed a fence for livestock and completed the fence.
26. Allegation is confusing as to which party is being discussed. Denied.
27. Defendants re-allege answers to paragraphs 1-26.
28. Admit.
29. Admit if there exist proper allegations.
30. Defendants re-allege paragraphs 1-26.
31. Deny.
32. Deny.

33. Deny.
34. Unknown, Deny.
35. Deny.
36. Deny.
37. Deny.
38. The old fence existed for some time but it is unknown, at this time, as to when the old fence was erected. The balance is denied.
39. Defendants re-allege prior answers of paragraphs 1-26; 30-38.
40. Deny.
41. Deny.
42. Deny.
43. Deny.
44. Deny.
45. Defendants re-allege answers to par. 1-26.
46. Deny.
47. Deny.
48. The old fence did not exist in total and had been removed. No trespassing signs were in some location.
49. Deny.
50. Deny.
51. Deny.
52. Defendants re-allege answers to par. 1-26.
53. Deny.
54. Deny.
55. Deny.

56. Deny.
57. Plaintiffs retained an attorney but were not required to do so.
58. Deny.

FIRST AFFIRMATIVE DEFENSE

The plaintiffs have failed to allege proper elements for quiet title, boundary disputes and trespass.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs recognized that the "old fence" was in disrepair or removed. The plaintiffs removed most of the remaining portions of the fence. The plaintiffs requested a survey and indicated to the defendants that the survey would control. The plaintiffs indicated that the new fence should be placed on the survey and would pay one-half (1/2) of the cost. Defendants complied.

THIRD AFFIRMATIVE DEFENSE

The parties have entered into an accord and satisfaction on the location of the new fence which would divide the properties appropriately between the two parcels.

FOURTH AFFIRMATIVE DEFENSE

The parties have never agreed upon a boundary based upon the old fence or the placement of the old fence. The parties specifically agreed to the survey to be controlling. Only after the plaintiffs discovered the survey was moved southward was any objection brought forth from plaintiffs to the defendants.

REQUEST FOR FEES AND COSTS

The defendants request their fees and costs for defending the complaint filed by the plaintiffs in this matter. The fees and costs are requested pursuant to statutes, rule and case law established in the State of Idaho.

COUNTERCLAIM

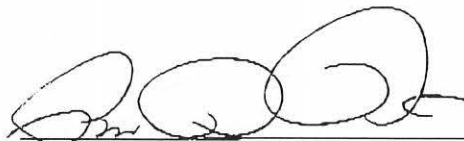
- A. The defendants own real property in Bonneville County, Idaho.
- B. The plaintiffs own real property south and abutting the real property of the defendants.
- C. The plaintiffs and these answering defendants are described in the complaint.
- D. The defendants are elderly and act through their agent and daughter, Linda Penning.
- E. The parties entered into an agreement that the survey that was being performed would control the boundary between the two parcels.
- F. The survey was completed and marked.
- G. The defendants constructed a fence upon the survey markings consistent with the survey.
- H. The plaintiffs previously had agreed to pay one-half the cost of the fence.
- I. The fence was a necessary item as plans were being made to have livestock to keep the grass and weeds eaten.
- J. The plaintiffs refused to honor their agreement as to the boundary after the survey and fence were completed.
- K. The plaintiffs owe the defendants for the one-half cost of the fence.
- L. The defendants request fees and costs pursuant to statutes, rules and case law in the State of Idaho.

WHEREFORE, the defendants pray for the following relief:

- 1. That the complaint on file be dismissed with prejudice;
- 2. That fees and costs be awarded to the defendants for defending the complaint;
- 3. That the defendants be awarded the relief requested in the counterclaim;
- 4. That the defendants be awarded fees and costs on the counterclaim; and,

5. For any and other just relief that is appropriate.

Dated this 1st day of July, 2016.



Robin D. Dunn, Esq.

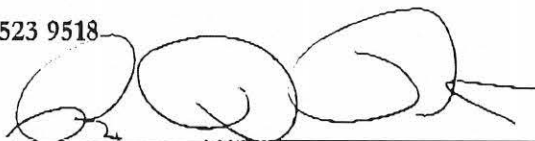
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2016, a true and correct copy of the foregoing was delivered to the following person(s) by:

Hand Delivery

Postage-prepaid mail

Facsimile Transmission 208 523 9518



Dunn Law Offices, PLLC

Karl R. Decker, Esq.
W. Forrest Fischer, Esq.
P.O. Box 50130
Idaho Falls, ID 83405

16 JUL 14 PM 4:20

Karl R. Decker, ISB #3390
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Idaho Falls, ID 83405
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN FISCHER,
Trustees of the William and Ann Fischer Revocable
Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MAJORIE C.
CROSTON, husband and wife;

AND ALL UNKOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES CLAIMING
ANY INTEREST IN THE FOLLOWING
DESCRIBED REAL PROPERTY:

Beginning at the Northeast corner of Lot 4, Block 12,
of the Original Ammon Townsite, Bonneville
County, Idaho; running thence N. 88°33'58'' W.
330.00 feet to the Northwest corner of said Lot 4;
thence S. 00°00'21''W. along the West line of said
Lot 4 a distance of 8.99 feet to an existing fence line;
thence S. 89°41'36'' E. along said existing fence line
329.90 feet to a point on the East line of said Lot 4;
thence N. 00°00'21'' E. along said East line 2.50 feet
to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**PLAINTIFFS' ANSWER TO
COUNTERCLAIMS**

JAMES F. CROSTON and MAJORIE C.
CROSTON, husband and wife;

Counterclaimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER,
Trustees of the William and Ann Fischer Revocable
Trust,

Counter Defendants.

COME now Plaintiffs/Counter Defendants, William R. Fischer and M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“Plaintiffs”), and answer Defendants’/Counterclaimants’, James F. Croston and Majorie C. Croston (“Defendants”), Counterclaim of the Defendants (“Counterclaim”) as follows:

FIRST DEFENSE

Plaintiffs deny each and every allegation in the Counterclaim not specifically admitted hereafter.

SECOND DEFENSE

Plaintiffs Defendants’ Counterclaim as follows:

1. Answering the allegations in paragraph A of the Counterclaim, Plaintiffs admit the allegations thereof.
2. Answering the allegations in paragraph B of the Counterclaim, Plaintiffs deny the allegations thereof. Plaintiffs own real property to the *north* and abutting the real property of Defendants.
3. Answering the allegations in paragraph C of the Counterclaim, Plaintiffs admit the allegations thereof.

4. Answering the allegations in Paragraph D of the Counterclaim, Plaintiffs state that they lack sufficient information to form a belief as to the truth of the allegations and therefore deny the allegations thereof. Plaintiffs admit that Linda Penning has represented herself to Plaintiffs that she is the agent of Defendants.
5. Answering the allegations in paragraph E of the Counterclaim, Plaintiffs deny the allegations thereof.
6. Answering the allegations of Paragraph F of the Counterclaim, Plaintiffs admit that a survey was conducted and that survey pins were placed.
7. Answering the allegations of Paragraph G of the Counterclaim, Plaintiffs admit that Defendants constructed a fence over the objections of Plaintiffs, but deny that the fence was constructed consistent with the survey. At the time that Defendants constructed the fence, no survey had been recorded.
8. Answering the allegations of Paragraph H, Plaintiffs denies the allegations thereof.
9. Answering the allegations of Paragraph I of the Counterclaim, Plaintiffs lack sufficient information to form a belief as to the truth of the allegations and therefore deny the allegations thereof. As of the date of this Answer, no livestock are on Defendants property and the grass and weeds have become overgrown.
10. Answering the allegations of Paragraph J of the Counterclaim, Plaintiffs deny the existence of an agreement and therefore deny the allegations thereof.
11. Answering the allegations of Paragraph K of the Counterclaim, Plaintiffs deny the allegations thereof.
12. Paragraph L contains no allegation against Plaintiffs. However, inasmuch as paragraph L alleges that Plaintiffs are liable to pay Defendants fees and costs, that allegation is denied.

THIRD AFFIRMATIVE DEFENSE

Defendants fail to state a claim upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

Defendants failed to take reasonable steps to mitigate the claimed or alleged damage.

FIFTH AFFIRMATIVE DEFENSE

Defendants' claim fails by reason of lack of consideration.

SIXTH AFFIRMATIVE DEFENSE

Inasmuch as Defendants seek equitable relief, such relief is barred under the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

Defendants' allegation of the existence of an oral agreement or contract between the parties is barred by Idaho's Statute of Frauds.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following judgment:

1. For an Order dismissing Defendants' Counterclaim with prejudice and further ordering that Defendants take nothing thereby.
2. For an Order awarding Plaintiff its reasonable attorneys' fees and costs as allowed under Idaho Code §12-120 and I.R.C.P. 54(d) and (e).
3. For all such other and further relief as may be just and equitable.

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///

///

DATED this 13 th day of July, 2016.



Karl R. Decker
W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 13th day of July, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

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Karl R. Decker, ISB #3390
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BONNEVILLE COUNTY
IDAHO

2016 DEC 20 PM 4:39

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

JAMES F. CROSTON and MARJORIE C.

Case No. CV-2016-2894

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

COMES NOW Plaintiffs/Counter Claimants, William R. Fischer And M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“Plaintiffs”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, respectfully move that the Court enter summary judgment in favor of Plaintiffs against Defendants/Counter Claimants. There are no genuine issues of material fact that would preclude this Court from rendering summary judgment in Plaintiffs’ favor. Furthermore, Plaintiffs request that the Court award them their damages as well as their costs and attorneys’ fees incurred in this action.

This Motion is supported by Plaintiffs’ Verified Complaint and following documents which are filed concurrently herewith:

- Declaration of W. Forrest Fischer;
- Declaration of Larry Kennedy;
- Declaration of Sharon Anderson;
- Declaration of M. Ann Fischer; and
- Plaintiffs’ Memorandum in Support of Motion for Summary Judgment.

DATED this 20th day of December, 2016.



Karl R. Decker
W. Forrest Fischer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 20th day of December, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

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Karl R. Decker, ISB #3390
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
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Beginning at the Northeast corner of Lot 4,
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along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

Plaintiffs/Counter Defendants, William R. Fischer and M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“**Plaintiffs**”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit this Memorandum in Support of their Motion for Summary Judgment.

I. INTRODUCTION

For at least the past six decades, an old post and wire fence between the parties’ respective properties existed and served as the parties’ mutually accepted boundary line. Moreover, the parties’ predecessors in interest also considered and regarded the fence as the boundary between their properties. Under Idaho law, these facts create the presumption that the location of the decades-old fence is the true boundary between the parties’ properties. This law – boundary by agreement or acquiescence – is firmly established in Idaho jurisprudence. One corollary of this doctrine is that long acquiescence between neighbors concerning the location of the boundary line between their properties ought to preclude “a controversy that will involve rights that have been unquestioned for a generation.” *Dreher v. Powell*, 120 Idaho 715, 717–18, 819 P.2d 569, 571–72 (Ct. App. 1991) (citation omitted). The facts presented in this case satisfy all of the requisite

elements for a boundary line by agreement. Despite this fact, Defendants engaged in self-help by forcibly claiming almost 1,900 square feet of Plaintiffs' property as their own. Accordingly the Court should grant summary judgment in favor of Plaintiffs and award them their reasonable attorneys' fees and costs based on this doctrine. Furthermore, the Court should grant summary judgment on Defendants' counterclaim as a matter of law.

II. STATEMENT OF FACTS

Plaintiffs own real property in Bonneville County, Idaho, located at 3000 S. Western Avenue, Ammon, Idaho ("**Fischer Property**"), which is legally described as:

Lot 3, and the South 59 feet of Lot 2, Block 12, Ammon Townsite, Bonneville County, State of Idaho, according to the recorded plat thereof.

*F. Fischer Decl.*¹, at ¶ 1 (Ex. A), *Verified Complaint*, at ¶¶ 7-8. Plaintiffs acquired the Fischer Property in their individual capacity in 1992 and later transferred it into a trust on November 2, 2001. *Id.* In order to avoid confusion, Plaintiffs shall hereinafter be referred to as the "**Fischers**," with the understanding that all actions performed by the Fischers prior to November 2, 2001, were done in their individual capacity, and all subsequent actions performed in the Fischers' capacity as Trustees of the William and Ann Fischer Revocable Trust.

The Fischers originally purchased the Fischer Property from Douglas M. Ackerman and Cheryl A. Ackerman in January 1992. *F. Fischer Decl.* at ¶ 1 (Ex. A); *M. Fischer Decl.*² at ¶ 2. The Ackermans obtained the Fischer Property from Larry J. Kennedy and Sharon Kennedy less than a year earlier, in June 1991. *F. Fischer Decl.*, at ¶ 1 (Ex. A). The Kennedys acquired the Fischer Property in 1982 from Sharon Kennedy's parents, Levi D. Barzee and Inza E. Barzee, who

¹ Declaration of W. Forrest Fischer in support of Plaintiff's Motion for Summary Judgment.

² Declaration of M. Ann Fischer.

had owned the property since 1943. *Id.*

Immediately adjacent to the south of the Fischer property is real property owned by Defendants James F. Croston and Marjorie C. Croston (“**Croston**”), commonly known as 3020 S. Western Avenue, Ammon, Idaho (“**Croston Property**”). *Id.* at ¶ 2, (Ex. B); *Verified Complaint*, at ¶ 9. The Croston Property is legally described as:

Lot number four (4), Block number twelve (12) of the Ammon Townsite, Bonneville County, State of Idaho as per recorded plat thereof.

Id. The North boundary of the Croston Property is the South boundary of the Fischer Property. *Verified Complaint*, at ¶ 10. The Crostons acquired the Croston Property in March 1959, from Denzel W. Rowbury and Viola H. Rowbury.³ *F. Fischer Decl.*, at ¶ 2 (Ex. B). At the time the Crostons purchased the Croston Property, there was an existing post-and-wire fence running along the Fischer Property’s southern boundary, dividing the Fischer Property and Croston Property (“**Old Fence**”). *F. Fischer Decl.*, at ¶ 4 (Ex. C at p. 9); *Anderson Decl.*⁴ at ¶ 7. The Fischers do not know when the Old Fence was first constructed. *M. Fischer Decl.*, at ¶ 3. However the Old Fence predated the Crostons’ acquisition of the Croston Property⁵ such that the date and purpose for construction of the Old Fence is beyond the personal knowledge of the Crostons. *F. Fischer Decl.*, at ¶ 4 (Ex. C at pp. 3, 4, and 9). The best evidence currently available reflects that the Old Fence existed since at least 1951. *Anderson Decl.* at ¶ 7.

Located upon the eastern portion of Croston Property is an old building that was once a log cabin (“**Log Cabin**”). *Anderson Decl.*, at ¶ 2. Sharon Anderson, née Rowbury, moved into the

³ The Rowbury’s obtained the Croston Property from Alvin and Blanche Issacs in 1951. *F. Fischer Decl.*, at ¶ 2 (Ex. B).

⁴ Declaration of Sharon Anderson.

⁵ *Anderson Decl.* at ¶ 7.

Log Cabin with her family in 1951. *Anderson Decl.*, at ¶ 2; *F. Fischer Decl.*, at ¶ 2 (Ex. B). At the time Mrs. Anderson moved into the Log Cabin, the Fischer Property was merely pasture. *Anderson Decl.*, at ¶ 6. According to Mrs. Anderson, the Old Fence existed prior to her parents moving into the Log Cabin. *Id.* at ¶ 7. Furthermore, Mrs. Anderson and her family always treated the Old Fence as the true boundary between what is now the Croston Property and Fischer Property. *Id.* at ¶¶ 8-9. After graduating from high school in 1958, Mrs. Anderson moved out of the Log Cabin, and a year later, her parents sold it to the Crostons. *Id.* at ¶¶ 3-4.

Around 1973, Larry Kennedy became acquainted with the Fischer Property as part of helping his friend Ron Barzee. *Kennedy Decl.*⁶ at ¶¶ 3-4. At that time, Ron Barzee's parents owned the Fischer Property, which was only pasture, as well as a home located directly north of the Fischer Property. *Id.* at ¶ 5. Because Ron's parents were elderly, he and Mr. Kennedy regularly helped around the house and maintained the Fischer Property. *Id.* at ¶ 4. Mr. Kennedy recalls fixing portions of the Old Fence, sometimes replacing rotted posts or other times stretching and stapling new hog wire. *Id.* at ¶¶ 6-7, (Ex. A). According to Mr. Kennedy, the Old Fence was in rough condition when he first saw it and thought that it was likely decades old. *Id.* at ¶ 6.

In addition to the Old Fence, there was a shed on a concrete foundation located on the south-west side of the Fischer Property (“**Shed**”). *Id.* at ¶¶ 5, 8 (Ex. B). It is unknown when this Shed was built or who built it. Nevertheless, Ron Barzee's parents primarily used the Shed to store tools and animal feed. *Id.* at ¶ 5. To access the Shed, Mr. Kennedy and others would drive on an existing, two-track dirt road that ran west from Western Avenue along the southern boundary of the Fischer Property until it met up with the Shed (the “**Access Road**”). *Id.*

⁶ Declaration of Larry Kennedy.

Mr. Kennedy married Ron Barzee's sister in about 1974 or 1975. *Id.* at ¶ 8. Beginning in 1981, Mr. Kennedy and his wife wanted to build a house for themselves in Ammon and purchased what is now the Fischer Property from Levi Barzee. *Id.* While Mr. Kennedy and his wife owned the Fischer Property, he rebuilt the Shed with tin. *Id.* However, Mr. Kennedy and his wife divorced before they could build a home on the Fischer Property, and subsequently sold it in 1991. *Id.* at ¶ 9.

At all times during his work upon, and ownership of, the Fischer Property, Mr. Kennedy regarded the Old Fence to be the true boundary line between the Fischer Property and the Croston Property. *Id.* at ¶ 10. Mr. Kennedy's knowledge is based on his prior ownership of the Fischer Property, his maintenance of the Fischer Property up to the Old Fence, and his repairs of sections of the Old Fence. *Id.*

In 1992, the Fischers built a single family home on the Fischer Property. *M. Fischer Decl.* at ¶ 2. When they purchased the Fischer Property, the Fischers regarded and understood the Old Fence to be the southern boundary of their property. *Verified Complaint*, at ¶ 11. Furthermore, from 1992 to 1996, the Fischers used the entire length and breadth of the Access Road to access the western part of the Fischer Property and the Shed. *Id.* at ¶ 12.

In or about 1996, the Fischers constructed a large garage (“**Garage**”) approximately 140 feet to the west of the easternmost boundary, and approximately 15 feet north of the Old Fence. *Id.* at ¶ 14. Around the same time, the Fischers removed the Shed in order to utilize the space it occupied, but left the Shed's concrete foundation intact. *Id.* at ¶ 16. The Fischers continued to use the Access Road in order to access the Garage and used the gap between the Garage and the Old Fence to access the westernmost part of the Fischer Property. *M. Fischer Decl.*, at ¶ 4; *Verified*

Complaint, at ¶ 15. Altogether, the Fischers exclusively used the Access Road to access the western portion of the Fischer Property and the Garage for over 24 years. *Verified Complaint*, at ¶ 15.

Since purchasing and building a home on the Fischer Property, the Fischers have regarded and treated the Old Fence as their southern boundary line. *Verified Complaint*, at ¶ 11. The Fischers have maintained the Fischer Property up to the Old Fence for over two decades by mowing and controlling the large grasses that grow on the property, especially along the Old Fence. *M. Fischer Decl.*, at ¶ 5.

Until 2015, the Fischers never witnessed the Crostons, or anyone else, maintaining the Old Fence. *Verified Complaint*, at ¶ 17. As a result, the Old Fence decayed to a point that certain portions had failed and fallen onto the Fischer Property. *Id.* Due to the dilapidated condition of the Old Fence, the Fischers decided to replace it with a new, more aesthetically pleasing fence in August 2015. *Id.* at ¶ 18.

While the Fischers were in the midst of replacing the Old Fence, the Crostons sent the Fischers a letter dated September 4, 2015, wherein they threatened to sue the Fischers for trespass and malicious injury to the Croston Property (“**Demand Letter**”) for their work on the Old Fence. *Verified Complaint*, at ¶ 17; *F. Fischer Decl.* at ¶ 5 (Ex. D). This Demand Letter also required that the Fischers “restore [the] property to [the Crostons’] satisfaction.” *Id.* At the bottom of the Demand Letter, it appeared that the Crostons sent additional copies of the letter to the City of Ammon’s Planning Department and Code Enforcement Department, the Bonneville County Sheriff, and the Progressive Irrigation District. *F. Fischer Decl.* at ¶ 5 (Ex. D). Given the tone and tenor of the Demand Letter and the inclusion of third party agencies, the Fischers immediately

ceased replacing the Old Fence and consulted with their attorney regarding what they could do to avoid being sued. *Verified Complaint*, at ¶ 19; *M. Fischer Decl.*, at ¶ 6.

Wanting to avoid litigation with the Crostons, the Fischers commissioned Ellsworth & Associates, PLLC, (“**Ellsworth**”) to conduct a survey of the existing boundary line between the Fischer Property and Croston Property. *Verified Complaint*, at ¶ 20; *M. Fischer Decl.*, at ¶ 7. The Fischers wanted a survey to ensure that the replacement fence would be located exactly where the Old Fence had been. *M. Fischer Decl.*, at ¶ 7.

Prior to the survey, Mrs. Fischer encountered and spoke with Jim Croston (“Jim”), on or about August 30, 2015. *Id.* at ¶ 8. At the time of their conversation, Mrs. Fischer did not know that Jim was the son of the Crostons. *Id.* Jim was in the process of marking and measuring those portions where the Old Fence had been, using spray paint to draw a line approximating the Old Fence’s location on those portions where it had been removed. *Id.* During their conversation, Mrs. Fischer indicated to Jim that the Fischers would be replacing the Old Fence with a better one. *Id.* Mrs. Fischer informed Jim that the Fischers had hired a survey company to mark the line of the Old Fence so there would be no disputes when they constructed the new fence. *M. Fischer Decl.*, at ¶ 8; *F. Fischer Decl.*, at ¶ 7 (Ex. F). Mrs. Fischer denies that she ever entered into an oral agreement changing the properties’ boundary during any portion of her conversation with Jim. *M. Fischer Decl.*, at ¶ 10. Rather, Mrs. Fischer merely informed Jim of the steps the Fischers were planning on taking to replace the fence on the boundary between the properties. *Id.* At the time of this conversation, the Fischers had no reason to believe that the Old Fence was not on the deeded boundary line. *Id.*

In September 2015, Ellsworth surveyed the boundary line between the Fischer and Croston

properties, placing survey markers. *Verified Complaint*, at ¶ 20. During this survey, the surveyor made several marks on the Fischer property to correspond with Ellsworth's understanding of the location of the lot boundaries according to the recorded plat of the Ammon Townsite ("Plat"). *Id.* Upon visual review of the survey markers, it appeared that the location of the Old Fence did not follow the lot line shown on the Plat. *Id.* at ¶ 21. Instead, the easternmost post of the Old Fence appeared to be approximately two and a half feet south of the north lot line, with the Old Fence running in a straight line to a westernmost point approximately 8 feet south of the lot line of the Croston Property shown on the Plat. *Id.*

The area located between the Old Fence and the platted boundary, as shown by the Ellsworth survey, consists of 1,896 square feet and is legally described as follows:

Beginning at the Northeast corner of Lot 4, Block 12, of the Original Ammon Townsite, Bonneville County, Idaho; running thence N. 88°33'58'' W. 330.00 feet to the Northwest corner of said Lot 4; then S. 00°00'21''W. along the West line of said Lot 4 a distance of 8.99 feet to an existing fence line; thence S. 89°41'36'' E. along said existing fence line 329.90 feet to a point on the East line of said Lot 4; thence N. 00°00'21'' E. along said East line 2.50 feet to the POINT OF BEGINNING

(hereinafter referred to as "**Tract 1**"). *Verified Complaint* at ¶ 22; *F. Fischer Decl.*, at ¶ 8 (Ex.

G). Tract 1 is illustrated as follows:

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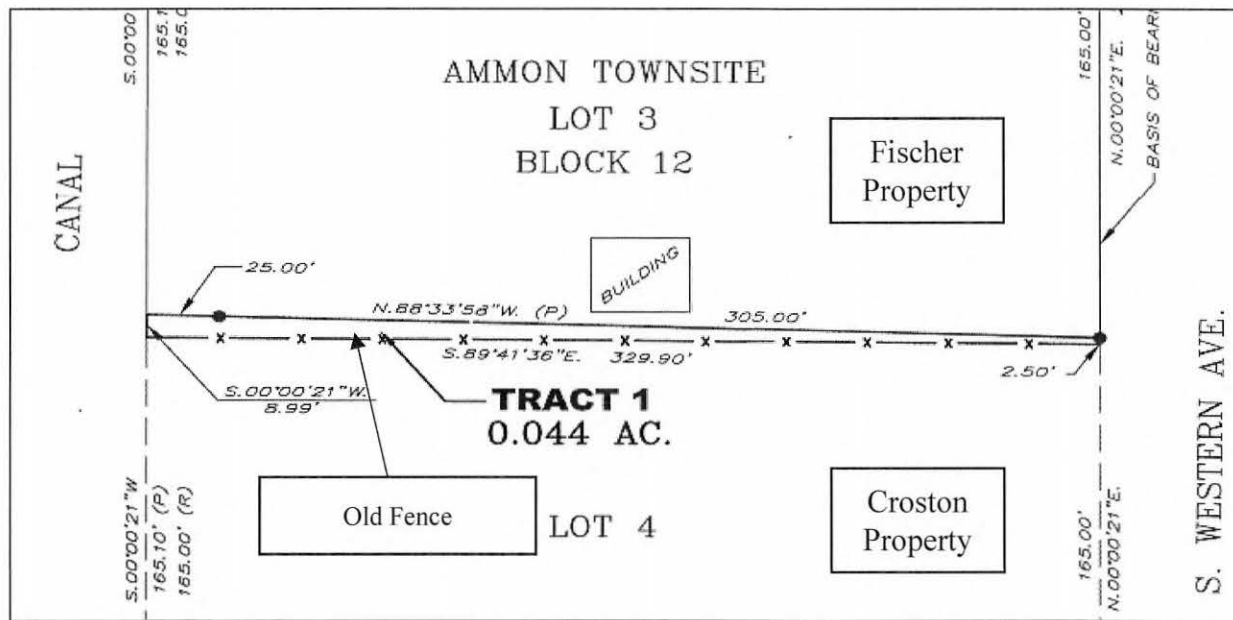
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Id.

After reviewing the survey and identifying Tract 1, the Fischers overnighted a letter to the Crostons dated September 24, 2015, notifying them of the fence line discrepancy, asserting the Fischers' legal right to Tract 1, and offering settlement of any potential issues between the Parties. *Verified Complaint*, at ¶ 23; *M. Fischer Decl.*, at ¶ 11. At the same time, the Fischer's posted two "No Trespassing" signs along the Old Fence. *Verified Complaint*, at ¶ 24.

On or about September 25, 2015, counsel for the Fischers called the Crostons and spoke with Marjorie Croston. *F. Fischer Decl.*, at ¶ 9, (Ex. H). According to Marjorie, the Fischers' attorney notified her of the Fischer's legal claim to Tract 1, instructed her not to construct a new fence until the parties came to an agreement, and told her to expect a letter in the mail outlining the Fischers' claims. *Id.* Marjorie informed the Fischers' attorney that her daughter, Linda Penning ("Penning"), had the Crostons' Power of Attorney to act on their behalf in this matter. *Id.* Following this phone call, Marjorie called Penning and informed her of her conversation with

the Fischers' attorney. *Id.* at ¶ 10 (Ex. I). Contrary to the Fischers' reasonable requests, Penning told Marjorie that she "would put the fence up now instead of waiting" as they wanted "to run some livestock anyway." *Id.* However, the Crostons could not put livestock on the Croston Property due to prohibitions within the Ammon City Code. *F. Fischer Decl.*, at ¶ 10 (Ex. I).

On September 27, 2015, Penning began construction of a new wire fence along what she assumed to be the boundary line ("New Fence"). *Verified Complaint*, at ¶ 25. Upon seeing the fencing crews on their property, the Fischers provided Penning with a copy of their letter dated September 24, 2015, and requested that she cease building the fence. *Id.* When Penning refused to comply with the Fischers' request, the Fischers' attorney immediately called Marjorie Croston. *F. Fischer Decl.*, at ¶ 11 (Ex. J). When Marjorie did not answer the phone, the Fischers' attorney left her a detailed voice message wherein he strongly advised that she instruct Penning to stop constructing the New Fence lest the Fischers file a lawsuit against her. *Id.* Unfortunately, despite the Fischers' numerous demands, the Crostons proceeded to complete the New Fence by the end of the day. *Verified Complaint*, at ¶ 25.

Currently, the New Fence blocks the Fischers from access to the western portion of their property over the Access Road running next to the Garage. *M. Fischer Decl.*, at ¶ 4. The New Fence runs at such an angle that it encroaches almost 9 feet into the Fischers' Property at the western end of the property, crossing the old concrete foundation of the Shed. *F. Fischer Decl.*, at ¶¶ 8 and 12 (Exs. G and K). Finally, in the course of a year since this dispute arose, the Crostons have neither inhabited the Log Cabin, nor utilized the Croston Property to graze animals. *M. Fischer Decl.*, at ¶ 12.

III. STANDARD OF REVIEW

Summary judgment is proper if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). The moving party carries the burden of proving that there is no genuine issue of material fact. *Losee v. Idaho Co.*, 148 Idaho 219, 222, P.3d 575, 578 (2009).

In this matter, neither party demanded a trial by jury. Furthermore, none of the causes of action at issue in this case warrant a jury trial. Accordingly, “[w]hen an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.” *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 692 (2004) (citation omitted). Furthermore, the Court “freely reviews the entire record to ascertain if either party was entitled to judgment as a matter of law and determines whether the record reasonably supports the inferences drawn by the district judge.” *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 13, 232 P.3d 330, 334 (2010) (citation omitted).

IV. ARGUMENT

A. The Court should declare that the Old Fence is the true boundary line between the Fischer Property and Croston Property under the doctrine of boundary line by agreement or acquiescence.

The Old Fence marked and served as the boundary between the Fischer Property and Croston Property for over six decades before this dispute arose. Fences that have been in place for a long time are presumed to be the true boundary under Idaho Law. *See Luce v. Marble*, 142 Idaho 264, 271, 127 P.3d 167, 174 (2005). Furthermore, the conduct of prior property owners demonstrate that the Old Fence was regarded as the true boundary between the properties. These

facts, coupled with lack of any evidence from those who were alive at the time the fence was built, create the presumption that the Old Fence is the true boundary between the properties. Accordingly, the Court should grant summary judgment in favor of the Fischers and declare that the Old Fence is the true boundary between the Fischer Property and Croston Property.

The doctrine of boundary by agreement or acquiescence⁷ is well established in Idaho law. The doctrine is based upon the premise that long acquiescence between neighbors concerning the boundary line between their properties ought to preclude “a controversy that will involve rights that have been unquestioned for a generation.” *Dreher v. Powell*, 120 Idaho 715, 718, 819 P.2d 569, 572 (Ct. App. 1991) (citation omitted). “Where the boundary is uncertain or disputed, coterminous owners ‘may orally agree upon a boundary line’ and such an agreement can become binding on successors if the parties to the oral agreement take possession under it.” *Flying Elk Inv.*, 149 Idaho at 13, 232 P.3d at 334 (citing *Downing v. Boehringer*, 82 Idaho 52, 56, 349 P.2d 306, 308 (1960)).

As distilled by the Idaho Supreme Court, “[b]oundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary.” *Luce*, 142 Idaho at 271, 127 P.3d at 174. Concerning the first element, “[t]here is no requirement that there be a dispute over the boundary. Rather, there must be either uncertainty or a dispute as to the location of the true boundary.” *Johnson v. Newport*, 131 Idaho 521, 523, 960 P.2d 742, 744 (1998). Moreover, “if the location of the true boundary is unknown to either of the parties, and is uncertain or in dispute, such coterminous owners may agree upon a

⁷ “Though [Idaho] cases often use the phrase ‘boundary by acquiescence’ interchangeably with ‘boundary by agreement,’ ... the latter phrase more accurately describes the doctrine.” *Wells v. Williamson*, 118 Idaho 37, 40, 794 P.2d 626, 629 (1990).

boundary line.” *Trappett v. Davis*, 102 Idaho 527, 531, 633 P.2d 592, 596 (1981). Finally, “[i]gnorance of the true boundary creates the uncertainty necessary to satisfy the first element.” *Flying Elk Inv.*, 149 Idaho at 13, 232 P.3d at 334 (citing *Morrissey v. Haley*, 124 Idaho 870, 873, (1993)).

Concerning the second element, “[t]he agreement may be either express or implied by the landowners’ conduct.” *Id.* (citing *Teton Peaks Investment Co. v. Ohme*, 146 Idaho 394, 397, 195 P.3d 1207, 1210 (2008)). Since there must be an agreement, acquiescence “is merely regarded as competent evidence of the agreement,” and alone is not enough to establish a boundary by agreement. *Flying Elk Inv.*, 149 Idaho at 13, 232 P.3d at 334 (citation omitted). However, “[a]llowing an adjoining landowner to improve the disputed land is evidence of an agreement.” *Id.* (citation omitted).

If the elements of boundary by agreement are satisfied, “the parties to the agreement are no longer entitled to the amount of property provided for in their deeds and must absorb the effect of any increase or decrease in the amount of their property as a result of the new boundary.” *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001). “The new boundary then is binding on successors in interest who purchase with notice of the agreement.” *Anderson v. Rex Hayes Family Trust*, 145 Idaho 741, 744, 185 P.3d 253, 256 (2008) (citation omitted).

In evaluating the existence of an implied agreement regarding a boundary line fence, Idaho courts are guided by two related presumptions:

First, when a fence line has been erected, and then coterminous landowners have treated that fence line as fixing the boundary between their properties for such a length of time that neither ought to be allowed to deny the correctness of its location **the law presumes an agreement fixing that fence line as the boundary**

...

Second, coupled with the long existence and recognition of a fence as a boundary, the want of any evidence as to the manner or circumstances of its original location, **the law presumes that it was originally located as a boundary by agreement** because of uncertainty or dispute as to the true line.

Luce, 142 Idaho at 271–72, 127 P.3d at 174 (citations and quotations omitted) (**emphasis** and internal spacing added). Based on these presumptions, Idaho courts have “repeatedly found a boundary by agreement where a fence is treated as the property line for a number of years, there is no information about why the fence was built, and no evidence to disprove that the fence was intended to be a boundary.” *Flying Elk*, 149 Idaho at 14, 232 P.3d at 335. Ultimately, “[t]he doctrine of boundary by agreement or acquiescence is based on a reasonable assumption implied from the surrounding circumstances.” *Luce*, 142 Idaho at 272, 127 P.3d at 174.

In *Flying Elk*, for example, the parties disputed ownership of a nineteen-acre sliver of land and the legal effect of a historic boundary fence. 149 Idaho at 12, 232 P.3d at 333. Prior to filing suit, Flying Elk had its lot surveyed, revealing that the fence dividing its property for the adjoining property cut into Flying Elk’s property by at least 300 feet in some places. 149 Idaho at 13, 232 P.3d at 334. When Flying Elk sued, the adjoining property owner counterclaimed under the theory of boundary by agreement arguing that because the fence had been present for roughly seventy years, the disputed land was now legally his. *Id.* The Idaho Supreme Court affirmed the district court’s grant of summary judgment in favor of the adjoining property owner, finding that the evidence supported the conclusion that the fence had long been recognized as boundary between the properties. 149 Idaho at 14, 232 P.3d at 335. Some of the facts and evidence which supported this conclusion included (1) successive owners using the land up to the fence line; (2) the installation of a pond by the adjoining land owner within the disputed tract without objection from

Flying Elk's predecessor; (3) testimony that the fence was essentially unchanged for at least 50 years, but for minor repairs; and (4) no evidence regarding the purpose of the original fence. *Id.* Ultimately, the Idaho Supreme Court concluded that these factors demonstrated and supported a boundary line by agreement. *Id.*

Flying Elk is directly on point here. First, like the fence in *Flying Elk*, the Old Fence is decades old. Specifically, the Old Fence existed since at least 1951⁸ - at least 64 years before this current dispute arose. While the Fischers have not found anyone that can testify about the Old Fence's construction, prior owners of both the Fischer Property and Croston Property always regarded the Old Fence as the true boundary line between the properties. *See generally, Anderson Decl. and Kennedy Decl.*

Second, just like the prior owners in *Flying Elk*, the prior owners of both the Fischer Property and Croston Property have used the land up to the Old Fence. Mrs. Anderson, Mr. Kennedy, and the Fischers have all testified regarding their use of the Fischer Property up to the Old Fence line, including use as an animal pasture, mowing grass in conjunction with ownership of a single family home, and use of the Access Road to access the western portion of the Fischer Property. *Anderson Decl.*, at ¶ 7; *Kennedy Decl.*, at ¶¶ 5,8; *M. Fischer Decl.*, at ¶ 5. Concerning the Croston Property, Mrs. Anderson testified of her parents using their property up to the Old Fence line for grazing of animals and a garden until 1959, when they sold to the Crostons. *Anderson Decl.*, at ¶ 7.

Third, like installation of the pond within the disputed area in *Flying Elk*, the construction of the Shed on the Fischer Property, complete with a concrete foundation, further supports a

⁸ *Anderson Decl.*, at ¶ 7.

boundary by agreement. As it stands now, the Shed's concrete foundation is located several feet into Tract 1 – south of the New Fence. *F. Fischer Decl.*, at ¶ 12 (Ex. K). Given that the process of excavating, pouring a concrete foundation, and constructing a substantial outbuilding does not happen overnight, the Shed was no doubt built within full view of the Crostons or their predecessors. Although it is unknown exactly when the Shed was first constructed, Mr. Kennedy testifies of its existence since at least 1973 – at least 14 years *after* the Crostons acquired their property. *Kennedy Decl.*, at ¶ 5. Moreover, Mr. Kennedy testified to increasing the size of the Shed and replacing the exterior with tin during his ownership of the Fischer Property, all within full view of the Crostons, who never objected. *Id.* at ¶ 8. The Shed itself shows that the prior owners of the Fischer Property and Croston Property believed the Old Fence to be the true boundary line.

Fourth and finally, the Old Fence remained essentially unchanged for at least 64 years, with only minor repairs. Again, it is unknown exactly when the Old Fence was constructed, as was the case in *Flying Elk*. Nevertheless, Mrs. Anderson has testified that it existed when she lived on the Croston Property beginning in 1951. *Anderson Decl.*, at ¶ 7. This fact is supported by the Crostons' admission that the Old Fence existed when they bought the Croston Property in 1959. *F. Fischer Decl.*, at ¶ 4 (Ex. C at p. 9). Finally, Mr. Kennedy's testimony reinforces the existence and location of the Old Fence, given his maintenance and repairs of it. *Kennedy Decl.*, at ¶¶ 6 – 7, 10.

Based on these facts, the Court should follow the direction of the Idaho Supreme Court in *Flying Elk* and similarly hold that the Old Fence is the true boundary between the Fischer Property and Croston Property under the doctrine of boundary by agreement. The facts presented in this

case clearly give rise to the two presumptions articulated in *Luce*: namely, that (1) there was an agreement between prior owners fixing the Old Fence Line as the true boundary between the Fischer Property and Croston Property; and (2) that the true boundary between the Fischer Property and Croston Property is the location of the Old Fence. *See Luce*, 142 Idaho at 271–72, 127 P.3d at 174-175. Although these presumptions are rebuttable, the Crostons cannot rely on their own unexpressed intentions regarding the purpose of the Old Fence because “[t]he Court can only evaluate the parties’ conduct, not their ‘mental operations.’” *Flying Elk*, 149 Idaho at 14, 232 P.3d at 335 (citation omitted).

Ultimately, there is no evidence to indicate the fence was built for any purpose other than the **presumed** purpose of establishing a boundary between the Fischer Property and Croston Property. Accordingly, the Court should grant summary judgment in favor of the Fischers as a matter of law.

B. The Fischers are entitled to summary judgment as to the Crostons’ Counterclaim.

While the Crostons appear to assert a counterclaim against the Fischers, the nature of this counterclaim is not exactly clear. *See Answer to Complaint and Counterclaim of the Defendants (“Answer & Counterclaim”)*, p. 6. Although the Crostons make several allegations that could support a counterclaim, no specific cause of action is identified. *Id.* Furthermore, the Crostons request an award of attorney’s fees and costs, but fail to cite any statutory authority supporting such a claim. *Id.* at ¶ L. Failing to provide such authority renders the claim ineffective and inapplicable. *See PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 641, 200 P.3d 1180, 1190 (2009). Accordingly, the Fischers contend that the Crostons’ counterclaim defective on its face. *See Gillespie v. Mountain Park Estates L.L.C.*, 138 Idaho 27, 29, 56 P.3d 1277, 1279 (2002) (“The

Key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it.”). As a result of being defective, the Court should dismiss it, or, at the very least, not consider it on summary judgment. *See Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005) (“A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.”) (citation omitted).

Assuming for the sake of argument that the Crostons did adequately plead a counterclaim, the first step is to identify what it is. The Crostons allege that the “parties entered into an agreement that the survey that was being performed would control the boundary between the [Croston Property and the Fischer Property]” and that the Fischers “previously had agreed to pay one-half the cost of the fence.” Answer & Counterclaim, p. 6, ¶¶ E, H. This, along with a subsidiary claim for fees and costs,⁹ appears to form the Crostons’ counterclaim. However, the facts, even when construed in favor of the Crostons, do not support this counterclaim. Accordingly, for the reasons that follow, there are no genuine issues of material fact and the Fischers are entitled to judgment as a matter of law as to the Crostons’ counterclaim. I.R.C.P. 56(a).

1. The Crostons’ counterclaim is prohibited by Idaho’s statute of frauds.

It is undisputed that no written agreement exists between the Fischers and the Crostons. *See* Exs. C, F to *Fischer Decl.* Instead, the only evidence for an agreement comes from a written statement signed by the Crostons son, Jim. *Fischer Decl.*, at ¶ 7 (Ex. F). Jim Croston claims that while he was marking the location of the Old Fence, Ann Fischer allegedly said to him:

We will be replacing the fence with a much better fence. We are going to get a survey to find out where the line is at. We are using

⁹ Answer & Counterclaim, p. 6, ¶ L.

the same surveyors as the City uses so [there] shouldn't be any disputes.

Id. Jim Croston states that he “said OK.” *Id.* Based upon this statement, the Crostons claim that the parties entered into an **oral** agreement regarding the boundary between their two properties. However, what the Crostons fail to realize is that, regardless of the content of Jim Crostons’ statement, oral agreements are invalid and unenforceable under Idaho’s statute of frauds.

Idaho’s statute of frauds is codified within Idaho Code § 9-505. The pertinent parts of this statute reads as follows:

9-505. CERTAIN AGREEMENTS TO BE IN WRITING. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

...

4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

I.C. § 9-505. As interpreted by Idaho courts, “[a]n agreement for the sale of real property is invalid unless the agreement or some note or memorandum thereof be in writing and subscribed by the party charged or his agent.” *Hoffman v. S V Co.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981) (citation omitted). “Failure to comply with the statute of frauds renders an oral agreement unenforceable both in an action at law for damages and in a suit in equity for specific performance.” *Id.*

Here, ownership of Tract 1 passed to the Fischers long before they filed their Verified Complaint. *See Stafford*, 136 Idaho, at 225, 31 P.3d at 247 (“[i]f a boundary by agreement is

established, the parties to the agreement are no longer entitled to the amount of property provided for in their deeds and must absorb the effect of any increase or decrease in the amount of their property as a result of the new boundary.”). Thus, any change in the Fischers’ interest in the Fischer Property, including Tract 1, would require a written agreement signed by the Fischers. *See* I.C. § 9-505(4). Again, it is undisputed that no written agreement exists regarding the ownership or disposition of Tract 1. *See Fischer Decl.*, (Ex. C at pp. 6, and 9) (Ex. F). This fact alone completely undermines the Crostons’ counterclaim.

Absent the existence of a written agreement, the Crostons’ counterclaim fails as a matter of law pursuant to Idaho’s statute of frauds. Any agreement purporting to transfer interest in Tract 1 or otherwise setting mutual boundary lines, is required to be in writing and signed by the parties who are to be bound. I.C. § 9-505(4). Because no such written agreement exists, the Fischers are entitled to summary judgment disposing of the Crostons’ counterclaim.

2. The Crostons are precluded from arguing boundary line by agreement or acquiescence because they do not satisfy the requisite elements for such a claim.

Given that Idaho’s statute of frauds significantly undercuts their counterclaim, the Crostons may be tempted to argue boundary by agreement or acquiescence as an exception to this rule. However, this argument would fail because the available evidence does not satisfy the required elements of this doctrine.

Idaho case law has determined that boundary line by agreement or acquiescence does not fall under the purview Idaho’s Statute of Frauds: “[t]he general rule of case law is that an agreement which arises from *uncertainty* or *dispute* over the location of a boundary is valid, and does not constitute an oral conveyance of land.” *Norwood v. Stevens*, 104 Idaho 44, 45, 655 P.2d 938, 939 (Ct. App. 1982) (*emphasis* in original). As stated above, boundary by agreement or

acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary.” *Luce*, 142 Idaho at 271, 127 P.3d at 174. However, “[w]here the location of the true boundary line between coterminous owners is known to either of the parties, or is not uncertain, and is not in dispute, an oral agreement between them purporting to establish another line as the boundary between their properties constitutes **an attempt to convey real property in violation of the statute of frauds...and is invalid.**” *Downing v. Boehringer*, 82 Idaho 52, 56, 349 P.2d 306, 308 (1960) (**emphasis added**).

Here, the Crostons cannot satisfy the first element of boundary line by agreement or acquiescence. Specifically, at the time of the purported agreement between Mrs. Fischer and Jim Croston, the Fischers **knew** the location of the true boundary line between the properties to be the Old Fence line.¹⁰ As argued above, the true boundary line was fixed decades before the Fischers purchased the Fischer Property. *See Stafford*, 136 Idaho, at 225, 31 P.3d at 247. Because of this, it is immaterial that the deeded boundary line shown on the Ellsworth survey differs from the Old Fence line. Rather, it is presumed that, at the time that the Old Fence was built, the predecessors in interest to the Fischer Property and Croston Property agreed that the Old Fence would serve as the true boundary between them. *Id.* Whereupon the law recognizes that the deeds were modified to reflect this agreement. *Id.*

Ultimately, because the Fischers knew the location of the true boundary at the time of the purported agreement, the Crostons cannot satisfy the first element of boundary line by agreement or acquiescence. Failure to satisfy both elements of boundary line by agreement or acquiescence

¹⁰ Indeed, Jim Croston’s act of spray painting the Old Fence line seems to imply that the Crostons believed the Old Fence to be the true boundary as well. *See M. Fischer Decl.*, at ¶ 16 (Ex. D).

is fatal to such a claim. *See Luce*, 142 Idaho at 271, 127 P.3d at 174; *see also Downing*, 82 Idaho at 56, 349 P.2d at 308.

3. Assuming, for the sake of argument, that the true boundary line was not known, the Crostons' counterclaim still fails because there was not an agreement between coterminous owners.

Assuming that the Crostons satisfy the first element of boundary line by agreement or acquiescence, their counterclaim nevertheless fails to satisfy the doctrine's second element – namely, evidence of an agreement between the Fischers and the Crostons fixing the boundary. *See Luce*, 142 Idaho at 271, 127 P.3d at 174. Although the Crostons might attempt to point to the alleged oral agreement between Mrs. Fischer and Jim Croston as satisfying this element, this argument is flawed. Specifically, Jim Croston is neither an owner of the Croston property nor designated as the Crostons' attorney in fact. As a result, he cannot enter into contracts or agreements affecting the Crostons' real property interests.

As stated above, it is undisputed that no written agreement between the parties exists. *See Exs. C, F to Fischer Decl.* Instead, the only evidence for an agreement comes from a Jim Crostons' statement regarding his conversation with Mrs. Fischer. *Fischer Decl.*, at ¶ 7 (Ex. F). However, Jim Croston lacked the authority to enter into any agreement on his parent's behalf. *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004) (“For an agent to bind a principal to a third party in contract the agent must have actual or apparent authority.”). First, Jim Croston does not have any ownership interest in the Crostons Property. *Fischer Decl.*, at ¶ 4 (Ex. C at p. 8). And second, at no time did the Crostons, or Jim himself, represent that Jim Croston was authorized to bind the Crostons in contract. *M. Fischer Decl.*, at ¶ 8. Instead, the Crostons have only asserted that Penning is their attorney in fact. *F. Fischer Decl.*, at ¶ 9 (Ex. H). For these

reasons, it was impossible for Jim Croston to enter into an agreement with the Fischers which directly impacted the Crostons' property rights, even if the agreement was written and signed. *See Huyett*, 140 Idaho at 909-910, 104 P.3d at 951-952 (affirming that no binding contract between I.S.U. and a head coach existed because, *inter alia*, I.S.U. lacked authority to enter into a multi-term employment contract).

In addition to lacking the requisite authority, the alleged oral agreement lacks necessary elements for a binding contract.¹¹ There is no offer-and-acceptance resulting in a meeting of the minds. *Shapley v. Centurion Life Ins. Co.*, 154 Idaho 875, 878, 303 P.3d 234, 237 (2013) (“A meeting of the minds is evidenced by a manifestation of intent to contract which takes the form of an offer and acceptance”). There is no mutual assent. *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 237, 31 P.3d 921, 925 (2001). And there is no consideration. *McColm-Traska v. Valley View, Inc.*, 138 Idaho 497, 501, 65 P.3d 519, 523 (2003) (“When consideration supports a distinct and common understanding of the parties, the understanding becomes an enforceable contract”). Because the alleged oral agreement lacks these crucial elements, no valid/enforceable agreement could exist between the Fischers and the Crostons.

In addition to lacking requisite contract terms, the Crostons' self-contradictory statements concerning the terms of the agreement belie its existence altogether. For example, the Crostons allege that this oral agreement somehow included a provision that the Fischers would “pay one-half the cost of the fence.” Answer & Counterclaim, p. 6, ¶ H. However, this allegation is

¹¹ While this point may seem redundant and unnecessary in light of the Fischers' statute of frauds argument, the lack of fundamental contract elements demonstrates that the Crostons' Counterclaim is purely the product of *post hoc* rationalization in litigation, as opposed to a true belief.

contradicted by the Crostons themselves. Specifically, in their response to Interrogatory 18 of Plaintiffs' discovery requests, the Crostons provided:

Croston Statement from 8/31/15. Would pay half the cost of the new fence. (NOT AWARE OF THIS OFFER.) See Jim Croston Statement from 8/31/15. The Fischers have offered to pay the full price of the fence twice in their settlement offers if the Crostons give them the property in question.

F. Fischer Decl., at ¶ 4 (Ex. C at p. 6). While it is befuddling that the Crostons would allege that the Fischers would pay for half the fence in their counterclaim, only to state later on that they were never aware of this offer, the statement still remains as a contradictory admission. Furthermore, this admission cannot be construed as an inadvertent mistake, given that the same notation appears in additional responsive documents produced by the Crostons:

replace the fence after the survey was completed. The Fischers have offered to pay the full price of the fence twice in their settlement offers if the Crostons give them the property in question.
(I DO NOT RECALL WHERE THEY EVER OFFERED TO PAY ½ OF THE COST TO REPLACE THE FENCE. THEY DID INDICATE IN THEIR SETTLEMENT OFFERS THAT THEY WOULD PAY TO REPLACE THE FENCE AND MAINTAIN IT.)

Id. at p. 14. While it is understandable that the Crostons may personally feel that the Fischers' offers of settlement represent the Fischers' (past) willingness to pay for half of the fence, counsel for the Crostons is undoubtedly aware that such statements made in settlement discussions cannot be used to establish liability or the existence of an agreement pursuant to the Idaho Rules of Evidence, Rule 410. All in all, the Crostons' credibility to accurately recall a statement supposedly made by the Fischers is undermined by their inconsistent and contradictory statements made within their Answer & Counterclaim and discovery responses.

The Crostons fail to provide evidence supporting the existence of a binding agreement that forms the basis of their counterclaim. This is fatal to the Crostons' counterclaim. *Cumis Ins. Soc'y*,

Inc. v. Massey, 155 Idaho 942, 946, 318 P.3d 932, 936 (2014) (“The non-moving party may not rest upon the mere allegations or denials of that party's pleadings, but that party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial” (citation and internal quotations omitted)); *see also* I.R.C.P. 56(c)(1)(B) (a party may show the absence of a genuine issue of material fact by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact”). There is no evidence such an agreement was made between the Fischers and Crostons, apart from an alleged comment by Mrs. Fischer which, at best, could indicate that the Fischers may have contemplated making an agreement. Even then, Jim Croston lacked the requisite authority to enter into any agreement in the first place. Finally, the Crostons do not even agree with the claimed terms of the agreement they allege exists (*e.g.*, relating to paying half the cost of any new fence).

Altogether, there is no genuine issue of material fact; there was no agreement between the Crostons and the Fischers as described in the counterclaim. As a result, the Fischers are entitled to judgment as a matter of law and summary judgment should be entered on their behalf as to the Crostons' counterclaim.

C. The Fischers are entitled to treble damages and an award of attorneys' fees for the Crostons' willful and intentional trespass upon the Fischers' real property and for committing waste.

The Fischers are entitled to treble damages and their reasonable attorneys' fees and costs incurred in this action against the Crostons for waste and trespass pursuant to Idaho Code § 6-202. The Crostons willfully and intentionally entered upon the Fischers' Property that had a “No Trespassing” signs staked at its boundary, removed the signs, and constructed the New Fence upon

it. The New Fence is a continuing trespass upon the Fischer Property. Accordingly, the Court should grant the Fischers treble damages, consisting of their estimated costs of removing the New Fence and surveying the true boundary line, as well as their reasonable attorneys' fees and costs.

Idaho Code § 6-202 states that “[a]ny person who, without permission of the owner...willfully and intentionally enters upon the real property of another person which property is posted with “No Trespassing” signs...is liable to the owner of such land...for treble the amount of damages which may be assessed therefor or fifty dollars (\$50.00), plus a reasonable attorney’s fee which shall be taxes as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails.” Here, it is indisputable that the Crostons willfully and intentionally entered into Tract 1, removed the Fischers’ “No Trespassing” signs, and constructed the New Fence. *F. Fischer Decl.*, at ¶ 13 (Ex. L). The only remaining issue is the ownership of Tract 1 at the time of the Crostons’ actions. As described above, Tract 1 was absorbed by the Fischer Property long before the dispute between the parties arose. *See Stafford*, 136 Idaho, at 225, 31 P.3d at 247 (“[i]f a boundary by agreement is established, the parties to the agreement are no longer entitled to the amount of property provided for in their deeds and must absorb the effect of any increase or decrease in the amount of their property as a result of the new boundary.”). For this reason, the Crostons’ actions were done willfully and intentionally upon the Fischer Property.

Given the foregoing, the Crostons’ actions constitute trespass upon the Fischer Property, with the New Fence constituting a continuing trespass. Pertaining to damages, the Fischers seek an award of \$1,878.00 which consists of the estimated costs associated with removing the New Fence and having a professionally surveyor ascertain and mark the Old Fence line. *F. Fischer Decl.*, at ¶ 14 (Ex. M). According to I.C. § 6-202, this amount is to be trebled, which results in

\$5,634.00. Finally, the Fischers seek an award of their reasonable attorneys' fees and costs associated with bringing this matter, as also required by Idaho Code § 6-202.

D. In the alternative, if the Court does not award the Fischers their reasonable attorneys' fees and costs under Idaho Code § 6-202, the Court should nevertheless grant the Fischers attorneys' fees pursuant to Idaho Code § 12-121.

The Fischers are also entitled to their reasonable attorneys' fees and costs incurred in this action pursuant to I.C. § 12-121. Specifically, the Fischers are the prevailing parties in this matter. Furthermore, the Crostons' defenses and counterclaims are frivolous, unreasonable and without foundation. Accordingly, the Court should grant the Fischers their reasonable attorneys' fees and costs.

As a preliminary matter, the Idaho Supreme Court's admonition in *Weitz v. Green* against using self-help to solve boundary line issues strongly supports an award of attorneys' fees to the Fischers:

This Court strongly disfavors the resort to forceful self-help in resolving property disputes. *See Burke v. Prudential Ins. Co. of Am.*, No. 02C5910, 2004 WL 784073, at *4 (N.D.Ill. Jan. 29, 2004) ("Self-help in litigation is not condoned by the courts."); *Doles v. Doles*, No. 17462, 2000 WL 511693, at *2 (Va.Cir.Ct. Mar. 10, 2000) ("[P]ublic policy favors the settlement of disputes by litigation rather than by self help force ..."). When parties have entered into a conflict over real property the rights are usually fixed far in advance of the exchange of attorneys' letters, or subsequent filing of a lawsuit, motions, depositions, and hearings. **Making a bold physical attempt to gain, or regain, possession or control of a real property interest, by demolishing or erecting gates or fences, bulldozing land, etc., results in no strategic advantage. Instead, passions become inflamed, positions become entrenched, damages are exacerbated rather than mitigated, and the parties end up spending far more money in litigation than their supposed interest was worth to begin with.** Attorneys who counsel their clients to engage in self-help, without being certain that the respective rights and responsibilities have been settled, do their clients a disservice. Clients who ignore the advice of counsel and take matters into their own hands do themselves a disservice. **In short, parties who attempt to solve a property dispute through their**

own forceful action do so at their own peril.

148 Idaho 851, 864, 230 P.3d 743, 756 (2010) (**emphasis added**). Among the perils at risk by engaging in self-help is the risk of an award of attorney's fees against the offending party.

Had the Crostons not disregarded the Fischers' multiple protestations against the construction of the New Fence, the parties would have had an opportunity to engage in meaningful negotiations without resorting to costly litigation. However, the Crostons' decision to simply "put the fence up now instead of waiting"¹² foreclosed that option, thereby causing the parties to become entrenched and exacerbating damages as forewarned by the Supreme Court in *Weitz*. Altogether, the policy set forth in *Weitz* strongly supports that the Fischers be compensated their attorneys' fees in this matter.

Turning to Idaho Code §12-121, the Idaho Supreme Court in *Hoffer v. Shappard* recently stated that "prevailing parties in civil litigation have the right to be made whole for attorney fees they have incurred 'when justice so requires.'" 160 Idaho 870, 380 P.3d 681, 696 (2016) (citation omitted). Although, this change is not set to go into effect until March 1, 2017,¹³ the Fischers posit that the Court should still take into account the considerations outlined in *Shappard* given that, had this matter gone to trial on March 21, 2017, the Supreme Court's interpretation would unquestionably apply.

As it stands now, Idaho Rule of Civil Procedure 54(e)(2) can be read to limit the courts' discretion to award attorney fees to those instances where the case was "brought, pursued or defended frivolously, unreasonably or without foundation." However, because the Supreme Court of Idaho specifically acknowledged that the courts' adoption of Idaho Rule of Civil Procedure

¹² *Fischer Decl.*, at ¶ 9 (Ex. H).

¹³ *Id.*

Rule 54(e)(1) distorted the legislatures' original intention of Idaho Code § 12-121, the ongoing validity of Rule 54(e)(1)'s "frivolously, unreasonably or without foundation" restriction is called into question (notwithstanding the Court's attempt to delay the effect of their pronouncement until March 1, 2017). *See Hoffer*, 160 Idaho at 870, 380 P.3d 681 at 696. Simply stated, if the intention of the legislature was "clear"¹⁴ when they adopted Idaho Code § 12-121, and the Court had no "authority to amend the laws enacted by the Legislature,"¹⁵ then such purported amendment was void *ab initio*, and not just after March 1, 2017.

Nevertheless, even if the Court applies Idaho Rule of Civil Procedure 54(e)(2), the Crostons' defenses and counterclaims in this matter still satisfy the standard for granting the Fischers' attorneys' fees and costs. As outlined above, Idaho's doctrine of boundary line by agreement is both well-known and supported by substantial case law. The issues presented here are neither novel nor nuanced. Rather, this case contains significantly similar facts to many prior Idaho cases wherein a boundary line by agreement was found in relation to the location of a historic fence (*e.g. Flying Elk*). In spite of this, the Crostons engaged in self-help by constructing the New Fence, unreasonably filed an answer containing ambiguous and inapplicable affirmative defenses, and frivolously brought a counterclaim based upon facts that they would later contradict in their responses to the Fischers' discovery requests. Assuming that the Fischers prevail in this matter, these facts support the Court's award of reasonable attorneys' fees under Idaho Code § 12-121.

V. CONCLUSION

The Fischers are entitled to summary judgment as a matter of law in that there are no genuine issues of material facts in dispute. The Old Fence existed and served as the boundary line

¹⁴ *Hoffer*, 160 Idaho at 870, 380 P.3d at 695.

¹⁵ *Id.*

between the Fischer Property and Croston Property for more than 64 years. Under Idaho's doctrine of boundary line by agreement or acquiescence, the Court should declare that the Old Fence is the true boundary line between the properties and should quiet title in Tract 1 in favor of the Fischers. Furthermore, the Court should award the Fischers' damages and their reasonable attorneys' fees pursuant to Idaho Code § 6-202 and/or Idaho Code § 12-121.

Respectfully submitted this 20th day of December 2016.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 20th day of December, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
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- Hand Delivery
- Other: _____

Forrest Fischer
W. Forrest Fischer

BONNEVILLE COUNTY
IDAHO

2016 DEC 20 PM 4:40

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58'' W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21''W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36'' E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21'' E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

JAMES F. CROSTON and MARJORIE C.

Case No. CV-2016-2894

**DECLARATION OF M. ANN
FISCHER**

CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

I, M. Ann Fischer, pursuant to Idaho Code § 9-1406 and Idaho Rule of Civil Procedure 2.7, declare under the penalty of perjury as follows:

1. I am over the age of 18, currently reside in Ammon, Idaho, and am a trustee of the named Plaintiff in this case. I am competent to be a witness in this matter and have personal knowledge of the facts stated herein.

2. As a matter of clarification, the Verified Complaint filed in this matter contains a minor error. Specifically, paragraphs 11, 12 and 13 within the Verified Complaint mention that my husband and I purchased the "Fischer Property" (as defined within the Verified Complaint) in 1991. However, this is technically incorrect. Instead, toward the end of 1991, my husband and I began the process of negotiating the purchase of the Fischer Property and obtaining the requisite financing. While we filled out and executed most of the necessary paperwork to purchase the Fischer Property toward the end of 1991, the actual deed was not signed and recorded until January 1992. Furthermore, our home was not completed until 1992.

3. Neither my husband nor I know when the Old Fence was built. The Old Fence existed back in 1991 when we first began the process of purchasing the Fischer Property, and it remained in the same location until August of 2015, when we began the process of replacing it.

4. Pertaining to the Access Road, after we built the Garage, we continued to use the Access Road to access the Garage itself and used the space between the Garage and the Old Fence as access to the western part of our Property. However, the location of the New Fence has significantly narrowed that space, preventing vehicular access to the westernmost parts of our property along that route. Instead, we now have to drive on our lawn around the north of the Garage.

5. Since purchasing it, we have maintained the Fischer Property up to the Old Fence by mowing and controlling the large grasses that grow on the property, especially along the Old Fence.

6. Since purchasing our property, the Old Fence had been steadily decaying to a point that certain portions of it had failed and fallen onto our property. Because of this, we decided to replace the Old Fence with a new one around August 2015. On or around September 4, 2015, we received a Demand Letter from the Crostons that stated that we had trespassed upon their property and that they would sue us unless we restored their property to their satisfaction. The Crostons also appeared to have copied the City of Ammon, the Bonneville County Sheriff, and the Progressive Irrigation District as well. Because we disagreed with the allegations within the Demand Letter, we contacted our attorney and asked for advice.

7. After speaking with our attorney concerning the Crostons' Demand letter, we decided to have the fence line surveyed in order to ensure that the Crostons would not try and sue us for failing to replace the Old Fence in the exact spot that it had been in before we began replacing it. When we commissioned the survey, we had no reason to believe that southern the lot line would be anything different that where the Old Fence had been since before we purchased the property.

8. Before the surveyors came out to conduct the survey, I observed a man at the boundary between our property and the Crostons' Property using spray-paint and a tape measure in an apparent attempt to approximately mark where the Old Fence had been on those sections we had removed. This was on or about August 30, 2015. When I approached him, this individual identified himself as Jim Croston. At the time of our conversation, I was unaware that Jim Croston was the son of our neighbors to the south. Rather, I assumed he was merely a relative. During our conversation, I informed Jim that we were in the process of having the Old Fence surveyed and that we would be replacing it with a better one. At no time during this conversation did Jim Croston state that he was authorized as the Crostons' power of attorney or that he owned the property.

9. I have reviewed the statement written by Jim Croston which was provided by Defendants in Discovery. Contrary to what the Crostons claim, I never said or implied that we did not know where the boundary line between the properties was at. Rather, I merely remarked to Jim Croston that we were going to have a surveyor provide us with the exact location of where the Old Fence used to be so we could put it back exactly where it was, so there would be no disputes.

10. I have also reviewed Defendants' Answer and Counterclaim in this matter. I deny that Jim Croston and I ever entered into an oral agreement concerning the replacement of the fence. Rather, I merely informed Jim Croston of our intentions to replace the Old Fence with a newer one, in the exact place that the existing fence had been in. At that time, portions of the Old Fence still remained and in the areas that had been removed, there was still a clearly visible line demarking its location. Again, I had no reason to believe that the deeded boundary line between the properties was anything more than the location of the Old Fence. It also appeared that Jim Croston also believed the Old Fence to be the location of the boundary due to the fact that he had measured and spray painted the approximate location on the ground as shown by the picture

attached as **Exhibit D**.

11. The first time we were made aware of the discrepancy between the location of the Old Fence and the deeded boundary line was when we first obtained the preliminary survey from Ellsworth & Associates. After reviewing this preliminary survey, we spoke with our attorney who drafted a letter to the Crostons asserting our legal right to Tract 1 and discussing potential settlement options. We overnighted this letter via Federal Express on September 24, 2015.

12. Since the Crostons built the New Fence, they have neither lived in the Log Cabin nor grazed animals on the Croston Property. We have thought about calling the police and reporting the teenagers who trespass in the Log Cabin as we have in times past, however, since this lawsuit arose, we have been wary to make any police reports for fear that the Crostons might accuse us of impropriety.

13. Attached hereto as **Exhibit A** are family pictures which show the location of the Old Fence taken around 1992 when we were building our home.

14. Attached hereto as **Exhibit B** are family pictures which show the location of the Shed before we removed it.

15. Attached hereto as **Exhibit C** are pictures I took showing the location of the New Fence in relation to the Shed's concrete foundation.

16. Attached hereto as **Exhibit D** is a picture I took showing the white line which Jim Croston drew when he was measuring the Old Fence line.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

///

///

///

12-30-2016
Date

M Ann Fischer
Signature

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 20th day of December, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____

Forrest Fischer
W. Forrest Fischer



Exhibit A - Page 001



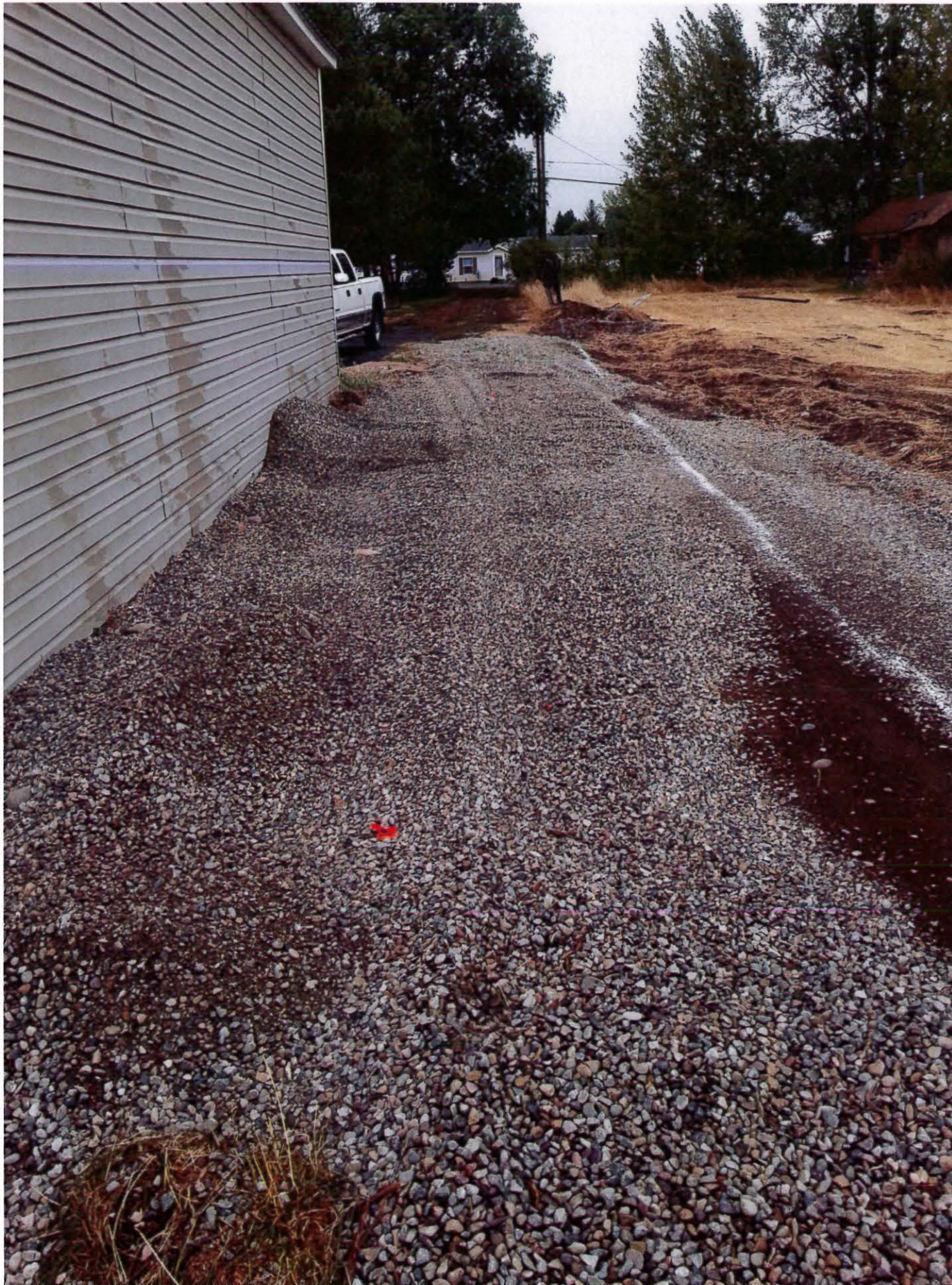
Exhibit A - Page 002



Exhibit B - Page 001







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W. Forrest Fischer, ISB #10009
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BONNEVILLE COUNTY
IDAHO
2016 DEC 20 PM 4:40

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

JAMES F. CROSTON and MARJORIE C.

Case No. CV-2016-2894

**DECLARATION OF SHARON
ANDERSON**

CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

I, Sharon Anderson, née Rowbury, pursuant to Idaho Code § 9-1406 and Idaho Rule of Civil Procedure 2.7, declare, under the penalty of perjury, as follows:

1. I am over the age of 18 and currently reside in Montgomery, Alabama. I am competent to be a witness in this matter and have personal knowledge of the facts stated herein.

2. In 1951, my family and I moved into a log cabin located at 3020 S. Western Ave., in Ammon, Idaho ("**Log Cabin**").

3. I lived in the Log Cabin until I graduated from high school in 1958, when I moved away from home.

4. My parents, Denzel and Viola Rowbury, continued to live in the Log Cabin until 1959, when they sold it.

5. While I lived in the Log Cabin, the Barzees owned the property directly to the north of my parents' property. I was friends with their children and played with them often on both my parents' property and the Barzee's property.

6. Between the Log Cabin and the Barzee's home was a pasture, which was also owned by the Barzees.

7. My parents' property was separated from the Barzee's pasture by a fence that ran east-west from Western Avenue to the canal ("**Old Fence**"). Both my parents and the Barzees

kept animals on their properties and the Old Fence prevented the animals from trespassing on either property. My parents also had a garden next to the Log Cabin which ran all the way up to the Old Fence. I do not know when the Old Fence was built, but know that it existed before my parents and I moved into the Log Cabin around 1951.

8. During my time at the Log Cabin, I and everyone I knew always treated the Old Fence as the boundary between my parents' property and the Barzees' property.

9. Neither my parents nor the Barzees ever questioned whether or not the Old Fence was anything but the true boundary between their properties.

10. In 2001, I traveled back to Idaho Falls to attend my mother's funeral. While there, I went to see the Log Cabin. I also noticed that a home was built in the pasture area between the Log Cabin and the Barzees' home. I now know that this home belongs to the Plaintiffs in this case.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

December 15, 2016
Date

Sharon A. Anderson
Signature

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 20th day of December, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
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- Other: _____



W. Forrest Fischer

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BONNEVILLE COUNTY
IDAHO

2016 DEC 20 PM 4:40

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
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WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
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along the West line of said Lot 4 a distance
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S. 89°41'36" E. along said existing fence
line 329.90 feet to a point on the East line of
said Lot 4; thence N. 00°00'21" E. along
said East line 2.50 feet to the POINT OF
BEGINNING

Defendants.

Case No. CV-2016-2894

**DECLARATION OF LARRY
KENNEDY**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

I, Larry Kennedy, pursuant to Idaho Code § 9-1406 and Idaho Rule of Civil Procedure 2.7, declare under the penalty of perjury as follows:

1. I am over the age of 18 and currently reside in Idaho Falls, Idaho. I am competent to be a witness in this matter and have personal knowledge of the facts stated herein.

2. In about 1973, I met Ron Barzee when I went to work for a local construction company.

3. Ron and I soon became fast friends to the point that I would often go with him to visit his parents at their home located at 2910 S. Western Ave, in Ammon, Idaho (“**Barzee Home**”).

4. Because Ron’s parents were elderly, Ron and I would frequently go to the Barzee Home to help with work around the house and in the yard.

5. To the south of the Barzee Home was a large pasture which was also owned by Ron’s parents in which they kept and grazed various animals in over the years (“**Barzee Pasture**”). Located on the south east of the Barzee Pasture was a shed which had a concrete foundation (“**Shed**”). Ron’s parents primarily used the Shed to store tools and animal feed. I am not sure when the Shed was constructed, but I know it existed back when I began visiting the

Barzee Home back in 1973. To access the Shed, I and others would drive on an existing road that ran from the Shed along the southern boundary of the Barzee Pasture until it met up with Western Avenue.

6. Immediately to the south of the Barzee Pasture was an old log cabin which I believe was abandoned (“**Log Cabin**”). Separating the Log Cabin from the Barzee Pasture was a post and wire fence which ran east to west from Western Avenue to the canal on the western portion of the Barzee Pasture (“**Old Fence**”). I remember that the Old Fence was decades old when I first saw it, given its rough condition. Attached as **Exhibit A** are photos which I have reviewed and have confirmed depict the condition and location of the Old Fence.

7. I remember several occasions that Ron and I fixed portions of the Old Fence, either replacing rotted posts or stapling new hog wire.

8. In about 1974 or 1975, I married Ron’s sister, Sharon. In about 1981, Sharon and I wanted to build a house for ourselves in Ammon, and Ron’s father, Levi, offered to sell us the Barzee Pasture for us to do so. We accepted Levi Barzee’s offer and purchased the Barzee Pasture. While Sharon and I owned the Barzee Pasture, I replaced the Shed with a larger Shed made of tin. While I was expanding the Shed, no one from the property to the south ever contacted me or complained about what I was doing. In fact, I don’t ever recall anyone living at the Log Cabin while I worked and owned the Barzee Pasture. Attached as **Exhibit B** are photos that I have reviewed and have confirmed depict the Shed I rebuilt.

9. Unfortunately, Sharon and I were unable to build a home on the Barzee Pasture and eventually divorced in or around 1989. Following the divorce, we sold the Barzee Pasture in 1991 to the Ackermans.

10. At all times, beginning with assisting Ron in working on his parents' property through my ownership of the Barzee Pasture, the Old Fence was always regarded as the true boundary line between the Barzee Pasture and the property to the south. I maintained the Old Fence even before I owned the Barzee Pasture and utilized all of the pasture grasses to graze animals up to the boundary line demarked by the Old Fence. Additionally, I frequently drove on the road from Western Avenue to the Shed in order to store my tools and equipment.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

12, 20, 2016
Date

Larry Kennedy
Signature

G:\WPDATA\WFF\18611 (Fischer Property)\Pleadings\5 - Motion for Summary Judgment\Decl. of L. Kennedy.docx

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 20th day of December, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer



Exhibit A - Page 001



Exhibit A - Page 002



Exhibit A - Page 003



Exhibit A - Page 004



Exhibit A - Page 005



Exhibit B - Page 001

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone (208) 523-0620
Facsimile (208) 523-9518

BONNEVILLE COUNTY
IDAHO

2016 DEC 20 PM 4:39

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**DECLARATION OF W. FORREST
FISCHER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

I, W. Forrest Fischer, pursuant to Idaho Code § 9-1406 and Idaho Rule of Civil Procedure 2.7, declare under the penalty of perjury as follows:

1. I am an attorney with Holden, Kidwell, Hahn & Crapo P.L.L.C., the firm representing Plaintiffs in this matter.

2. Attached hereto as **Exhibit A** are true and correct copies of the recorded deeds relating to real property located at 3000 S. Western Avenue, Ammon, Idaho 83406.

3. Attached hereto as **Exhibit B** are true and correct copies of the recorded deeds relating to real property located at 3020 S. Western Avenue, Ammon, Idaho 83406.

4. Attached hereto as **Exhibit C** is a true and correct copy of relevant portions of Defendants' "Reponses to Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission."

5. Attached hereto as **Exhibit D** is a true and correct copy of a letter from Defendants to Plaintiffs, dated September 4, 2015.

6. Attached hereto as **Exhibit E** is a true and correct copy of an email from the secretary to Defendants' counsel on November 14, 2016 ("**Email**"). Attached to this Email were

additional discovery documents responsive to Plaintiff's discovery requests.

7. Attached hereto as **Exhibit F** is a true and correct copy of a written and signed statement by Jim Croston, dated August 30, 2015. This document was produced by Defendants in the Email and corresponds to Defendants' answers to Plaintiffs' interrogatories.

8. Attached hereto as **Exhibit G** is a true and correct copy of the preliminary survey of the boundary between Plaintiffs' and Defendants' respective properties, conducted by Ellsworth & Associates, and dated October 2015.

9. Attached hereto as **Exhibit H** is a true and correct copy of hand written notes made by Marjorie Croston on September 28, 2015, a digital transcription of these notes, and notes typed by Linda Penning from of phone call with Marjorie Croston on the same day. Both of these documents were produced by Defendants in the Email and correspond to Defendants' answers to Plaintiffs' interrogatories.

10. Attached hereto as **Exhibit I** is a true and correct copy of the relevant portions of the Ammon City Code regarding the keeping and grazing of livestock in the City.

11. Attached hereto as **Exhibit J** is a true and correct copy of a written transcript of two voice messages left on the Crostons' answering machine by me as the attorney for the Fischers on September 24, 2015. The audio file from which this transcript was made was provided by Defendants in the Email described above.

12. Attached hereto as **Exhibit K** are pictures depicting the location of the New Fence in relation to the foundation of the Shed. These photos were provided by Defendants as part of their discovery disclosures, contained on a CD that was delivered to my firm's office on November 14, 2016. Also attached as part of Exhibit K is an email to Defendants counsel confirming my

receipt of the CD with the aforementioned pictures.

13. Attached hereto as **Exhibit L** are pictures depicting the location of the Fischers' "No Trespassing" signs before they were removed, as well as pictures of unknown individuals, apparently acting under the direction of Linda Penning, removing the Fischers' "No Trespassing" signs and dumping dirt and gravel onto the Fischers' property. These photos were contained within the CD provided by Defendants as described in paragraph 12 above.

14. Attached hereto as Exhibit M are invoices detailing the estimated costs of removing the New Fence and having a surveyor mark the Old Fence line. The cost of removing the New Fence is estimated to be \$1,278.00 while Eagle Rock Engineering and Land Surveying P.C. ("**Eagle Rock**") estimates the cost of marking the location of the Old Fence line to be \$600. Because the invoice from Eagle Rock was not generated on its letter head, I have included Eagle Rock's email attaching the invoice as well. Altogether, these invoices total \$1,878.00.

15. Attached hereto as **Exhibit N** are pictures depicting the location of the Old Fence. These photos were provided by Defendants in response to Plaintiffs' discovery requests.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

Dec. 19, 2016
Date

Forrest Fischer
Signature

G:\WPDATA\WFF\18611 (Fischer Property)\Pleadings\5 - Motion for Summary Judgment\Decl. of W. Forrest Fischer.docx

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 20th day of December, 2016, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

THIS INDENTURE, Made this Third day of December in the year of our Lord one thousand nine hundred and forty three, by and between Jesse M. Day and Louise Day, husband and wife

of the County of Bingham, State of Idaho the part 1/8 of the first part, and L. D. Barzee and Inza E. Barzee, husband and wife of the County of Bonneville, State of Idaho the part 1/8 of the second part:

WITNESSETH, That the said part 1/8 of the first part, for and in consideration of the sum of Thirteen Hundred and No/100 - - - - - DOLLARS, lawful money of the United States of America, to them in hand paid by the part 1/8 of the second part, the receipt whereof is hereby acknowledged, have Granted, Bargained and Sold, and by these presents do Grant, Bargain, Sell, Convey and Confirm, unto the said part 1/8 of the second part, and to their heirs and assigns, forever, all the following described real estate, situated in Bonneville County, State of Idaho, to-wit:

Lots One (1), Two (2), and Three (3) in Block Twelve (12) of Ammon Townsite, Bonneville County, Idaho, as per the recorded plat thereof, together with the tenements, water rights and appurtenances thereto belonging or in anywise appertaining.

TOGETHER With all and singular the tenements, hereditaments and appurtenances therunto belonging or in any wise appertaining, and the reversion, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest, in and to the said property, as well in law as in equity, of said part 1/8 of the first part.

TO HAVE AND TO HOLD, All and singular the above mentioned and described premises, together with the appurtenances, unto the part 1/8 of the second part, and to their heirs and assigns forever. And the said part 1/8 of the first part, and their heirs and assigns, against the said part 1/8 of the second part, and their heirs and assigns, against the said part 1/8 of the first part, and their heirs and assigns, against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said part 1/8 of the first part have hereunto set their hand and seal, the day and year first above written.

Signed, Sealed and Delivered in the Presence of

C. R. Crowley

Louise Day (SEAL)

Jesse M. Day (SEAL)

(SEAL)

(SEAL)

STATE OF IDAHO, COUNTY OF Bonneville

On this Third day of December, in the year 1943, before me, Notary Public, said County and State, Jesse M. Day and Louise Day, husband and wife, in and for the personal appearance of

known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

My commission expires Feb. 3rd, 1944 C. R. Crowley, Notary Public, Residing at Idaho Falls, Idaho

Recorded at the request of Bonneville Abstract Co., December 4th, 1943 at 2:20 A. M.

W. L. Bearink, Recorder.

By Grace Mc Intosh, Deputy Recorder.

Recorder's Fee, \$ - 1.20

THIS IS thousand nine

of the part 1/8 of the part y

WITNE One and lawful mone is hereby ac Confirm, un real estate,

L Book, n L Town of thereof

TOGI taining, at in and to TO E the part y heirs, th against th claiming c

IN V the day a Sign

COUNTY On t in and fo

known t that t

My age Record Dact

Record

WARRANTY DEED

620988

THIS INDENTURE, made this 12th day of March, 1982, between L. D. BARZEE and INZA E. BARZEE, husband and wife,

of the County of Bonneville, State of Idaho, the parties of the first part and LARRY J. KENNEDY and SHARON KENNEDY, husband and wife, whose mailing address is 315 Luv Place, Idaho Falls, Idaho of the County of Bonneville, State of Idaho, the parties of the second part,

WITNESSETH, that the said part of the first part, for and in consideration of the sum of TEN AND NO/100 (\$10.00) Dollars lawful money of the United States of America and other good and valuable consideration to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and by these presents, do grant, bargain, sell and convey and confirm unto the said part of the second part, and to their heirs and assigns, forever, all the following described real estate, situated in the County of Bonneville State of Idaho, to-wit:

Lot Three (3) and the South 59 feet of Lot Two (2), Block Twelve (12), Ammon Townsite, Bonneville County, State of Idaho, as per the recorded plat thereof

SUBJECT TO all conditions, reservations, easements, rights, Rights-of-way, zoning ordinances and governmental regulations of record.

INSTRUMENT NO. 620988
DATE 3-16-82
INST. CODE 1475
FICHE NO. 1475
L. D. Barzee
Inza E. Barzee
Peterson

RECORDED
BOOK 1475
PAGE 1475

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, and rents, issues and profits thereof; and all estate right, title and interest in and to the said property, as well in law as in equity of the said part of the first part.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises together with the appurtenances unto the parties of the second part, and to their heirs and assigns forever. And the said parties of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seal on the day and year first above written.

Executed and Delivered in the Presence of

L. D. Barzee [SEAL]
Inza E. Barzee [SEAL]
[SEAL]
[SEAL]

808274

Warranty Deed

For Value Received

LARRY J. KENNEDY AND SHARON KENNEDY, husband and wife
the grantors, do hereby grant, bargain, sell and convey unto

DOUGLAS M. ACKERMAN AND CHERYL A. ACKERMAN, husband and wife
whose current address is

2390 Ammon Rd.
Ammon, Idaho 83406

the grantees, the following described premises, in Bonneville County Idaho, to wit:

Lot 3, and the South 59 feet of Lot 2; Block 12, Ammon Townsite, Bonneville
County, State of Idaho, according to the recorded plat thereof.

SUBJECT TO: All existing patent reservations, easements, rights of way, protective covenants, zoning
ordinances and applicable building codes, laws and regulations.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee s,
their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said
Grantee s, that they the owners in fee simple of said premises; that they are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: June 3, 1991

Larry J. Kennedy
LARRY J. KENNEDY

Sharon Kennedy
SHARON KENNEDY

808274

STATE OF IDAHO, COUNTY OF Bonneville
On this 3rd day of JUNE, 1991,
before me, a notary public in and for said State, personally appeared

LARRY J. KENNEDY
SHARON KENNEDY
HUSBAND AND WIFE

known to me to be the person whose name
subscribed to the within instrument, and acknowledged to me that
executed the same.

[Signature]
Notary Public
Residing at IDAHO FALLS, ID
Comm. Expires 02/15/92

INSTRUMENT NO. 808274
DATE 6-14-91
INST. CODE 336
FICHE NO. 788-01
700

STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss

I hereby certify that the within
instrument was recorded.

Recorded longmore,
Recorder
By *[Signature]* Deputy
Request of

91 JUN 14 AM 9:41

BONNEVILLE COUNTY
CLERK

Printed by the AMERICAN LAND TITLE COMPANY, INC.

821169

WARRANTY DEED

For Value Received

Douglas M. Ackerman and Cheryl A. Ackerman, Husband & Wife

the grantors do hereby grant, bargain, sell and convey unto

William Fischer and Ann Fischer, Husband & Wife

whose current address is

3150 Central, Ammon, Idaho

the grantee of the following described premises, in BONNEVILLE County Idaho, to wit:

Lot 3, and the South 59 feet of Lot 2, Block 12, Ammon Townsite, Bonneville County, State of Idaho, according to the recorded plat thereof...

SUBJECT TO: All existing patent reservations, easements, rights of way, protective covenants, zoning ordinances and applicable building codes, laws and regulations.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises; that they are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: January 22, 1992

Douglas M. Ackerman
Douglas M. Ackerman

Cheryl A. Ackerman
Cheryl A. Ackerman

821169

STATE OF IDAHO, COUNTY OF Bonneville
On this 22 day of JANUARY, 19 92
before me, a Notary Public in and for said State, personally
appeared,
Douglas M. Ackerman
Cheryl A. Ackerman, Husband & Wife
known to me to be the persons whose names are
subscribed to this instrument, and acknowledged to
me that they executed the same.
James P. Payne
Notary Public
Residing at Idaho Falls, ID
Comm. Expires 04/15/97

INSTRUMENT NO. 821169
DATE 1-22-92
INST. CODE 350
FICHE NO. 7048-23
FEE 3.00
STATE OF IDAHO
COUNTY OF BONNEVILLE
I hereby certify that the within
instrument was recorded.
By *[Signature]*
Request of *[Signature]*

99 JAN 29 PM 4:39
100

Indexed by the AMERICAN LAND TITLE CO. Pocatello, Idaho

14-10423-B

QUITCLAIM DEED

For Value Received

WILLIAM FISCHER AND ANN FISCHER, husband and wife

do hereby convey, release, remise and forever quit claim unto

WILLIAM R. FISCHER AND M. ANN FISCHER, husband and wife

whose current address is

3000 WESTERN DRIVE IDAHO FALLS, IDAHO 83406

the following described premises, to-wit:

LOT 3 AND THE SOUTH 59 FEET OF LOT 2, BLOCK 12, AMMON TOWNSITE, BONNEVILLE COUNTY, IDAHO, ACCORDING TO THE RECORDED PLAT THEREOF...

837555

BONNEVILLE COUNTY
CLERK
92 OCT 13 PM 4:12

together with their appurtenances.

Dated: OCTOBER 7, 1992

William Fischer
WILLIAM FISCHER

Ann Fischer
ANN FISCHER

STATE OF IDAHO, COUNTY OF BONNEVILLE
On this 7TH day of OCTOBER, 1992,
before me, a notary public in and for said State, personally
appeared

WILLIAM AND ANN FISCHER, husband and wife

known to me to be the persons whose names are
subscribed to the within instrument, and acknowledged to
me that they executed the same.

Residing at IDAHO FALLS
Comm. Expires 03/08/96

Notary Public
Idaho

INSTRUMENT NO.	837555
DATE	10-13-92
INSTR. CODE	386
INDEX NO.	2001-45
TRF	3.00
STAMPED ()	ss
FILED ()	within
at ()	Idaho
County Recorder	
By <i>Sublet</i>	Deputy
Request of	ALTC

Furnished by the AMERICAN LAND TITLE CO., Pocatello, Idaho

1062389

BONNEVILLE COUNTY RECORDER

1062389 NOV 9 '01 PM 12:12

THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE.

Recorded at Request of Gallian, Westfall, Wilcox & Welker, L.C., 59 S. 100 E., St. George, UT 84770
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to William R. & Ann Fischer Address 3000 Western, Idaho Falls, ID 83403

WARRANTY DEED

WILLIAM R. FISCHER and M. ANN FISCHER, husband and wife, Grantors,
as joint tenants
of Idaho Falls, County of _____, State of Idaho, hereby
CONVEY and WARRANT to the WILLIAM AND ANN FISCHER REVOCABLE TRUST,
under Agreement dated November 2, 2001, William R. Fischer and M. Ann Fischer, or
Successors, Trustees

of 3000 Western, Idaho Falls, ID
TEN (\$10.00)-----
and other good and valuable consideration
the following described tract of land in Bonneville
State of Idaho:

Lot 3, and the South 59 feet of Lot 2, Block 12, Ammon Townsite,
Bonneville County, State of Idaho, according to the recorded plat there

SUBJECT TO all existing patent reservations, easements, rights-of-way,
protective covenants, zoning ordinances and applicable building codes, laws
and regulations

INSTRUMENT NO. 1062389
DATE 11-9-01
INITIAL CODE 205
IMAGED PGS 1
DOLLARS, 3.00
FEE
STATE OF IDAHO)
COUNTY OF BONNEVILLE) ss
I hereby certify that the within
instrument was recorded.
Ronald Longmore,
County Recorder
By R. Way Deput
Request of Gallian Westfall
59 S. 100 E.
St. George, Ut
84770

WITNESS, the hand of said grantor, this
November 2, A. D. 2001.

Signed in the Presence of

William R. Fischer

M. Ann Fischer

STATE OF UTAH,)
ss.)
County of Washington)

On the 2 day of November, A.D. 2001, personally appeared before me
William R. Fischer and M. Ann Fischer, the signers of the within instrument, who duly acknowledged
to me that they executed the same.



Notary Public

WARRANTY DEED

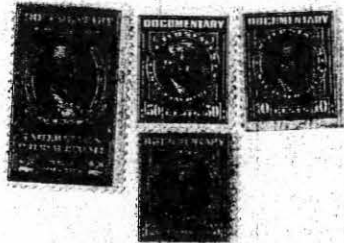
THIS INDENTURE, Made this 13th day of September, 1951, by and between Alvin Isaacs and Blanche Isaacs, husband and wife,

of the County of Bonneville, State of Idaho, the parties, of the first part, and Denzel W. Rowbury and Viola H. Rowbury, husband and wife,

of the County of Bonneville, State of Idaho, the parties of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Twenty-five Hundred and No/100 - - - - - DOLLARS lawful money of the United States of America, to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm unto the said parties of the second part and to their heirs and assigns forever, all the following described real estate, situate in the County of Bonneville, State of Idaho, to wit:

Lot Numbered 4 in Block Numbered 12 of the Ammon Townsite, Bonneville County, Idaho, as per the recorded plat thereof, containing one and one fourth acres, more or less, together with building and improvements thereon.



TOGETHER, With all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property as well in law as in equity, of the said parties of the first part.

TO HAVE AND TO HOLD, All and singular, the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever. And the said parties of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said parties of the second part, and their heirs and assigns against the said parties of the first part and their heirs and against all and every person and persons, whomsoever lawfully claiming or to claim the same, shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

Alvin Isaacs (SEAL)
Blanche Isaacs (SEAL)

79 525

STATE OF IDAHO,
County of Bonneville } ss.

On this 3 day of September, in the year 1951 before me,
the undersigned, a Notary Public in and for the State of Idaho, personally
appeared Alvin Isaacs and Blanche Isaacs, husband and wife,

known to me to be the person.s whose name.s are subscribed to the within instrument, and
acknowledged to me that the.y executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.

Louise Keefer
Notary Public.

Residing at Idaho Falls, Idaho.

My commission expires March 12th, 1955

SEAL

INDEXED
SERIALIZED
FILED
No. 288713

WARRANTY DEED

TO

Dated, 1951,
STATE OF IDAHO,
County of Bonneville, ss.

I hereby certify that this instrument
was filed for record at the request of
Charles T. & Janet Co.

at 10 minutes past 1
o'clock P. M., this 21st
day of Nov., 1951,
in my office and duly recorded in
Book 79 of D.S.S.'s, at
page 595

By Jimmy Morris
Deputy
Bertine Hillman
Deputy
Recorder

Fees \$ 1.50

STATE OF IDAHO, }
County of Bonneville } ss.

On this 25th day of March in the year 1959, before me
The undersigned, a Notary Public in and for said State, personally appeared
Denzel W. Rowbury and Viola H. Rowbury, His wife
known to me to be the person whose name is subscribed to the within instrument, and acknowledged
to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal
the day and year in this certificate first above written.

Lloyd H. Hillman
Notary Public for the State of Idaho,
Residing at Firth, Idaho.

421195
No.

WARRANTY DEED
(FORM No. 389)

AUG 9 2 04 PM '71

TO

Dated 8-7-71, 1971

STATE OF IDAHO, }
County of Bonneville } ss.

I hereby certify that this instrument
was filed for record at request of

at minutes past day of
o'clock M., this 7th day of
office, and duly entered in Book
of in my
at page

By
Fees, \$ 5.00
Deputy

Mail to

IDAHO STATE NOTARY

1121195

THIS INDENTURE, made this 25th day of March, 1959, between Denzel W. Rowbury and Viola H. Rowbury, His wife of Ammon, County of Bonneville, State of Idaho, the part i.e.s. of the first part and James F. Croston and Marjorie C. Croston, His wife of Idaho Falls, County of Bonneville, State of Idaho, the part i.e.s. of the second part,

WITNESSETH, that the said part i.e.s. of the first part, for and in consideration of the sum of Ten dollars Dollars lawful money of the United States of America. And other good and valuable consideration, to them in hand paid by the part i.e.s. of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and by these presents, do grant, bargain, sell and convey and confirm unto the said part i.e.s. of the second part, and to their heirs and assigns, forever, all the following described real estate, situated in Ammon, County of Bonneville, State of Idaho, to-wit:

Lot number four (4), Block number twelve (12) of the Ammon Townsite, Bonneville County, State of Idaho as per recorded plat thereof. Containing 1/4 acres (more or less) together with buildings and improvements thereon.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, and rents, issues and profits thereof; and all estate, right, title and interest in and to the said property, as well in law as in equity of the said part i.e.s. of the first part.

TO HAVE AND TO HOLD, all and singular the above mentioned and described premises together with the appurtenances unto the part i.e.s. of the second part, and to their heirs and assigns forever. And the said part i.e.s. of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said part i.e.s. of the second part, their heirs and assigns, against the said part i.e.s. of the first part, and their heirs, and against all and every person and persons whosoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

IN WITNESS WHEREOF, the said part i.e.s. of the first part have hereunto set their hand and seals the day and year first above written.

Executed and Delivered in the Presence of

Denzel W. Rowbury [SEAL]
Viola H. Rowbury [SEAL]
[SEAL]
[SEAL]

DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB #2903
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83442
Telephone: (208) 745-9202
Facsimile: (208) 745-8160
rdunn@dunnlawoffices.com

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN)
FISCHER, Trustees of the)
William and Ann Fischer Revocable Trust,)
Plaintiffs,)

Case No. CV-16-2894

vs.)

RESPONSE TO PLAINTIFFS' FIRST
SET OF INTERROGATORIES,
REQUESTS FOR PRODUCTION,
AND REQUESTS FOR ADMISSION

JAMES F. CROSTON and MARJORIE C.)
CROSTON, husband and wife;)
AND ALL UNKNOWN OWNERS AND/OR)
OTHER PERSONS OR ENTITIES)
CLAIMING ANY INTEREST IN THE)
FOLLOWING DESCRIBED REAL)
PROPERTY:)

Beginning at the Northeast corner of Lot 4, Block)
12, of the Original Ammon Townsite, Bonneville)
County, Idaho; running thence N. 88°33'58" W.)
330.00 feet to the Northwest corner of said Lot 4;)
thence S 00°00'21"W. along the West line of said)
Lot 4 a distance of 8.99 feet to an existing fence)
line; thence S. 89°41'36" E. along said existing)
fence line 329.90 feet to a point on the East line of)
said Lot 4; thence N. 00°00'21" E. along said East)
line 2.50 feet to the POINT OF BEGINNING.)

Defendants.)
_____)

COME NOW, the defendants, JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife, by and through the undersigned counsel, and respond to Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission as follows:

I.

INTERROGATORIES

INTERROGATORY NO. 1: Please identify all persons who provided information for the preparation of answers and responses to these Interrogatories and Requests for Production of Documents and state the specific answer(s) and/or response(s) to which they contributed.

RESPONSE TO INTERROGATORY NO. 1: Linda Penning, James F. Croston and Marjorie C. Croston; they all talked and provided and answer to each discovery item contained herein. Marjorie C. Croston gathered additional information via telephone and conversations with third parties that were incorporated in these answers. She (Marjorie) also provided photographs and google pictures along with other documents. He parents are the named defendants and are too elderly to gather or supply such information. Rod Croston provided pictures and contributed to some of the questions.

INTERROGATORIES NO. 2 through 12 & RESPONSES TO
INTERROGATORIES NO. 2 through 12: OMITTED

INTERROGATORY NO. 13: Please state all facts upon which you base your denial of paragraph 31 of the Complaint.

RESPONSE TO INTERROGATORY NO. 13:

Facts upon which denial of Paragraph 31 of the complaint is based.

There is no way to know what the intent of the old fence was at the time it was constructed. It is unknown when the old fence was constructed. As far as we are aware it separated fields and did not demarcate any specific boundary or property line. The old fence was removed by the Fischers, destroying any implied property line.

INTERROGATORIES NO. 14 through 17 & RESPONSES TO
INTERROGATORIES NO. 14 through 17: OMITTED

INTERROGATORY NO. 18: Please identify and describe in detail the factual basis for each affirmative defense Defendants assert in their Answer, and identify each document Defendants contend constitutes evidence of or provides support for each affirmative defense Defendants assert in this action.

RESPONSE TO INTERROGATORY NO. 18:

Plaintiffs failed to allege proper elements for quiet title, boundary disputes and trespass.

Plaintiff's recognize old fence in disrepair or removed.

This is the Fischers claim. The Crostons state the fence did need some repair.

The only place it was falling down were the Fischer's had slowly and systematically shoved it over beginning in 2011 per the Google Earth maps. As noted in the pictures taken August 2015, it was not falling into the Fischers property but was leaning into the Croston's property

They requested a survey & indicated would control. They indicated would put up a new, much nicer fence to be placed on the Survey line and would be no dispute. See Ellsworth survey report. See Jim Croston Statement from 8/31/15. Would pay half the cost of the new fence. (NOT AWARE OF THIS OFFER.) See Jim Croston Statement from 8/31/15. The Fischers have offered to pay the full price of the fence twice in their settlement offers if the Crostons give them the property in question.

The Fischers stated to Jim Croston were going to replace the fence and get a survey with the Surveyors the City of Ammon uses so will be no disputes. See Jim Croston Statement from 8/31/15. The temporary fence was placed 4" south of the Survey line. This does not give away or permission for use of the additional 4" of the Crostons property.

- a. Accord on location of new fence.

See Jim Croston Statement from 8/31/15. No written agreement.

- b. No agreement between parties on boundary designated by old fence.

The Crostons have never discussed with the Fischers the boundary lines between their properties therefore no agreement ever existed. Ms. Croston, Linda Penning and others were on the Croston property August 17 to 20th doing clean up and maintenance. At that time the destroyed fence and irrigation ditch was intact. The Fischers had ample opportunity to discuss the destroyed fence and any need for repairs with the Crostons at that time. They did not speak with Ms. Croston or Linda Penning.

Agreement survey would be controlling.

See Jim Croston Statement from 8/31/15. No written agreement.

Fischers no problem until boundary moved northward with Survey. The Fischers stated to Jim Croston were going to replace the fence and get a survey with the Surveyors the City of Ammon uses so will be no disputes. See Jim Croston Statement from 8/31/15. See notes from Fischer's sons phone calls and letters from the Fischer's son.

INTERROGATORIES NO. 19 through 21 & RESPONSES TO
INTERROGATORIES NO. 19 through 21: OMITTED

INTERROGATORY NO. 22: Please identify any and all persons and entities which have a current legal interest in the ownership of the Croston Property and the nature and percentage of such ownership.

RESPONSE TO INTERROGATORY NO. 22:

Current legal interest in the ownership of the Croston Property.

James and Marjorie Croston. Full ownership.

INTERROGATORIES NO. 23 through 24 & RESPONSES TO
INTERROGATORIES NO. 23 through 24: OMITTED

&

REQUESTS FOR PRODUCTION NO. 1 through 20 &
RESPONSES TO REQUESTS FOR PRODUCTION NO. 1
through 20: OMITTED

&

REQUESTS FOR ADMISSION NO. 1 through 2 &
RESPONSES TO REQUESTS FOR ADMISSION NO. 1
through 2: OMITTED

REQUEST FOR ADMISSION NO. 3: Admit that the Old Fence existed at the time Defendants purchased the Croston Property in 1959.

RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admit.

REQUEST FOR ADMISSION NO. 4: Admit that no written contract exists between Plaintiffs and Defendants evidencing that they were in agreement as to ownership of Tract 1, the location of the New Fence, and that Plaintiffs would pay Defendants one-half of the cost of constructing the New Fence.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Admit. Everyone relied on the verbal responses and integrity of the parties.

Admit. No written contract. Was verbal interchange between Ms. Fischer and Jim Croston as to replacement of the fence and location to be survey line.

REQUESTS FOR ADMISSION NO. 5 through 9 & RESPONSES TO
REQUESTS FOR ADMISSION NO. 5 through 9: OMITTED
&
CERTIFICATE OF SERVICE: OMITTED

Robin D. Dunn, Esq., ISB #2903
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 P. O. Box 277
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN)
 FISCHER, Trustees of the)
 William and Ann Fischer Revocable Trust,)
)
 Plaintiffs,)
)
 vs.)
)
 JAMES F. CROSTON and MARJORIE C.)
 CROSTON, husband and wife;)
)
 AND ALL UNKNOWN OWNERS AND/OR)
 OTHER PERSONS OR ENTITIES)
 CLAIMING ANY INTEREST IN THE)
 FOLLOWING DESCRIBED REAL)
 PROPERTY:)
)
 Beginning at the Northeast corner of Lot 4, Block)
 12, of the Original Ammon Townsite, Bonneville)
 County, Idaho; running thence N. 88°33'58" W.)
 330.00 feet to the Northwest corner of said Lot 4;)
 thence S 00°00'21"W. along the West line of said)
 Lot 4 a distance of 8.99 feet to an existing fence)
 line; thence S. 89°41'36" E. along said existing)
 fence line 329.90 feet to a point on the East line of)
 said Lot 4; thence N. 00°00'21" E. along said East)
 line 2.50 feet to the POINT OF BEGINNING.)
)
 Defendants.)
)

Case No. CV-16-2894

VERIFICATION

JAMES F. and MARJORIE C. CROSTON, being first duly sworn, depose and state:

That they are the defendants in the above-entitled action; that they have read the

foregoing Defendants' Response to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission, know the contents thereof, and verily believe the statements contained therein to be true.

DATED this 10th day of October, 2016.

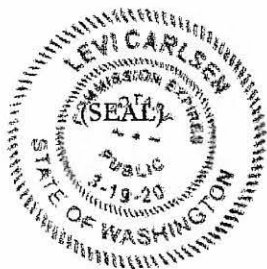
James F. Croston

JAMES F. CROSTON
Defendant

Marjorie C. Croston

MARJORIE C. CROSTON
Defendant

SUBSCRIBED AND SWORN to before me this 10th day of October, 2016.



Levi Carlsten
Notary Public for Idaho/Washington
Residing at: Spokane County
Commission Expires: 3.19.20

RESPONSE TO FIRST INTERROGATORIES

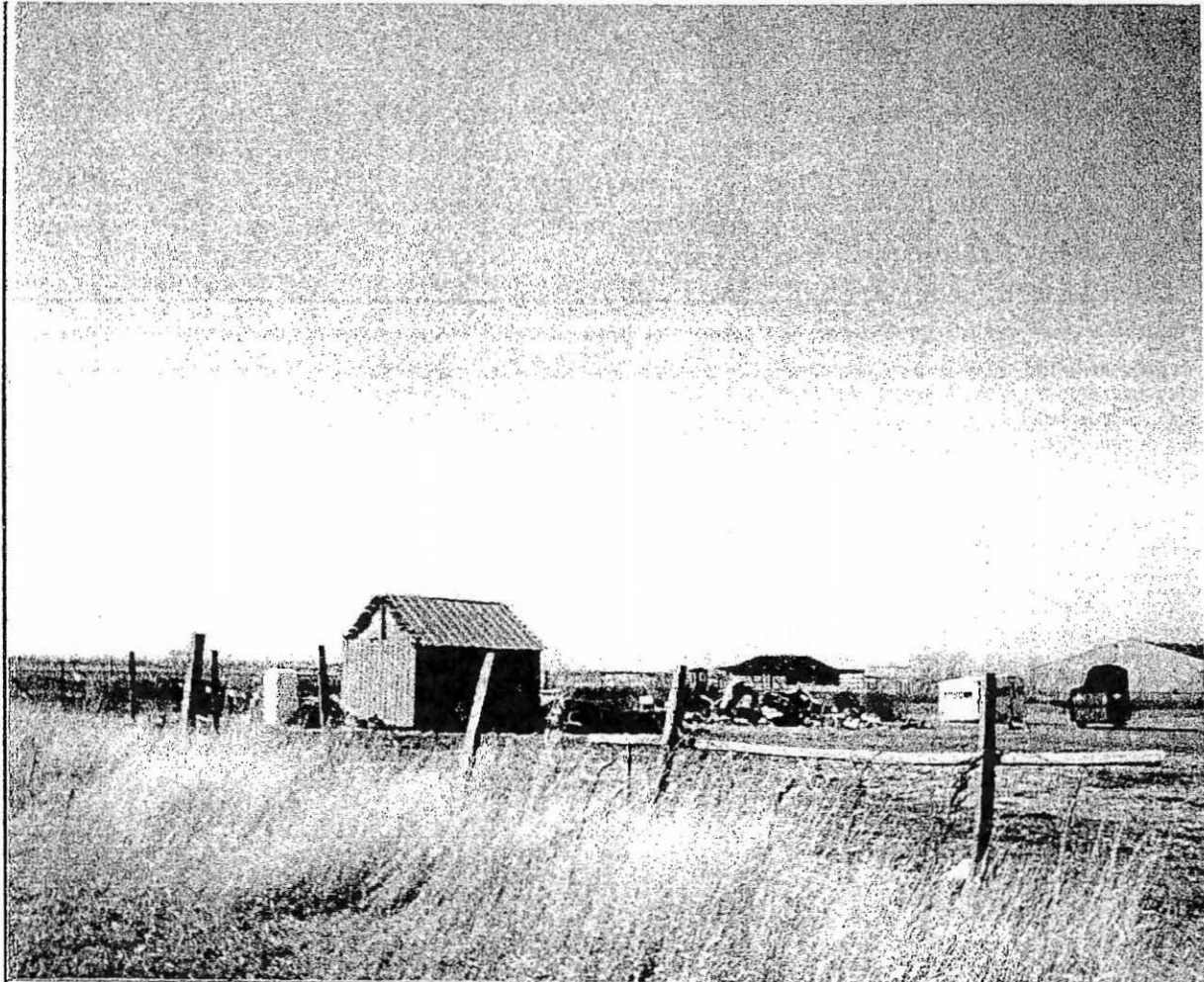
POINTS OF FACT FOR ROBB DUNN



Picture of Tin shed and fence line taken looking North in 1987.

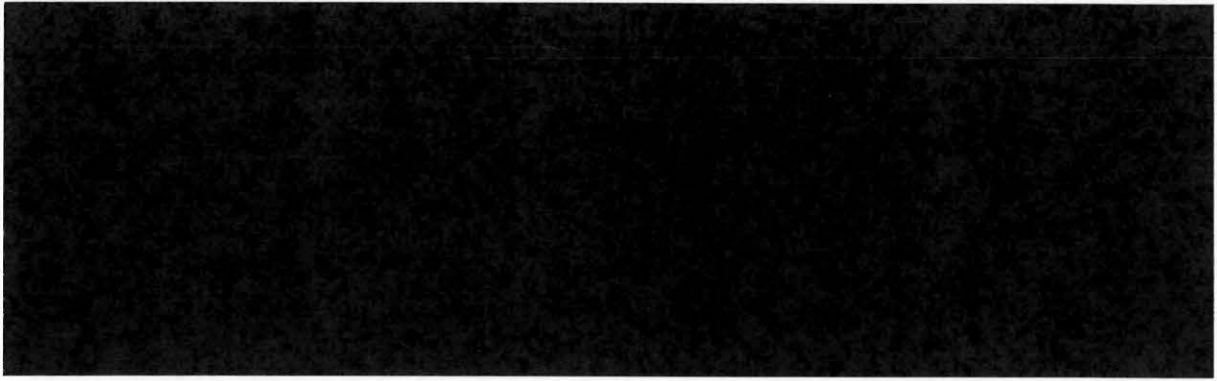


Page 2 of Points of Fact: Omitted



Measurements taken September 2015, from the old shed foundation to the old fence line indicates the shed was approximately 5 feet from the old fence line and is now approximately 2 feet inside our property line. (Old fence measurements are based on the completed survey) Since the Fischer's tore down the old shed in 1996 when they built their garage and no longer used this area for over 20 years it is no longer relevant that the old shed foundation is now slightly on our side of the established property line.


Pages 4 through 46 of Points of Fact: Omitted



12. Facts upon which we base our allegation that Plaintiffs desired new fence per survey, Response to Paragraph 25 of the complaint.

Ms. Fischer stated to Jim Croston on 8/30/15: "we are going to replace the fence. Going to get a survey to find out where the line is at. We are using the same surveyors as the City uses so shouldn't be any disputes." This implies the Fischers desired the new fence be placed on the surveyed property line.

13. Facts upon which denial of Paragraph 31 of the complaint is based.

There is no way to know what the intent of the old fence was at the time it was constructed. It is unknown when the old fence was constructed. As far as we are aware it separated fields and did not demarcate any specific boundary or property line. 



15. Facts upon which we base our allegation that Plaintiffs desired new fence per survey and would pay half the cost in our second affirmative response.

Ms. Fischer stated to Jim Croston on 8/30/15: "we are going to get a survey to find out where the line is at. We are using the same surveyors as the City uses so shouldn't be any disputes." This implies the Fischers desired the new fence be placed on the surveyed property line. Ms. Fischer had told Jim Croston they intended to replace the fence after the survey was completed. The Fischers have offered to pay the full price of the fence twice in their settlement offers if the Crostons give them the property in question.

(I DO NOT RECALL WHERE THEY EVER OFFERED TO PAY 1/2 OF THE COST TO REPLACE THE FENCE. THEY DID INDICATE IN THEIR SETTLEMENT OFFERS THAT THEY WOULD PAY TO REPLACE THE FENCE AND MAINTAIN IT.)

Pages 48 through 51 of Points of
Fact: Omitted

James & Marjorie Croston
6806 S. 3rd St.
Spokane Valley, WA 99212
(509) 893-9445

September 4, 2015

William & Ann Fischer
3000 S. Western Ave.
Ammon, ID 83406

RE: Trespass and Destruction of Property : Removal of Fence
and Irrigation Ditch

Dear Mr. & Mrs. Fischer,

We were in Ammon working on our property located at 3020 S. Western Ave from August 17 to August 20, 2015. At that time our fence and irrigation ditch were intact.

We are aware that you have recently removed our fence; filled our irrigation ditch and added gravel adjacent to your property. You have done all of this without our consent or knowledge.

Your actions are not acceptable and constitute trespass and malicious injury to our property. You are hereby notified that you must restore our property to our satisfaction by September 24, 2015 or face prosecution pursuant but not limited to Idaho State Law Title 18: Crimes and Punishments; Chapter 70: Trespass And Malicious Injuries To Property; 18-7001-Malicious Injury To Property and 18-7008: Trespass.

In the future, please contact us directly before doing any action that will impact our property.

Sincerely,


James and Marjorie Croston

Sent Certified w/Return Receipt, # 7013 2250 0001 8905 3033

C: Ron Folsom, Ammon City Administrator, Ammon Administrative Office, Ammon City Hall,
2135 S. Ammon Rd., Ammon, ID 83406 Certified #7013 2250 0001 8905 3040

Shawna Avery, Enforcement Officer, Ammon Enforcement Office, Ammon City Hall,
2135 S. Ammon Rd., Ammon, ID 83406 Certified #7013 2250 0001 8905 3064

Bonneville County Sheriff, 605 N. Capital Ave., Idaho Falls, ID 83402
Certified #7013 2250 0001 8905 3057

Progressive Irrigation District, 2585 N. Ammon Rd., Idaho Falls, ID 83401-1949
Certified #7013 2250 0001 8905 3026

William Forrest Fischer

From: Judy McCowin <jmccowin@dunnlawoffices.com>
Sent: Monday, November 14, 2016 4:52 PM
To: William Forrest Fischer
Subject: FW: Fischer v. Croston - Requests for Production
Attachments: Linda 2015 Calendar Aug-Oct.pdf; Jim Statement 8-30-15.pdf; Phone Messages 9-27-15.m4a; Mom Notes Fischer Atty Call 9-25-16.pdf; Mom conversation with Fischers Atty 9-25-15.doc; Conversation with my Mom 9-25-15 re-Atty Call.docx

Mr. Fischer, attached is a partial response to your discovery requests. We will supplement with the letter from Ammon, Ms. Croston's journal; surveys and the police report. Thank you for your patience.

Judy McCowin
Secretary to Robin D. Dunn

Statement from Jim Croston regarding interchange with Ms. Fischer regarding survey.

I went to my parent's property at 3020 E. Western Ave. Ammon, ID after the Fischers took it out their fence and filled in their irrigation ditch. This was on August 30, 2015. I was marking and measuring where the original fence had been. Ms. Fischer came out and asked me who I was and what I was doing. I answered her questions. When I told her I was determining where the fence line used to be, she replied, "We will be replacing the fence with a much better fence. We are going to get a survey to find out where the line is at. We are using the same surveyors as the City uses so shouldn't be any disputes." I said OK. Ms. Fischer then returned to her house.

8-30-15 Jim Croston

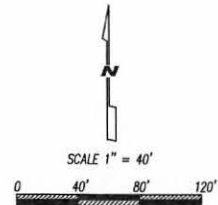
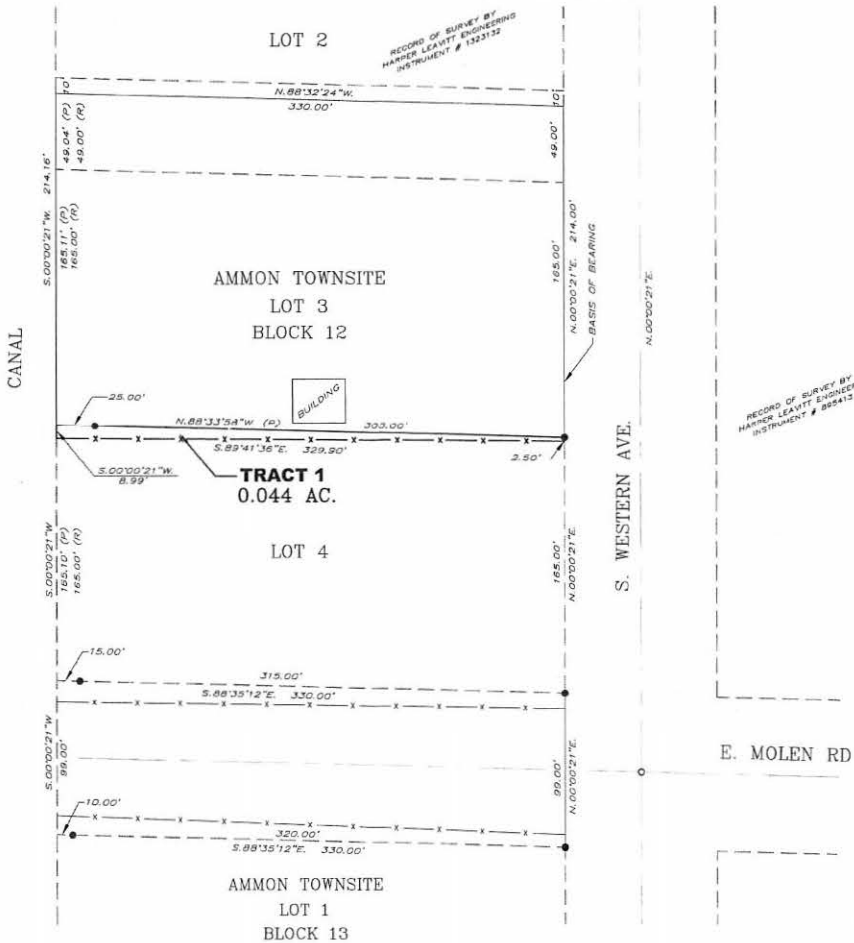
RECORD OF SURVEY
 PART OF THE SE 1/4 OF SECTION 27
 TOWNSHIP 2 NORTH, RANGE 38 EAST OF THE BOISE MERIDIAN
 BONNEVILLE COUNTY, IDAHO

EXISTING LEGAL DESCRIPTION

TRACT 1

Beginning at the Northeast corner of Lot 4, Block 12, of the Original Ammon Townsite, Bonneville County, Idaho; running thence N.88°33'58"W, 330.00 feet to the Northwest corner of said Lot 4; thence S.00°00'21"W, along the West line of said Lot 4 a distance of 8.99 feet to an existing fence line; thence S.89°41'36"E, along said existing fence line 329.90 feet to a point on the East line of said Lot 4; thence N.00°00'21"E, along said East line 2.50 feet to the POINT OF BEGINNING.

SUBJECT TO: existing easements of record.
 CONTAINING: 1,896 Sq. Ft or 0.044 acres.



LEGEND & NOTES

- SET 1/2" X 24" STEEL RE-BAR WITH PLASTIC CAP STAMPED PLS.# 10884
- FOUND PK NAIL P.L. MONUMENT
- (P) PROPORTED DISTANCE
- (R) RECORDED DISTANCE

SURVEYOR'S CERTIFICATE

I, RODNEY L. ELLSWORTH, A LAND SURVEYOR LICENSED BY THE STATE OF IDAHO, HEREBY CERTIFY THAT THE TRACT OF LAND WAS SURVEYED UNDER MY SUPERVISION AND STAKED AS SHOWN HEREON.

PRELIMINARY

RECORD OF SURVEY ANN FISCHER PART OF THE SE 1/4 OF SECTION 27 T. 2 N., R. 38 E., B.M. BONNEVILLE COUNTY, IDAHO		Job No. 1139 Sht. 7 of 7
Scale: 1" = 40' Drawn By: S.O.F. 208 522 5414 253 1st Street,	Date: OCTOBER, 2015 Eadfile: 1139 ROS 2 Fax 208 523 2614 Idaho Falls, ID 83401	Engineers & Land Surveyors

Ref call received 9/25/15 Friday

I received a call from Forrest Fischer. He identified himself as an attorney with Honess & Allison and was calling regarding our property on western ave, Arroyo. He stated he was representing the Fishers and they were planning on taking us to court for Address possession. That there had been some fencing co on our property and he advised me not to put up a fence until this was resolved. I asked if he was related and he told me he was their son. I told him I had give my daughter power of attorney and she was down there representing me. He asked me to give him my daughters number and I told him no. You give me your name and number and I will have her call you if she chooses to. He gave me the phone # 206-596-7838. I mentioned that my daughter had been on the property working and his parents never said one word to her he said that was

Exhibit H - Page 001

because he had advised them not to talk to us. He stated that he advised his parents to put up a sign on the property line not to put up a fence. He advised me not to proceed with any fence, that they are taking us to court for adverse possession, mentioned a temporary restraining order until things can be resolved. He said he was sending me a letter ups Fox at this time I have not received a letter.

He said he would like to work this out with us. He said it would be better if we could resolve this without going into litigation because if we end up in litigation it could be very costly for us. When he asked me what I think I told him no comment.

Maxine Costin 1:00pm
9/28/15

Reference call received 9/25/15.

I received a call from Forrest Fischer. He identified him self as an attorney with Houser Allison and was calling regarding our property at 3020 Western Ave, Ammon, Idaho. He stated said he was representing William and Ann Fischer. They are planning on taking us to court for adverse possession. He stated fencing companies had been on our property. He advised me not to put up any fence until this was resolved .I asked him if he was related to the Fischers. He said he was their son. I told him I had given my daughter power of attorney and we were hiring an attorney, He asked for his name. I told him we had not retained him yet that he was out of town until the 28th. He asked me to give him my daughter's phone number. I told him to give me his name and number and I will have her call you if she wants. He gave me the phone number 206 596 7838. I mentioned my daughter had been on our property working and his parents had not said one word to her. He said that was because he had advised them not to talk to us. He stated that he had advised his parents to put up a sign on the property line stating 'Do not put up a fence'. He advised me not to proceed with any fence, that they are taking us to court for adverse possession. He mentioned a temporary restraining order until things can be resolved. He said he was sending us a letter fax UPS. He said he would like to work this out with us. He said it would be better if we could resolve this with out going in to litigation, because if we end up in litigation it could be very costly for us. He asked me what I think and I said no comment.

Marjorie Croston

Conversation with my Mom, Marjorie Croston, Friday 9/25/15

My Mom called me at 12:54 PM. She was extremely distraught and upset. Said the neighbor's attorney had called and was threatening to steal her land. I got her calmed down enough to find out what was said. It was Forest Fischer, the neighbor's son who is representing them. Said he is with Holden, Holden & Kidwell. Here are the notes I jotted down during this conversation:

- He is sending letter today overnight.
- Filing a claim for adverse possession.
- Told Mom she could not put up a fence.
- He told his parents not to talk to us.
- She told him I was here and representing her. Told him he could talk to me.
- He asked for my number and was told I would call him if I wanted to talk to him. His number is 206-596-7838.

I had to calm my mom down several times during this conversation. She wanted to know what we can do to prevent them from stealing her property. Told her I would put the fence up now instead of waiting. We want to run some livestock anyway so no reason to wait. Mom will fax me the letter as soon as it arrives.

CHAPTER 3

ANIMALS

SECTION:

- 5-3-1: *Cruel Treatment*
- 5-3-2: *Animal Fights*
- 5-3-3: *Cruel Impoundment of Animals*
- 5-3-4: *Failure to Provide Minimum/Adequate Care*
- 5-3-5: *Beating*
- 5-3-6: *Herding Animals*
- 5-3-7: *Keeping of Certain Animals Prohibited*
- 5-3-8: *Keeping or Maintaining Animals*
- 5-3-9: *Non-Conforming Uses*
- 5-3-10: *Keeping and Maintaining Animals Constituting a Nuisance*
- 5-3-11: *Keeping of Beehives*
- 5-3-12: *Animals Running at Large*
- 5-3-13: *Impoundment of Animals*
- 5-3-14: *Abandonment of Animals*
- 5-3-15: *Definitions*
- 5-3-16: *Penalty*

documenting the violation, may enter upon any place where such animal is confined, and supply it with necessary food and water.

5-3-4: FAILURE TO PROVIDE MINIMUM/ADEQUATE CARE: Every owner or person having the custody or control of any domestic animal who shall fail to provide proper care and attention to such animal shall be guilty of a misdemeanor. Nothing herein shall prevent the humane disposal of any sick, disabled, infirm, crippled or abandoned animal.

5-3-5: BEATING: Every person who cruelly whips, beats, starves or otherwise ill treats any animal in his care or charge, whether belonging to him or any other person, is guilty of a misdemeanor.

5-3-6: HERDING ANIMALS: Any person who herds or drives any fowl, cattle, swine, goats, sheep, horses, mules, or other animal upon any street, alley, or public way shall be guilty of a misdemeanor. Nothing herein shall prevent the riding of any horse or mule, or the driving of a horse, mule, ox, or cow hitched to a carriage or conveyance, for the purpose of any public parade or exhibition.

5-3-7: KEEPING OF CERTAIN ANIMALS PROHIBITED: Except as provided and allowed in an RE or Animal Overlay (AO) zone or by prior established non-conforming use, any person who keeps or maintains any horse, mule, ox, cow, swine, goat, sheep, fowl, bison, llama, or other domestic animal of a related nature or any person who keeps any feral, poisonous, dangerous, or fetid animal within the City is guilty of a misdemeanor.

Nothing herein shall prohibit the keeping or maintenance of any domestic dog, cat, bird, or fish, or any such household pet which shall not present a danger, menace, or nuisance to other residents.

Nothing herein shall prohibit the keeping or maintenance of such described animals within any public zoo, circus, exhibition, pet show, pet store, veterinarian clinic, auctioneering business, or in any duly licensed business dealing in livestock, provided the operators thereof shall have first obtained a license under the provisions of this Code and being subject always to the provisions of all laws relating to nuisances.

5-3-8: KEEPING OR MAINTAINING ANIMALS: It shall be unlawful to keep and maintain swine within the City limits, other than as provided in Section 5-3-7 hereinabove. It shall be unlawful to keep, maintain, stable, or pasture any horse, mule, ox, cow, swine, goat, sheep, fowl, bison, llama, or other domestic or feral animal of related nature except as provided in the RE or Animal Overlay (AO) zones and under the following conditions which shall apply therein, or by prior established, non-conforming use.

(A) That the livestock or fowl may be maintained for pasturing upon any lot or area which shall be adequately and securely fenced or otherwise enclosed to prevent any such animal or fowl from becoming loose or straying or in reaching over or through such fence or enclosure under all normal and reasonable conditions; providing further, that upon any lot on which there is a dwelling house located, such area in which animals, livestock,

or fowl are maintained and pastured must not be on that portion of said lot and area which is a yard or lawn appurtenant to the dwelling, and in an Animal Overlay (AO) Zone must not be in any area to the side or front of such dwelling; and provided further, that upon any unimproved lot, the whole thereof may be pastured but the same shall be adequately and securely fenced as above stated.

- (B) That in pasturing of such areas as provided in the preceding and next subsections, no more than the number of livestock that can be pastured with the amount of pasturage then available upon such area, under the conditions and circumstances of such area and lot then existing, with only normal and reasonable supplemental feeding, may be kept or maintained upon such area at any one time.
- (C) That no livestock or fowl shall be kept and maintained where the normal pasturage grown shall not maintain the same and where feeding is necessary except when the portion of the lot, area, or parcel where pasturage is permitted by the zone wherein it is contained consists of:

For lots, area, or parcels in the Animal Overlay (AO) Zone: no less than seven thousand (7000) square feet of area per one (1) one animal or 25 fowl.

For lots in the RE Zone:

No less than one half ($\frac{1}{2}$) acre (twenty-one thousand, seven hundred eighty [21,780] square feet) of area per one (1) animal.

No more than fifty (50) total fowl or small animals.

Provide further, that in an Animal Overlay (AO) Zone such pasturing and feeding and maintaining and keeping of said animals shall be done only on the rear one-half of said lot and that any feeding area, resting, or loafing area or shed, barn, or stable shall be no closer than 100 feet from any dwelling home or residence, other than the dwelling home or residence of the owner or such animals or livestock.

- (D) No person or persons keeping, maintaining, stabling, or pasturing animals or fowl herein provided shall allow any accumulation of manure or refuse to the extent that the same constitutes a nuisance or hazard in such area and any such area shall at all times be maintained and kept by such person or persons in a clean and neat manner so as not to be objectionable to, nor to constitute a nuisance to, the inhabitants and residents of the City; to cause no undue odors or hazards, and to be kept and maintained in a manner to conform to all applicable health and sanitary laws, rules, and regulations of the State of Idaho, County of Bonneville, and City of Ammon now existing or hereafter enacted.
- (E) Nothing within the contents of this chapter shall prohibit the keeping or maintenance of domestic hens as allowed below:
 - 1. The keeping of domestic hens is hereby permitted within the following residential zones within the City subject to the provisions of this section: R1, R1A, RP, RPA, R2 (the R2 zone is limited to those properties developed as townhomes and shall not pertain to properties built and/or developed as apartments as defined in Title 10, Chapter 2 (10-2-1) of the City Code). The keeping of such hens is allowed only when the primary use is for the production of eggs.

2. Domestic hens shall be allowed on any single family residentially zoned lot, meeting the terms of this chapter and with the following restrictions:
 - (A) On any lot with a detached home a maximum of six (6) domestic hens shall be allowed.
 - (B) On any lot with an attached home a maximum of three (3) domestic hens shall be allowed.
3. All buildings, shelters or enclosures used for the purpose of housing or sheltering domestic hens shall be located no less than twenty feet (20') from the primary residence located upon the lot or parcel for such uses and no less than twenty feet (20') from any primary residence located upon an adjacent lot to the parcel for such uses.
4. The side yard requirements of any building, shelter or enclosure used for domestic hens shall meet the minimum side yard requirement of the zone and/or lot in which the structure or fence is located. The side yard requirement shall be as defined in Title 10, Chapter 2 (10-2-1) of the City Code. For lots containing townhomes with zero lot line divisions, the side yard required shall be the minimum distance allowed for the side yard not considered to be a zero lot line.
5. All buildings, shelters or enclosures used for the purpose of housing or sheltering domestic hens shall be located in the rear yard of the property as defined in Title 10, Chapter 2 (10-2-1) of the City Code.
6. Domestic hens shall at all times be kept within a secure enclosure having a total area of not less than six (6) square feet per domestic hen. Domestic hens shall not be kept within any building or structure designed for human occupancy.
 - (A) In addition to the above requirement, there shall also be a coop provided for nesting. This area shall be a minimum of two (2) square feet per domestic hen. The coop area may be elevated within the required enclosure area or included as an attachment to the enclosure. If elevated there must be a minimum of eighteen (18) inches between the bottom of the nesting area and the ground within the enclosure.
7. The area within which domestic hens are kept shall be cleaned and maintained in a manner that does not unreasonably attract flies, emit foul or objectionable odors or create a public health hazard nor shall the keeping of domestic hens disturb the peace of the adjoining properties or otherwise constitute a nuisance. Any building, structure or coop used for housing domestic hens shall provide adequate ventilation to prevent excessive odors or create a public health hazard.
8. Hens shall have access to feed and unfrozen water at all times.
9. All domestic hens found running at large are declared to be a nuisance, and it shall be the duty of the Animal Control Officer to confiscate the same. Domestic hens picked up by the Animal Control Officer shall be confined at the animal control shelter for twenty-four (24) hours; after such time the Animal Control Officer may release said hen(s) to any person(s) who can show the ability to

provide the immediate care and shelter required for said hen(s) or at the discretion of the Animal Control Officer dispose of said hen(s).

10. Nothing in section 5-3-8-(E) shall disallow any animal overlay or zoning that may allow for additional domestic hens as provided in another portion of section (5-3-8).
11. Under no circumstances shall the allowances within this chapter be perceived to allow any rooster within the City.
12. An animal control officer shall be authorized to inspect any property where hens are kept upon receipt of any complaint or observation that the requirements of this section have not been met.

5-3-9: NON-CONFORMING USES: Any prior established non-conforming use for the keeping and maintenance of animals may be continued within the scope of the prior use but subject to all provisions relative to the maintenance and keeping of said animals without creating a nuisance. Any non-conforming use which becomes abandoned or is discontinued for a continuous period of one (1) year shall not thereafter be entitled to further use for the maintenance and keeping of animals but will be subject to all other provisions of this Code relative thereto.

5-3-10: KEEPING AND MAINTAINING ANIMALS CONSTITUTING A NUISANCE: No provision of this Code shall allow any person or persons within the City to maintain and keep animals in a manner which shall constitute a nuisance. Any act which shall constitute a nuisance shall subject the violator thereof to the provisions of this Code and the laws of the State of Idaho for a violation thereof or for an abatement, but nothing shall be herein construed to limit the right of any citizen or any person to bring an action for any civil damages alleged to be maintained.

5-3-11: KEEPING OF BEEHIVES:

(A) Purpose. The purpose of this Section is to protect the public health and safety by establishing terms and conditions under which domestic honeybees and beehives may be kept within the City.

(B) Definitions. For the purposes of this Chapter, certain terms shall have the meanings ascribed below:

Apiary. Any place where one or more colonies of honeybees are located.

Beekeeper. A person who owns or has charge of one (1) or more colonies of honeybees.

Colony. Honeybees in a hive including queens, workers, and drones.

Hive. A frame hive, commonly referred to as a Langstroth Hive, or a Top Bar hive, which

Transcription of voicemail messages left for Crostons

Hi Mr. Croston this is Forrest Fischer, an attorney with Houser and Allison, calling with regards to the previous conversation we had a day or so ago. It appears that your daughter or daughter-in-law is putting up a fence despite our previous conversation. We have handed her the Demand Letter and she has proceeding nevertheless. You are hereby placed on notice that we will commence with the lawsuit for trespass adverse possession on which you will be liable for damages. It is advisable that you do cease these activities at this point. Otherwise it will end up being very costly for you. Thank you . B-bye.

Hi Marjorie this is Forrest Fischer calling to clarify my previous message that I left. I wanted to clarify that I am personally representing the Fischers, that I am licensed to practice in Washington but I am associating with a local law firm in Idaho Falls called Holden, Kidwell, Hahn and Crapo. We do ask that you stop work out on the boundary line so that we can possibly work out settlement. Unfortunately if the boundary line does go up right now it might hurt settlement in the future. So if you have any questions or you can have your daughter who you said was your Power of Attorney or your attorney who you have said you have retained, give me a call. My cell phone is (425) 941-2753. Thank you.

G:\WPDATA\WFF\18611 (Fischer Property)\Voicemail transcription.msg for Croston.wpd:jl









William Forrest Fischer

From: William Forrest Fischer
Sent: Monday, November 7, 2016 12:54 PM
To: 'Robin Dunn'
Cc: Charles Homer
Subject: RW: Fischer v. Croston - Requests for Production

Dear Mr. Dunn:

We received a CD at our office today from you containing pictures of the Croston Property and fence. However, we are still missing several documents identified within your clients' answers to Plaintiff's discovery as identified below. Accordingly, pursuant to Rule 37, which we again request that you produce no later than noon on November 14, 2016. These documents include, but are not limited to, the following:

- As identified verbatim within Defendants' response to Interrogatory No. 4:
 - o Linda 2015 Calendar for August through September;
 - o Recording of Fischer's son harassing Ms. Croston;
 - o Statement from Jim Croston regarding survey to establish property line 8-30-15;
 - o Letter from Ammon;
 - o Transcript of Ms. Croston conversation with Fischer's son harassing the Crostons;
 - o Receipts and pictures as proof of residence at Ammon property 1985-1987 and 1992;
 - o Ms. Croston's journal regarding residency and activities at Ammon property 1985-1987;
 - o Ms. Penning's statement of events when temporary fence was erected;
 - o Copy of surveys pertaining to Tract 1 showing different survey numbers; and
 - o Police report, Case #2015-11057

- As identified within Defendants' response to Interrogatory No. 8,18, and 19:
 - o Jim Croston statement 8-31-15

If you have any questions concerning this letter, please reply to this email. Thank you.

Sincerely,

W. Forrest Fischer



W. Forrest Fischer

Holden, Kidwell, Hahn & Crapo, P.L.L.C.

P.O. Box 50130

Idaho Falls, Idaho 83405

Phone: (208) 523-0620

Fax: (208) 523-9518

Email: wfischer@holdenlegal.com

Physical Address:

1000 Riverwalk Drive, Suite 200

Idaho Falls, ID 83405

Confidentiality Notice: The information contained in this e-mail and any accompanying attachments, all of which may be confidential and/or privileged, is intended only for use by the person or entity to whom it is addressed. If you are not the intended recipient, any unauthorized use, disclosure, or copying of this e-mail and its contents is strictly prohibited and may be unlawful. If you are not the intended recipient, please immediately notify me by return e-mail and/or telephone at 208-523-0620, and delete the original message and all copies from your system. Thank you.

From: William Forrest Fischer
Sent: Wednesday, November 2, 2016 1:36 PM
To: 'Robin Dunn' <rdunn@dunnlawoffices.com>
Cc: Charles Homer <chomer@holdenlegal.com>
Subject: RE: Fischer v. Croston - Requests for Production

Dear Mr. Dunn:

I am writing to follow up on my email below. Because we have not heard back from you, please consider this our final Rule 37 good faith attempt to obtain disclosure of the documents identified within your client's answers to discovery, without court action. Accordingly, we request that you produce the CD and/or documents on or before noon on November 7th. Thank you.



W. Forrest Fischer
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
P.O. Box 50130
Idaho Falls, Idaho 83405
Phone: (208) 523-0620
Fax: (208) 523-9518
Email: wfisher@holdenlegal.com

Physical Address:
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405

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From: William Forrest Fischer
Sent: Monday, October 24, 2016 10:22 AM
To: 'Robin Dunn' <rdunn@dunnlawoffices.com>
Cc: Charles Homer <chomer@holdenlegal.com>
Subject: Fischer v. Croston - Requests for Production

Dear Mr. Dunn:

In your clients' recent answers to the Fischer's discovery requests, they indicate the majority of their document production is contained within a CD. However, no such CD accompanied your clients' answers. Accordingly, when can we expect to have this CD? Thank you.

Sincerely,

Forrest



W. Forrest Fischer

Holden, Kidwell, Hahn & Crapo, P.L.L.C.

P.O. Box 50130

Idaho Falls, Idaho 83405

Phone: (208) 523-0620

Fax: (208) 523-9518

Email: wfischer@holdenlegal.com

Physical Address:

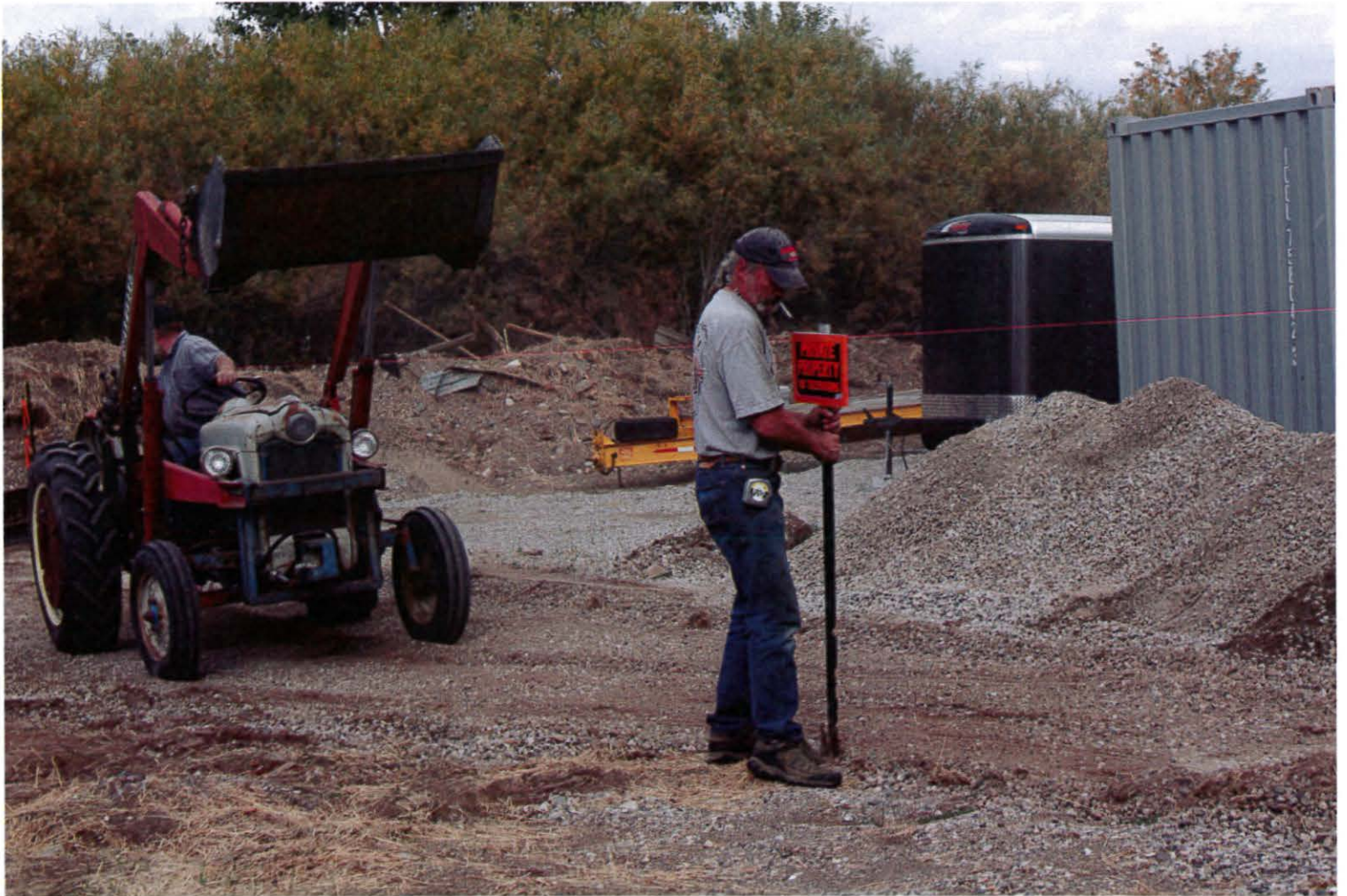
1000 Riverwalk Drive, Suite 200

Idaho Falls, ID 83405

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Robert Jackson Construction

3709 Shale Street

Idaho Falls, Idaho 83401

Robertjacksonconstruction@yahoo.com

Idaho Contractors License number RCT-9981

208-520-3691

William and Ann Fischer
3000 Western
Ammon, Idaho 83401
208-522-1414

RE: Removal of existing fence (south) approx. 300 ft.

Bid includes:	Tractor rental with operator 8 hrs @ \$65	\$520.00
	2 men 8 hrs @ \$27.00 each	\$432.00
	Overhead	\$126.00
	Profit	\$200.00

Total amount \$1278.00

Invoice

Bill To
Forrest Fischer PO Box 50130 Idaho Falls, ID 83405

Date	Invoice #
12/16/2016	7699

Terms	Due Date
Net 10	12/26/2016

Description	Prior Amt	Total %	Work Performed	Amount
16188 Forrest Fischer 2 Man Survey With GPS Stake Fence Line between Lots 3 & 4				600.00
Thank you for your business.			Total	\$600.00
			Payments/Credits	\$0.00
			Balance Due	\$600.00

William Forrest Fischer

From: Eagle Rock Engineering and Land Surveying, PC <replyTo@intuit.com>
Sent: Friday, December 16, 2016 8:51 AM
To: William Forrest Fischer
Subject: Invoice 7699 from Eagle Rock Engineering and Land Surveying, PC
Attachments: Inv_7699_from_Eagle_Rock_Engineering_and_Land_Surveying_PC_3428.pdf

Dear Customer:

Your invoice is attached. Please remit payment at your earliest convenience.

Thank you for your business - we appreciate it very much.

Sincerely,
Eagle Rock Engineering and Land Surveying, PC

208-542-2665

*** Pay this invoice online ***

Pay Now >https://connect.intuit.com/portal/app/CommerceNetwork/view/ed660825-00f4-4f0c-95dd-253af1fe2249?locale=en_US&cta=viewinvoicenow&src=qbd

To view your invoice

Open the attached PDF file. You must have [Acrobat® Reader®](#) installed to view the attachment.







DUNN LAW OFFICES, PLLC.
 Robin D. Dunn, Esq., ISB #2903
 477 Pleasant Country Lane
 P.O. Box 277
 Rigby ID 83442
 Telephone: (208) 745-9202
 Facsimile: (208) 745-8160
rdunn@dunnlawoffices.com

2016 DEC 30 PM 3: 17
 DISTRICT COURT
 MAGISTRATE DIVISION
 BONNEVILLE COUNTY
 IDAHO

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
 FISCHER,
 Trustees of the William and Ann Fischer
 Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
 CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
 OTHER PERSONS OR ENTITIES
 CLAIMING ANY INTEREST IN THE
 FOLLOWING DESCRIBED REAL
 PROPERTY:

Beginning at the Northeast corner of Lot 4, Block
 12, of the Original Ammon Townsite, Bonneville
 County, Idaho; running thence N. 88°33'58" W.
 330.00 feet to the Northwest corner of said Lot 4;
 thence S 00°00'21"W. along the West line of said
 Lot 4 a distance of 8.99 feet to an existing fence
 line; thence S. 89°41'36" E. along said existing
 fence line 329.90 feet to a point on the East line of
 said Lot 4; thence N. 00°00'21" E. along said East
 line 2.50 feet to the POINT OF BEGINNING.

Defendants.

Case No. CV-16-2894

AFFIDAVIT OF ROBIN D. DUNN IN
 SUPPORT OF MOTION TO
 CONTINUE TRIAL

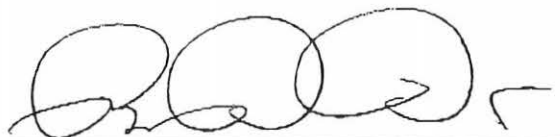
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of December, 2016, a true and correct copy of the foregoing was delivered to the following person(s) by:

DOCUMENT SERVED: AFFIDAVIT OF ROBIN D. DUNN, ESQ. IN SUPPORT OF MOTION TO CONTINUE TRIAL

ATTORNEYS AND/OR INDIVIDUALS SERVED:

W. Forrest Fischer, Esq.	()	First Class Mail
P.O. Box 50130	()	Facsimile 523 9518
Idaho Falls, ID 834205	()	Hand Delivery
	()	Courthouse box



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

DUNN LAW OFFICES, PLLC.
 Robin D. Dunn, Esq., ISB #2903
 477 Pleasant Country Lane
 P.O. Box 277
 Rigby ID 83442
 Telephone: (208) 745-9202
 Facsimile: (208) 745-8160
rdunn@dunnlawoffices.com

2017 JAN -4 AM 8:18
 DISTRICT COURT
 MAGISTRATE DIVISION
 BONNEVILLE COUNTY
 IDAHO

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
 FISCHER,
 Trustees of the William and Ann Fischer
 Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
 CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
 OTHER PERSONS OR ENTITIES
 CLAIMING ANY INTEREST IN THE
 FOLLOWING DESCRIBED REAL
 PROPERTY:

Beginning at the Northeast corner of Lot 4, Block
 12, of the Original Ammon Townsite, Bonneville
 County, Idaho; running thence N. 88°33'58" W.
 330.00 feet to the Northwest corner of said Lot 4;
 thence S 00°00'21"W. along the West line of said
 Lot 4 a distance of 8.99 feet to an existing fence
 line; thence S. 89°41'36" E. along said existing
 fence line 329.90 feet to a point on the East line of
 said Lot 4; thence N. 00°00'21" E. along said East
 line 2.50 feet to the POINT OF BEGINNING.

Defendants.

Case No. CV-16-2894

AFFIDAVIT OF LINDA D.
 PENNING IN OPPOSITION OF
 PLAINTIFFS' MOTION FOR
 SUMMARY JUDGMENT

STATE OF _____)
)ss.
 County of _____)

LINDA D. PENNING, being first duly sworn, hereby deposes and states as follows:

1. That I am the person with power of attorney for my elderly parents, James and Marjory Croston, defendants in the above-entitled matter.
2. I am over the age of 18 and competent to make this affidavit.
3. Attached as Exhibit A and incorporated herein is the tract description between the plaintiffs and the defendants.
4. Attached as Exhibit B and incorporated herein is the sketch or the original survey between the parties.
5. Attached as Exhibit C and incorporated herein is the statement I made when putting up a temporary fence.
6. Attached as Exhibit D and incorporated herein is the police report of 9/21/15 containing the statements of the plaintiffs.
7. The "old fence" separating the properties between the plaintiffs and defendants had been torn down by the plaintiffs. Virtually nothing remained of the fence when it was torn down. The plaintiffs also placed gravel about the area on our property; and, removed the remains of a ditch that used to water the properties.
8. I was present on an earlier date when Ann Fischer indicated that the fence was being torn down, a new survey was being obtained and the new fence would be placed on the new survey line.
9. On 9/27/15, the date of my statement, we went to put up a temporary fence on the survey line as engineered by Ellsworth and obtained at the request of the plaintiffs. We placed the new temporary fence on the actual survey line as presented by the survey marks.

This is the first date that we were told not to put up the fence. The plaintiffs had indicated previously that a nice new fence would be installed as agreed. We wanted to fence the property to put in animals to keep the grass and weeds down.

10. We learned at a later point that the City of Ammon would not let us put animals in the pasture. We took no further action until this legal action was commenced.

11. The history of the old fence is not disputed. It had been removed and we had agreed upon a new fence being placed on the survey line. We knew of no other reason why the plaintiffs would obtain a survey. The survey was slightly in the favor of the defendants; but, the issue was where to place the new fence. Our initial desire was to simply get along with the plaintiffs and have them place the new fence where they promised.

12. I do not know what changed from the date of Jim Croston's statement on 8/31/15 to the date of the temporary fence being constructed.

DATED this 3rd day of January, 2017.



Robin D. Dunn, Esq.

(Attached verification of Linda Penning)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of January, 2017, a true and correct copy of the foregoing was delivered to the following person(s) by:

DOCUMENT SERVED: AFFIDAVIT OF ROBIN D. DUNN, ESQ. IN SUPPORT OF MOTION TO CONTINUE TRIAL

ATTORNEYS AND/OR INDIVIDUALS SERVED:

W. Forrest Fischer, Esq.
P.O. Box 50130
Idaho Falls, ID 834205

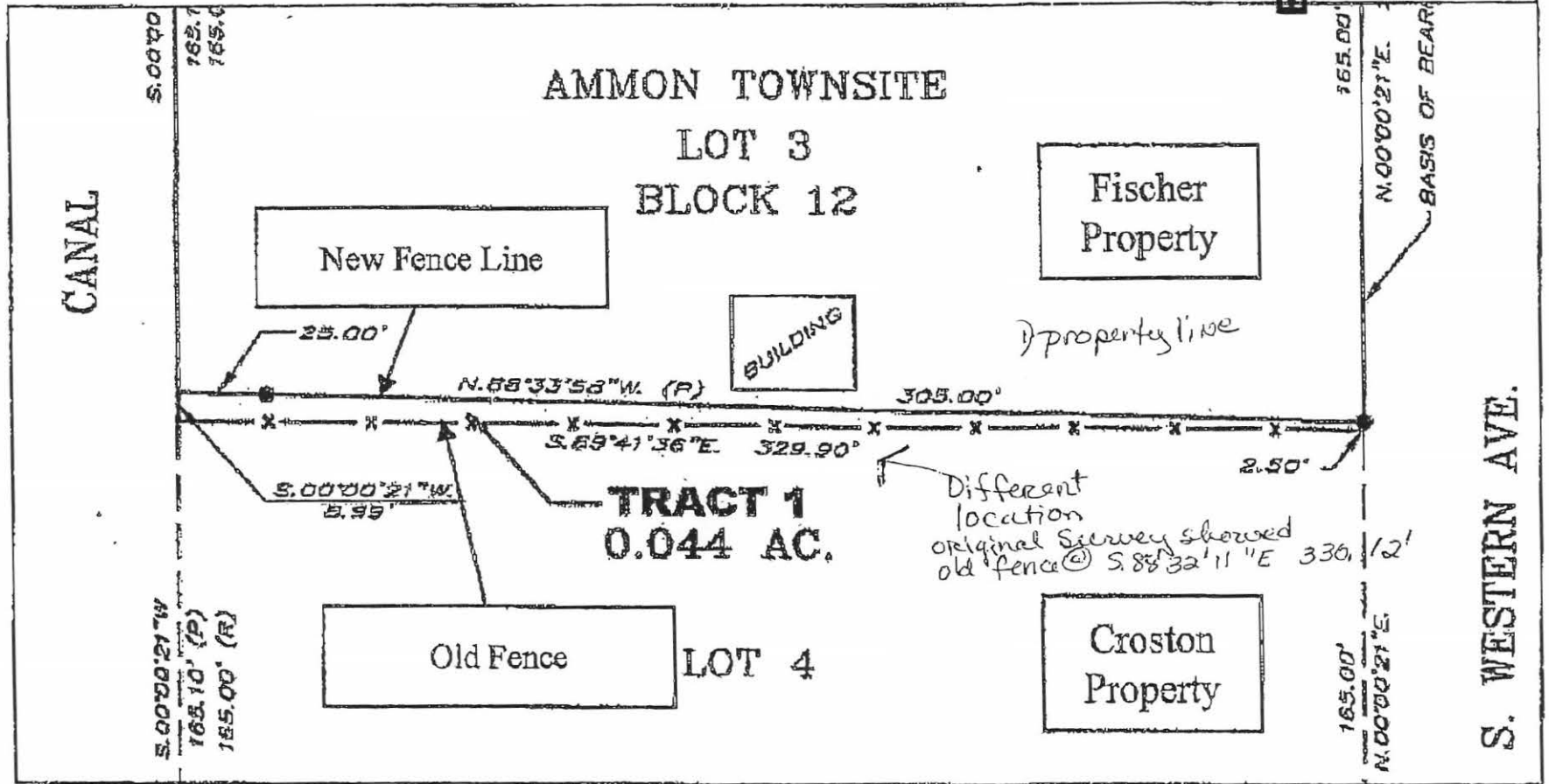
- () First Class Mail
- () Facsimile 523 9518
- () Hand Delivery
- () Courthouse box



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

tract description from law suit
North

EXHIBIT 17



South

Fischer's

CANAL

S.00°02'05"W
165.11'

S.00°02'05"W. 214.16'
165.16'

49.01

old street
230' Per
Fischer's
305.12'

S.88°32'11"E.
330.12'



AMMON TOWNSITE

LOT 3

BLOCK 12

EXHIBIT B

LOT 4

164.98'
N.00°02'05"E.

165.00'
N.00°02'05"E. 214.00'

49.00'

gate to
field
patrol to
Fischer's

S. WESTERN AVE.

original Survey

Temporary Fence constructed on North property survey line Sunday 9/27/15. We arrived at our property at approximately 9:30 AM. There were two No trespassing signs placed on our property approximately where the Fischers tore down our previous fence. We removed these placing them on their side of the survey line.

Approximately 10:00 the Fischers drove into their garage driveway. Don Penning was inside the front fence line. The Fischers stopped their car, not getting out. Ann Fischer asked Don if he was the owner. He told her no. She then asked if he was a relative. He said "yes, I am authorized to speak for the owners." Ann Fischer didn't say anything further. William Fischer then said "this property is under dispute, please don't put up a fence." Don told him we were going to put up a fence. They said nothing further but proceeded to back out of the drive and pulled back into the house drive and parked their car. They went into the house.

After about 5 minutes Mr. Fischer came out of the house and started to walk over. My brother Rod was watching and when he stepped over the survey line into our property, Rod told him he was trespassing and to get off our land. Mr. Fischer left.

After about another 5 minutes both Mr. Fischer and Ms. Fischer came back out of the house, got into the car and drove down the garage driveway to where we were gathered.

I was at the property survey line on our side with my brothers determining where the survey markers were next to the Fischers' garage. One marker was no longer visible where it was the last time I was there. More gravel had been piled up. The Fischers drove their car down their drive and on to our property next to their garage. While approaching they yelled out the window for us to get off their property. I yelled back it is our property and they are trespassing and to leave. They parked their vehicle and got out of the car, approaching us. Ann Fischer asked if I was Linda. I told her yes. She introduced herself. Stated they had not intentionally done anything. Had hired a contractor and they made a mess of things. I told her all it would have taken was a phone call. She did not respond to this. She asked that I not put up a fence. I did not respond. She stated it was not a "legal" survey and was not recorded. I told her the survey pins were in place clearly showing it was our property. She handed me a letter and her attorneys name and phone number. The letter was addressed to my Mom from their attorney. Mr. Fischer stated the property is in dispute and asked us not to put up a fence. My brother, Rod stated it was being fenced today. The Fischer's got back in their car and began backing down the driveway. They stopped and came back up. Ann Fischer got out of the car, she was on her cell phone. She asked me if I would talk to her attorney. I told her no. He could talk to my attorney. She asked who my attorney was and his phone number so her attorney could call him. I told her my attorney would call her attorney. She got back in the car and they left.

They did not talk to any of us the rest of the day but did observe periodically. My Mom called twice because their attorney had called leaving phone messages threatening her with costly litigation and the taking of her property. She was very upset both times. I told her not to answer the phone or talk to them or their attorney. She had not received the letter their attorney told her he was FedExing on Thursday.

Gracie Penning
9/27/15

EXHIBIT C

Case Summary Report

Agency: BCSO

Case Number: 2015-11057

Date: 9/21/2015 11:28:20

Last Modified: 9/21/2015 00:13:45

Incident Information

Date/Time Reported 09/15/2015 15:09	Date/Time Found	Date/Time Found	Officer (348DMS) SCHWARTZ, DAVID MICHAEL
Incident Location Idaho Falls, ID			

Charges

1	Charge Type State	Description CIVIL PROBLEM	Statute 999	UCR 999	<input type="checkbox"/> Att <input checked="" type="checkbox"/> Com
<input type="checkbox"/> Alcohol <input type="checkbox"/> Drugs <input type="checkbox"/> Computers		Location Type RESIDENCE/HOME	Premises Entered	Forced Entry <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Weapons 1. 2. 3.
Entry	Exit	Criminal Activity			
Bias Motivation	Bias Target	Bias Circumstances	Hate Group		

Other Persons Involved

Name Code Reporting Party	Seq. # 1	Name (Last, First, M) PENNING, LINDA D	Race W	Sex F	DOB
Address				Home Phone	
Employer Name/Address				Business Phone	
Name Code Involved, Other	Seq. # 1	Name (Last, First, M) FISCHER, WILLIAM ROBERT	Race W	Sex M	DOB
Address				Home Phone	
Employer Name/Address				Business Phone	
Name Code Involved, Other	Seq. # 2	Name (Last, First, M) FISCHER, ANNE	Race W	Sex F	DOB
Address				Home Phone	
Employer Name/Address				Business Phone	

EXHIBIT D

Case Summary Report

Agency: BCSO

Case Number: 2015-11057

Date: 9/21/2015 11:28:20

Last Modified: 9/21/2015 00:13:45

Notes/Narratives

On 9/15/15, I responded to a property at [REDACTED]. I contacted Linda Penning at that address. She was a relative of one of the owners of the property, and wished to report a problem at the property. Linda said she had a power of attorney to do so. For information, the property at [REDACTED] is a city lot with a small abandoned house which sits on the lot. No one lives on the property. The house has been abandoned for many years, and has had numerous issues with vandalism and subjects breaking into the house to do criminal activity.

Linda wished to report on this date that the neighbors to the north at [REDACTED] had taken down part of the fence between the properties, and then left the metal fence in a pile near the house. Linda also reported that the neighbors had filled in part of the irrigation ditch on the north side of the property which ran along the fence going west. Linda believed it may be the neighbor's intention to build a new fence, but she was unsure they would follow through with this. Linda said that neighbor just had a new property survey completed, in which that neighbor may have actually lost some land. I could see the new survey markers along with the torn down fence. I photographed these items.

I told Linda I believed that this dispute was more likely a civil problem, and that I did not believe there was malicious intent in taking down the fence, especially if they were already in agreement to replace it. It appeared there may already be a plan to fix or improve the fence. I did also mention to Linda that to improve visibility in the area and see criminal activity on the property, along with discourage some, the brush and trees should be trimmed back on Western.

I spoke with Bill and Anne Fischer later that evening at [REDACTED]. They believed there was already an agreement in place where they were going to take down the fence and replace it with a new fence. They also said that the old fence was broken and leaning down over their property, or at least where they originally thought the property line was to be. They were aware of the land survey and knew that they indeed had ended up losing part of the land in the back of their property. They told me that all the lots in that area had bad property lines to the rear, and that would have to be addressed through other means later on.

I believe this is a civil problem, no further action taken.

Deputy Dave Schwartz #348

Notes/Continuation

Case Summary Report

Agency: BCSO

Case Number: 2015-11057

Date: 9/21/2015 11:28:20

Last Modified: 9/21/2015 00:13:45

DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB #2903
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83442
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2017 JAN -4 AM 8:17
DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN)
FISCHER,)
Trustees of the William and Ann Fischer)
Revocable Trust,)
Plaintiffs,)

Case No. CV-16-2894

vs.)

MEMORANDUM OF THE
DEFENDANTS IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

JAMES F. CROSTON and MARJORIE C.)
CROSTON, husband and wife;)

AND ALL UNKNOWN OWNERS AND/OR)
OTHER PERSONS OR ENTITIES)
CLAIMING ANY INTEREST IN THE)
FOLLOWING DESCRIBED REAL)
PROPERTY:)

Beginning at the Northeast corner of Lot 4, Block)
12, of the Original Ammon Townsite, Bonneville)
County, Idaho; running thence N. 88°33'58" W.)
330.00 feet to the Northwest corner of said Lot 4;)
thence S 00°00'21"W. along the West line of said)
Lot 4 a distance of 8.99 feet to an existing fence)
line; thence S. 89°41'36" E. along said existing)
fence line 329.90 feet to a point on the East line of)
said Lot 4; thence N. 00°00'21" E. along said East)
line 2.50 feet to the POINT OF BEGINNING.)

Defendants.)

COME NOW, the defendants, by and through the undersigned attorney, and submit
the following Memorandum in Opposition to the Plaintiffs' Request for Summary

Judgment:**STANDARD FOR SUMMARY JUDGMENT**

This Court is required to review a motion for summary judgment by applying the following standard:

Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in the light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. The burden of proving the absence of material facts is upon the moving party. The adverse party, however, “may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial.

Baxter v. Craney, 135 Idaho 166, 170, 16 P.3d 263, 266 (2000) (citations omitted). The Court should “liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party. *Walker v. Hollinger*, 132 Idaho 172, 175, 968 P.2d 661, 664 (1998).

Notwithstanding, the following also applies:

[W]hen a motion for summary judgment which has been properly supported with evidence indicating the absence of material factual issues, the burden shifts to the non-moving party to make a showing of the existence of a genuine material fact which would preclude summary judgment. This standard of review is not affected by the fact that both parties have filed motions for summary judgment. Rather, each motion must be separately considered on its own merits, with the court drawing all reasonable inferences against the party whose motion is under consideration.

Treasure Valley Gastroenterology Specialists, P.A., v. Woods, 135 Idaho 485, 488-489 20 P.3d 21, 24-25 (2001).

Idaho law is very clear on the standard used in summary judgment proceedings that has been cited in numerous cases. That initial standard is as follows:

Summary judgment should be granted if no genuine issue as to any material fact is found to exist after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the party opposing the summary judgment motion. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975).

Thereafter, the court follows often cited points, as follows:

If the court determines, after a hearing on a motion for summary judgment, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. *Barlows, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonable drawn from the evidence. *Smith v. Idaho State Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

When a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party. *Thompson v. City of Idaho Falls*, 126 Idaho 527, 887 P.2d 1094 (Ct. App. 1994).

If a genuine issue of material fact remains unresolved, or if the record contains conflicting inferences and if reasonable minds might reach different conclusions from the facts and inferences presented, summary judgment should not be granted. *Sewell v. Neilsen, Monroe, Inc.* 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

If an action will be tried by a court without a jury, a judge is not required to draw inferences in favor of a party opposing a motion for summary judgment. *Kaufman v. Fairchild*, 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991).

Thus, the court has at least two tasks concerning a summary judgment motion. First, the court must determine that no material facts are in dispute. Second, the court must draw reasonable inferences from those facts to determine which party should be granted summary judgment/partial summary judgment.

BACKGROUND

This case involves a boundary dispute between the plaintiffs and the defendants. An old fence had existed for numerous years between the real properties of the two parties. The old fence ran east and west which separated the two properties. The plaintiffs' real property is on the north and the defendants' real property is/are on the south. This property is located in the town site of Ammon.

The initial recitation of facts by the plaintiff is fairly accurate to the top of page 7. The defendants do not materially disagree with the introduction and facts set forth by plaintiffs nor do the defendants think or believe that these facts materially affect the outcome of the case. Where the parties reach disagreement is on some material facts that occurred in the year 2015.

The facts, believed to be accurate relying on both the written submissions of both of the parties, are as follows:

1. An old fence that had separated the real properties was in a complete state of disrepair and was removed by the plaintiffs. The fence no longer existed.
2. The plaintiffs obtained a survey from Ellsworth Engineering to determine the boundary lines per engineered standards.
3. The material disputed facts are that the parties agreed to be bound by the survey and place a new fence on the survey line. The defendants would argue that no reason existed to obtain a survey unless the parties were going to rely upon the survey. The plaintiffs did accomplish the task of obtaining the survey. The plaintiffs disagree with the new fence being placed on the surveyed line.
4. The plaintiff also removed a ditch and placed a large amount of gravel about the area in question.

5. The defendants placed a fence on the survey line as prepared by the engineer work and the pins that were placed by said engineers.

ARGUMENT

Boundary by agreement or by acquiescence is not applicable to this cause. The events which took place between the parties had nothing to do with the years prior to the old fence and the history of the two properties. The parties either entered into an agreement to relocate the fence or, on the other hand, did not reach such an arrangement. Under either scenario, the court has conflicting versions of the material facts on this issue. The defendants rely upon both of the parties declarations, sworn statements, pleadings and documents.

For instance, the following factual assertions preclude summary judgment.

1. The affidavit of Linda Penning disputes the assertions of the plaintiffs as to an agreement.
2. The plaintiff tore down whatever remained of the old fence. In reality, an old fence no longer existed. The plaintiffs also removed natural landmarks such as a ditch AND hauled in gravel to supplement the area in question.
3. The old fence no longer existed. Therefore, how did either party use the land up to the old fence or claim adversity to the fence that no longer was in existence.
4. Exhibit D to the affidavit of Linda Penning indicates that the plaintiffs stated: "They believed that there was already an agreement in place. . .". See also, Exhibit F to the declaration of Fischer.
5. The plaintiffs argue for fees and yet they "demolished the existing fence". See *Weitz v. Green*, 148 Idaho 851 (2010). They are guilty of the very issue that they

are trying to enforce. See also, Exhibit D to the declaration of Fischer. See the threats to the elderly Mrs. Croston, Exhibit H to Declaration of Fischer.

6. Exhibit L to the declaration of Fisher shows no fence and the gravel that was to be spread on the defendants' property.

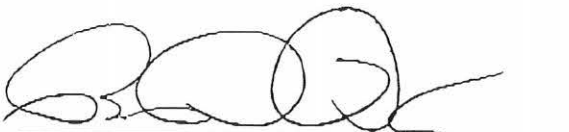
Until the factual basis can be determined it is difficult, if not impossible to apply legal theories. The plaintiffs argue legal theories pertaining to the boundaries; on the theories of trespass; on the issue of fees and other related matters. Until the fact-finder determines the facts, the briefing of the parties is nothing more than pre-trial opinions.

CONCLUSION

The legal theories of boundary by acquiescence and by agreement are irrelevant to the events after the 2015 year. Fees and costs should be decided after the court has made initial rulings. Summary judgment is precluded by disputed material facts between the parties. The plaintiffs are the parties that have taken matters into their own hands and ignored the peaceable attempts by defendants to resolve the issues.

The defendants plan to point out the inconsistencies in the declarations and sworn testimony of the plaintiffs at oral argument. However, the central and material point is the belief that an agreement existed to place the new fence on the survey line. The photos, the declarations, the affidavits and the sworn pleadings support this position.

DATED this 3rd day of January, 2017.



Robin D. Dunn, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of January, 2017, a true and correct copy of the foregoing was delivered to the following person(s) by:

DOCUMENT SERVED: MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

ATTORNEYS AND/OR INDIVIDUALS SERVED:

W. Forrest Fischer, Esq.
P.O. Box 50130
Idaho Falls, ID 834205

- () First Class Mail
- () Facsimile 523 9518
- () Hand Delivery
- () Courthouse box



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

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2017 JAN -4 PM 3:40

DISTRICT COURT
 MAGISTRATE DIVISION
 BONNEVILLE COUNTY
 IDAHO

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN)
 FISCHER, Trustees of the)
 William and Ann Fischer Revocable Trust,)
)
 Plaintiffs,)

Case No. CV-16-2894

vs.)

VERIFICATION

JAMES F. CROSTON and MARJORIE C.)
 CROSTON, husband and wife;)

AND ALL UNKNOWN OWNERS AND/OR)
 OTHER PERSONS OR ENTITIES)
 CLAIMING ANY INTEREST IN THE)
 FOLLOWING DESCRIBED REAL)
 PROPERTY:)

Beginning at the Northeast corner of Lot 4,)
 Block 12, of the Original Ammon Townsite,)
 Bonneville County, Idaho; running thence N.)
 88°33'58" W. 330.00 feet to the Northwest)
 corner of said Lot 4; thence S 00°00'21"W.)
 along the West line of said Lot 4 a distance of)
 8.99 feet to an existing fence line; thence S.)
 89°41'36" E. along said existing fence line)
 329.90 feet to a point on the East line of said)
 Lot 4; thence N. 00°00'21" E. along said East)
 line 2.50 feet to the POINT OF BEGINNING.)

Defendants.)

LINDA PENNING, being first duly sworn, deposes and says:

That she is the agent for the Defendants, James F. Croston and Marjorie C. Croston, in the above-entitled action; that she has read the foregoing *Affidavit in Opposition to Motion for Summary Judgment*, knows the contents thereof, and verily believes the statements contained therein to be true.

DATED this 4th day of January, 2017.

Linda Penning
Linda Penning

SUBSCRIBED AND SWORN to before me this 4th day of January, 2017.



(SEAL)

[Signature]
Notary Public for Idaho WASHINGTON
Residing at: Spokane County
Commission Expires: 8/26/2020

DUNN LAW OFFICES, PLLC
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2017 JAN -4 AM 8:18
 DISTRICT COURT
 MAGISTRATE DIVISION
 BONNEVILLE COUNTY
 IDAHO

Attorney for Defendants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN)
 FISCHER, Trustees of the)
 William and Ann Fischer Revocable Trust,)
)
 Plaintiffs,)

Case No. CV-16-2894

vs.)

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AND ALL UNKNOWN OWNERS AND/OR)
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Defendants.)

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DATED this _____ day of January, 2017.

Linda Penning

SUBSCRIBED AND SWORN to before me this _____ day of January, 2017.

Notary Public for Idaho
Residing at:
Commission Expires:

(SEAL)

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 3rd day of January, 2017, a true and correct copy of the foregoing was delivered to the following person(s) by:

DOCUMENT SERVED: AFFIDAVIT OF LINDA PENNING IN
 OPPOSITION TO MOTION FOR SUMMARY
 JUDGMENT

ATTORNEYS AND/OR INDIVIDUALS SERVED:

W. Forrest Fischer, Esq.
P.O. Box 50130
Idaho Falls, ID 834205

- () First Class Mail
- () Facsimile 523 9518
- () Hand Delivery
- () Courthouse box



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

BONNEVILLE COUNTY
IDAHO

2017 JAN 11 PM 1:30

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
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line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**PLAINTIFFS' MOTION TO
SHORTEN TIME TO HEAR MOTION
TO STRIKE AFFIDAVIT OF
LINDA D. PENNING**

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

COMES NOW Plaintiffs/Counter Claimants, William R. Fischer And M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“Plaintiffs”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and pursuant to Rule 7(b)(3)(H) of the Idaho Rules of Civil Procedure, respectfully move that the Court shorten the time limits for hearing Plaintiff’s Motion to Strike the Affidavit of Linda D. Penning in Opposition of Plaintiffs’ Motion for Summary Judgment (“Penning Affidavit”). There is good cause for this motion, as required by Rule 7(b)(3)(H), in that the Penning Affidavit was effectively filed on January 4, 2017 (although it was faxed the prior evening after 5:00 p.m., *see* I.R.C.P. 5(d)(3)(A)(ii)), in anticipation of the hearing on Plaintiffs’ Motion for Summary Judgment, scheduled for January 18, 2017. Plaintiffs could not respond to the Penning Affidavit on the same day it was filed—as would be required without this motion—and have exercised all due diligence in preparing and filing their motion to strike the Penning Affidavit. Correspondingly, Plaintiffs have no objection to shortening the time required for any response and reply under Rule 7.

DATED this 11th day of January, 2017.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

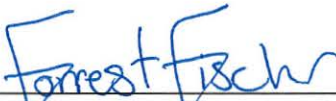
I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 11th day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

\\Law\data\WPDATA\WFF\18611 (Fischer Property)\Pleadings\6 - Motion to Strike\Motion to Shorten Time.docx

BONNEVILLE COUNTY
IDAHO
2017 JAN 11 PM 1:31

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
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Plaintiffs,

vs.

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CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
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line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**PLAINTIFFS' MOTION TO STRIKE
AFFIDAVIT OF LINDA D. PENNING**

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

COMES NOW Plaintiffs/Counter Claimants, William R. Fischer And M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“**Plaintiffs**”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and pursuant to Rule 56(c)(2) of the Idaho Rules of Civil Procedure, respectfully move that the Court strike the Affidavit of Linda D. Penning in Opposition of Plaintiffs’ Motion for Summary Judgment (“**Penning Affidavit**”). This Motion is supported by “Plaintiffs’ Memorandum in Support of Motion to Strike the Affidavit of Linda D. Penning” and the “Declaration of W. Forrest Fischer in Support of Plaintiffs’ Motion to Strike,” which are filed concurrently herewith.

DATED this 11th day of January, 2017.



W Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.,
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 11th day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
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P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

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BONNEVILLE COUNTY
IDAHO

2017 JAN 11 PM 1:30

Karl R. Decker, ISB #3390
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
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WILLIAM R. FISCHER and M. ANN
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Plaintiffs,

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AND ALL UNKNOWN OWNERS AND/OR
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line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**REPLY MEMORANDUM IN
SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Counter Defendants.

Plaintiffs/Counter Defendants, William R. Fischer and M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“**Fischers**”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit this Reply Memorandum in Support of their Motion for Summary Judgment. Plaintiffs will refer to terms as defined in prior briefing.

I. INTRODUCTION

Within their “Memorandum of the Defendants in Opposition to Plaintiffs’ Motion for Summary Judgment” (“**Opposition**”), the Crostons concede the vast majority of the arguments contained within the Fischers’ “Memorandum in Support of Motion for Summary Judgment” (“**Motion**”). Key among these issues is that the Old Fence demarcated the true boundary line between the Fischer Property and Croston Property by operation of boundary line by acquiescence or agreement, and has done so since at least 1951. The Crostons concede this, and other issues, by failing to rebut the Fischers’ facts and arguments. Instead, the Crostons wish to focus only on the events which transpired during the latter end of 2015, conveniently ignoring more than half a century of facts in evidence. However, the Crostons’ efforts to limit the scope of the Court’s inquiry are unpersuasive and ineffective.

Ultimately, the Crostons provide no material facts or evidence which precludes the Court from rendering a judgment as a matter of law in favor of the Fischers. Indeed, the utter lack of any meritorious argument by the Crostons conclusively demonstrates that their Opposition and Counterclaim are frivolous. Accordingly, the Court should grant the Fischers' Motion and award them damages in addition to their reasonable attorneys' fees and costs.

II. CORRECTED STANDARD OF REVIEW

The Crostons' Opposition contains a series of block quotes included to provide the Court with the proper standard of review on summary judgments. Yet some of these quotes contain language no longer present in the current version of I.R.C.P. 56. Furthermore, the Opposition lacks sufficient citations to the record or evidence, but states instead that the Crostons plan to raise their arguments at the hearing. *Opposition*, p. 6. This is neither sufficient, nor appropriate. Accordingly, the Court should consider the following standards as they directly apply to summary judgment in this case.

Specifically, the Fischers met their burden of demonstrating that there is no genuine issue of material fact which would preclude summary judgment in their favor. *See Losee v. Idaho Co.*, 148 Idaho 219, 222, P.3d 575, 578 (2009). Moreover, the Court, as the trier of fact in a non-jury case, **“is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.”** *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 692 (2004) (citation omitted, **emphasis** added). In doing so, the “trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court’s attention.”

Morrison v. St. Luke's Reg'l Med. Ctr., Ltd., 160 Idaho 599, 605-06, 377 P.3d 1062, 1068-69 (2016), *reh'g denied* (Sept. 6, 2016) (quotation marks and citation omitted). As applied, it is the Crostons' "obligation to bring the evidence of the genuine issues of material fact to the trial court's attention." *Silicon Intern. Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 552, 314 P.3d 592, 607 (2013).

Given the foregoing, it is not proper for the Crostons to wait until oral argument to raise "additional issues at the motion hearing" which they refused to brief. *See Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 793, 215 P.3d 505, 513 (2009). On this matter, the applicable rule states:

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) **consider the fact undisputed for purposes of the motion;**
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

I.R.C.P. 56(e) (**emphasis added**). The Idaho Supreme Court stated that when "an issue [] is unique to the fact[s] ... [it] is not one which may be addressed without the benefit of full briefing and the opportunity to reply." *Aardema*, 147 Idaho at 793, 215 P.3d at 513. In such a case, a court may "impose [sanctions] upon a party for failure to comply with the requirements of [Rule 56]." *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 14, 175 P.3d 172, 176 (2007). These sanctions include the imposition of "costs, attorney fees and [other] sanctions against a party or the party's attorney." I.R.C.P. 56(b)(3); *see Hutchison*, 145 Idaho at 14, 175 P.3d at 176 (citing former Rule 56(c), now Rule 56(b)(3)).

The Fischers object to the Crostons' stated intention to broaden the issues involved in this

Motion at the hearing without the benefit of any pre-hearing briefing on those issues. *See State v. Rubbermaid Inc.*, 129 Idaho 353, 356-57, 924 P.2d 615, 618-19 (1996). In light of this objection, this Court should not allow the Crostons to raise new issues at the summary judgment hearing. If, however, the Court does allow the untimely introduction of such new issues, this Court should impose appropriate sanctions against the Crostons and/or their attorney pursuant to I.R.C.P. 56(b)(3).

III. ARGUMENT

- A. **Because the Crostons have not legally or factually contested the Fischers' arguments, the Court should declare that the Old Fence is the true boundary line between the Fischer Property and Croston Property under the doctrine of boundary line by agreement or acquiescence.**

The Crostons effectively make only one argument within their Opposition – that summary judgment is inappropriate because “[t]he parties either entered into an agreement to relocate the fence, or, on the other hand, did not reach such an arrangement.” *Opposition*, p. 5. By raising only one argument, the Crostons fail to rebut much of Plaintiffs’ Motion. Accordingly, the Court should consider the facts and arguments in Plaintiffs’ Motion which are not challenged by the Crostons as undisputed. I.R.C.P. 56(e)(2).

The Crostons submit that “[t]he initial recitation of facts by the [Fischers] is fairly accurate to the top of page 7.” *Opposition*, p. 4. In other words, there is no disputed fact as to the events occurring between at least 1951 and 2015. *See Motion*, pp. 2-7. As applied, it is undisputed that “the Old Fence existed since at least 1951,” (*Motion*, p. 4) and that up until 2015, the respective owners “always treated the Old Fence as the true boundary between what is now the Croston Property and the Fischer Property.” *Motion*, p. 5. In such circumstances, “the trial court is not required to search the record looking for evidence that may create a genuine issue of material fact;

the party opposing the summary judgment is required to bring the evidence to the court's attention.” *Silicon Int'l Ore, LLC*, 155 Idaho at 552, 314 P.3d at 607. Thus, this Court may accept the Fischers’ uncontested facts as true. I.R.C.P. 56(e)(2).

By refusing to address the Fischers’ arguments, the Crostons concede that the location of the Old Fence is the location of the true boundary line between the parties’ respective properties pursuant to Idaho’s doctrine of boundary line by agreement or acquiescence. Although the Crostons attempt to conflate the fact that, at the time the dispute between the parties arose, portions of the Old Fence had been removed in preparation for replacement, this fact does not change the legal location of the true boundary line.¹ Again, the existence of a fence is merely **evidence** of the location of a boundary, and not the legal boundary itself. *Luce v. Marble*, 142 Idaho 264, 271-72, 127 P.3d 167, 174 (2005). Thus, the removal of the Old Fence does not change the location of the true boundary line between the Fischer Property and Croston Property established decades prior by agreement or acquiescence. It is entirely immaterial that the Old Fence was removed in 2015, as its decades-long existence provides sufficient evidence of the true boundary.

Because these facts are not disputed, the Court’s determination of the only remaining issue—the legal effect of those undisputed facts—is perfectly suited to adjudication by summary judgment. The Fischers demonstrate within their Motion that, under the doctrine of boundary by acquiescence or agreement, the true boundary between the Croston Property and the Fischer Property was fixed by the Old Fence since at least 1951. *See Motion*, pp. 12-18. In response, the

¹ Additionally, the Fischers point out that they were in the process of removing *and replacing* the Old Fence before they received the Demand Letter from the Crostons, whereupon they ceased further work. *Motion*, pp. 7-8. The Crostons’ statement that no fence existed at the time this dispute arose is both disingenuous and purposely misleading. The fact remains that the Fischers ceased their replacement of the Old Fence in order to work with the Crostons, whereupon the Crostons wrongfully seized upon an opportunity to grab more land than they had previously by constructing the New Fence over the Fischers’ objections. *Motion*, pp. 7-11.

Croston's make no counterargument—instead focusing their solitary argument on the narrow events of 2015. *See Opposition*, p. 6 (“The legal theories of boundary by acquiescence and by agreement are irrelevant to the events after the 2015 year”). The Croston's' only argument is that “the central and material point is the belief that an agreement existed [in 2015] to place the new fence on the survey line.” *Opposition*, p. 6. While the Fischers contest the issues arising in 2015 raised by the Croston's, there is no dispute that for decades prior to 2015, the true boundary between the properties was the Old Fence. Thus, whatever happened in 2015 (discussed in detail below) must be considered against the uncontested backdrop of everything that occurred decades prior.

B. The Croston's provide no rebuttal to support their Counterclaim that an agreement between the parties exists for the relocation of the Old Fence.

The Fischers contend that the Croston's' Counterclaim is defective on its face. *Motion*, p. 18. Specifically, the Croston's failed to identify a specific cause of action within their Counterclaim and similarly failed to cite any statutory authority supporting their request for attorneys' fees and costs. *Id.* Failing to provide such authority renders the Croston's' Counterclaim ineffective and inapplicable. *See PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 641, 200 P.3d 1180, 1190 (2009); *See Gillespie v. Mountain Park Estates L.L.C.*, 138 Idaho 27, 29, 56 P.3d 1277, 1279 (2002) (“The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it.”). Accordingly, this Court should dismiss the Croston's' Counterclaim outright. Moreover, because the Croston's raise no argument in rebuttal, they waive their ability to do so at oral argument. *See Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005) (“A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.”) (citation omitted).

If, however, the Court finds that the Crostons' Counterclaim is not defective on its face, the Court should nevertheless grant summary judgment in favor of the Fischers, finding that no valid or enforceable agreement exists between the parties concerning the location of the boundary fence dividing their respective properties. Again, the Crostons fail to address, let alone rebut, any of the Fischers' arguments on this issue. Instead, the Crostons make bare allegations that an agreement exists between the parties and that the terms of this purported agreement constitute a disputed material fact, precluding summary judgment. *Opposition*, pp. 5-6. This is a fundamentally flawed argument.

First and foremost, the Crostons fail to cite, describe, or articulate in any way, the alleged agreement upon which they predicate their position. Instead, they merely state that the agreement was to "relocate the fence." *Opposition*, p. 5. Yet, the Crostons fail to provide any evidence to support this statement. The Fischers theorized that the statement by Jim Croston provided in discovery might be the basis for the Crostons' agreement defense. *Motion*, pp. 19-20. However, the Crostons never assert that the Jim Croston statement describes the oral agreement to which they refer. Accordingly, the Fischers can only guess at which facts the Crostons might believe support their Counterclaim.

In actuality, the only reason the Fischers addressed the Jim Croston statement in the first place was to raise and refute a *potential* counterargument from the Crostons. As it stands now, the Fischers (and the Court for that matter) have no idea as to what evidence the Crostons *might* eventually rely upon to demonstrate the existence of the alleged binding agreement between the parties.

At oral argument, the Crostons will likely attempt to point to a police report attached to the Affidavit of Linda D. Penning as evidence of an agreement between the parties. However, the Fischer object that this document is inadmissible hearsay and should not be considered on summary judgment.² Nevertheless, even if not excluded, the police report contains no evidence as to what the supposed agreement between the parties entailed. The fact that the Crostons fail to provide sufficient evidence undermines their Counterclaim and Opposition. As a result, the Crostons fail to properly support their assertion that an agreement to move the boundary exists. I.R.C.P. 56(c)(1) (“A party assuming that a fact...is genuinely disputed must support the assertion by...citing to particular parts of materials in the record.”). Therefore, the Court should conclude that no agreement exists to move the boundary for the purposes of this Motion. I.R.C.P. 56(e)(2).

The second flaw in the Crostons’ argument is that they admit that the alleged agreement between the parties to relocate the fence was **oral** and not written. *See* Exs. C and F to *Declaration of W. Forrest Fischer*. On this matter, the Fischers argued within their Motion that an oral agreement concerning the transferring of an interest in real property is barred by Idaho’s statute of frauds – I.C. § 9-505. *Motion*, pp. 19-21. Furthermore, because ownership of Tract 1 passed to the Fischers long before the filed their Verified Complaint (*see Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001)), any future conveyance of Tract 1 is required to be in writing. *Motion*, p. 20-21. The Crostons provide no counter argument within their Opposition to rebut this point. For this reason, even if the Court were to find that an oral agreement between the Fischers

² This police report is appended as Exhibit D to the Affidavit of Linda D. Penning which was submitted alongside the Crostons’ Opposition. The Fischers have moved the Court to strike this affidavit as well as Exhibit D for evidentiary reasons. Accordingly, it is only in an abundance of caution that the Fischers refer to Exhibit D within their Response, in the event that the Court does not grant their Motion to Strike.

and the Crostons to move the boundary existed, it would be invalid and unenforceable under Idaho's statute of frauds.

The third fatal flaw in the Crostons' Opposition pertains to the lack of legal authority of Jim Croston to enter into a binding agreement with the Fischers on behalf of the Crostons. Even if the Court finds that an oral agreement exists between the Fischers and Jim Croston, and even if such agreement somehow does not fall within the prohibitions of the statute of frauds, the Crostons' counterclaim still fails. This is because the Crostons present no evidence that the alleged oral agreement was between coterminous **owners** of the Fischer Property and Croston Property. The Crostons Counterclaim is further undermined by the concession that Jim Croston is neither an owner of the Croston Property nor designated as the Crostons' attorney in fact. *Motion*, p. 23. As a result, and as a pure matter of law, Jim Croston is totally unable to enter into contracts or agreements affecting title to the Crostons' real property.

For the reasons above (which are more fully explained within the Fischers' Motion), the Crostons provide no persuasive rebuttal to defend their Counterclaim. Indeed, the Crostons provide no rebuttal whatsoever, but merely point to some ambiguous alleged agreement which they contend precludes summary judgment. As a result, the Crostons have conceded defeat on this issues, freeing the Court to rule in the Fischers' favor as a matter of law.

C. The Crostons provide no rebuttal to the Fischers' request for damages, attorneys' fees, and costs.

Finally, the Crostons provide an insufficient counterargument against the Fischers' request for damages, attorneys' fees, and costs. Rather, the Crostons merely argue that "[f]ees and costs should be decided after the court has made initial rulings," while saying nothing concerning the Fischers' damages claim. *Opposition*, p. 6. Accordingly, the Crostons do not dispute the Fischers'

claim for damages and have waived their ability to do so at oral argument. Concerning attorneys' fees and costs, there is no rule which precludes the Court from awarding these to the Fischers on summary judgment. As such, the basis for the Fischers' request for attorneys' fees and costs as contained within the Motion remains unchallenged by the Crostons, waiving their ability to challenge it at a later date.

IV. CONCLUSION

There is no dispute that, for at least the past six decades, an old post and wire fence between the parties' respective properties existed and served as the parties' mutually accepted boundary line. Moreover, there is no dispute that parties' predecessors-in-interest also considered and regarded the fence as the boundary between their properties. Under Idaho law, these facts create the presumption that the location of the decades-old fence is the true boundary between the parties' properties. The undisputed facts presented in this case satisfy all of the requisite elements for a boundary line by agreement or acquiescence. As a matter of law, nothing the Crostons claim occurred in 2015 can change the location of the true boundary line. Despite this fact, the Crostons engaged in self-help by forcibly taking almost 1,900 square feet of the Fischers' property as their own. Accordingly, the Court should grant summary judgment in favor of the Fischers and award them their reasonable attorneys' fees and costs based. Furthermore, the Court should grant summary judgment in favor of the Fischers, dismissing the Crostons' counterclaim as a matter of law.

Respectfully submitted this 11th day of January 2017.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 11th day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W/Forrest Fischer

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58'' W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21''W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36'' E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21'' E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO STRIKE
AFFIDAVIT OF LINDA D. PENNING**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

Plaintiffs/Counter Defendants, William R. Fischer and M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“**Plaintiffs**”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submit this Memorandum in Support of their Motion for to Strike the Affidavit of Linda D. Penning.

I. INTRODUCTION

On January 4, 2017, Defendants/Counter Claimants James F. Croston and Marjorie C. Croston (“**Croston**s”) filed their Opposition to Plaintiff’s Motion for Summary Judgment. To support their opposition, the Crostons filed the “Affidavit of Linda Penning in Opposition to Plaintiff’s Motion for Summary Judgment” (“**Penning Affidavit**”). However, the Penning Affidavit is inadmissible on its face because it does not satisfy the requirements of sworn affidavits under the Idaho Rules of Civil Procedure (“**I.R.C.P.**”) and Idaho Code (“**I.C.**”) § 51-109. Furthermore, the Penning Affidavit contains exhibits which are inadmissible under the Idaho Rules of Evidence (“**I.R.E.**”) because they lack foundation, contain hearsay, and contain hearsay within hearsay. Finally, the Penning Affidavit also contains a document which was not produced in

discovery despite being completely responsive to Plaintiffs' discovery requests.

Ultimately, any one of these issues provides the Court with substantial justification in striking the Penning Affidavit. Moreover, these flaws compound upon one another to the point that no portion of the Penning Affidavit is salvageable. Accordingly, Plaintiffs request that the Court strike the Penning Affidavit.

II. ARGUMENT

1. The Court should consider and determine this Motion before deciding Plaintiff's Motion for Summary Judgment.

Under I.R.C.P. 56(c)(2) “[a] party may object that the material cited to support or dispute a fact is not admissible in evidence at the hearing.” As stated by the Idaho Supreme Court, admissibility of evidence supported in summary judgment is a threshold issue:

It is axiomatic that objected-to evidence may not be admitted before the objection is considered and determined. As this Court has frequently held:

Evidence presented in support of or in opposition to a motion for summary judgment must be admissible. *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 785, 839 P.2d 1192, 1199 (1992). This threshold question of admissibility of evidence must be decided “before proceeding to the ultimate issue, whether summary judgment is appropriate.” *Ryan v. Beisner*, 123 Idaho 42, 45, 844 P.2d 24, 27 (Ct.App.1992).

Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999). Or, as stated in *Ryan v. Beisner*:

[I]f the admissibility of evidence presented in support of or in opposition to a motion for summary judgment is raised by the court on its own motion or on objection by one of the parties, **the court must first make a threshold determination as to the admissibility of the evidence before proceeding to the ultimate issue**, whether summary judgment is appropriate.

Neild v. Pocatello Health Servs., Inc., 156 Idaho 802, 814, 332 P.3d 714, 726 (2014) (**emphasis added**). Given the foregoing, the Court should consider Plaintiff's Motion to Strike before considering summary judgment in this matter.

2. The Court should strike the Penning Affidavit because it does not satisfy the requirements of I.R.C.P. 56(c)(4) and does not comply with I.C. § 51-109.

Pursuant to I.R.C.P. Rule 56(c)(4), “[a]n affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Affidavits submitted under this rule must also comply with I.C. § 51-109. *Evans v. Twin Falls County*, 118 Idaho 210, 218-219, n. 5, 796 P.2d 87, 95-96, n. 5 (1990). I.C. § 51-109 provides the requisite elements and format for notarizing and witnessing affirmations made in writing. When considering both I.R.C.P. Rule 56(c)(4) and I.C. § 51-109 together, Idaho courts have consistently held that if an affidavit fails to comply with the rules and statutes, it is not admissible as evidence. *See Evans*, 118 Idaho at 218-219, n. 5, 796 P.2d at 95-96, n. 5; *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 820-821, 979 P.2d 1174, 1178-1179 (1999); *Neild*, 156 Idaho at 814, 332 P.3d at 726. Here, the Penning Affidavit satisfies neither the court rule nor the state statute and the Verification does not remedy these facts.

a. *The Penning Affidavit is unsigned and the Verification does not cure this fact.*

Inexplicably, the Penning Affidavit is actually not signed by Ms. Penning herself. Rather, it is signed by the Crostons' counsel, Robin Dunn. *Penning Affidavit*, p. 3. This fact alone renders the entirety of the Penning Affidavit deficient, inadmissible, and of no evidentiary weight. *See Camp v. Jiminez*, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct. App. 1984) (“Unsworn statements are entitled to no probative weight in passing on motions for summary judgment.”).

In reply, the Crostons will likely argue that Ms. Penning signed her affidavit via her Verification which was filed separately from the Penning Affidavit. However, this Verification is ineffective for several reasons. First, nothing within either I.R.C.P. 56(c)(4) or I.C. § 51-109 mention, let alone permit, the use of I.R.C.P. 11.1 verifications in place of sworn affidavits or declarations. Second, I.R.C.P. 11.1 verifications are only allowed in pleadings,¹ and pleadings do not include affidavits under I.R.C.P. 7.² Third, even if verifications were allowed as a substitute for affidavits, the language of the Verification itself is defective.

Concerning the third reason – deficient language – the Verification states that “Linda Penning...has read the **foregoing** *Affidavit in Opposition to Motion for Summary Judgment*, knows the contents thereof, and verily believes the statements contained therein to be true.” *Verification*, at p. 2 (**emphasis** added). This language is particularly problematic because there are no substantive statements foregoing/preceding the Verification. Rather, there is citation to a document that appears nowhere in the docket. Namely, there is no document entitled *Affidavit in Opposition to Motion for Summary Judgment*.³

While this argument may see like splitting hairs, the Idaho Supreme Court recently focused on the exact use and meaning of the word “foregoing” when used within an affidavit. In *Garcia*

¹ The pertinent part of I.R.C.P. 11.1 states as follows:

“Verification of pleadings authorized or permitted under these rules or by law must be a written statement or declaration by a party or the party’s attorney of record sworn to or affirmed before an officer authorized to take depositions by Rule 28, or that otherwise complies with Idaho Code Section 9-1406 and Rule 28 of these rules, that the affiant believes the facts stated to be true, unless a verification upon personal knowledge is required.”

² I.R.C.P. 7 defines pleadings as “(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a cross claim; (5) a third party complaint; (6) an answer to a third party complaint; and (7) if the court orders one, a reply to an answer.”

³ Although it is probable that Ms. Penning was attempting to refer to the “*Affidavit of Linda D. Penning in Opposition of Plaintiffs’ Motion for Summary Judgment*,” the fact remains that the document referred to in the Verification does not exist. When dealing with sworn statements made under the penalty of perjury, clarity and concise language is paramount, if not required. Otherwise, the affiant is afforded the opportunity to hedge her statements with ambiguity.

v. Absolute Bail Bonds, LLC., et al., Docket No. 43315-2015 (Slip. Op. December 21, 2016),⁴ the plaintiff filed an affidavit which certified and declared “under penalty of perjury pursuant to the law of the state of Idaho that the foregoing is true and correct to the best of [plaintiff’s] knowledge.” *Id.* at pp. 3-4. This introductory statement was then followed by numerous statements intended to be the substance of the document. *Id.* However, because plaintiff specifically used the word “foregoing,” the Idaho Supreme Court refused to consider any statements which followed plaintiff’s introductory paragraph. *Id.* at p. 4. *Garcia* is directly on point here.

As in *Garcia*, the Verification signed by Ms. Penning contains no statements which precede her signature. Instead, the Verification is a self-contained document, filed separately with its own case caption. Accordingly, it cannot be used to cure the fact that the Penning Affidavit is unsigned. Thus, the Court should strike the Penning Affidavit for being unsworn and unsigned.

b. *The Penning Affidavit does not satisfy the affidavit requirements.*

Even if the Court were to find that the Penning Affidavit was signed by merit of the Verification, there is yet another fundamental flaw which still renders the Penning Affidavit as inadmissible. Specifically, nowhere within the Penning Affidavit does Ms. Penning state that its contents or statements were made by her personal knowledge. However, this statement is expressly required by I.R.C.P. Rule 56(c)(4) (“[a]n affidavit used to support or oppose a motion must be made on personal knowledge”). Because the Penning Affidavit fails to include this key language, the Court should strike it entirely.

Finally, the jurat at the end of the Verification does not meet the requirements of I.C. § 51-109. As was the case in *Evans v. Twin Falls County*, Ms. Penning’s signature was “merely

⁴ A copy of this decision is attached hereto as Appendix A.

acknowledged by a notary public” as opposed to being a certification defined and described I.C. § 51-109. 118 Idaho at 218-219, n. 5, 796 P.2d at 95-96. Because the Penning Affidavit is not subscribed and sworn to as an oath or affirmation in accordance with I.C. § 51-109, the Court should strike it.

3. In the alternative, the Court should disregard and strike all the Exhibits to the Penning Affidavit as they lack proper foundation, contain inadmissible hearsay, and violate I.R.C.P. 37(c)(1).

Assuming, for the sake of argument, that the Court does not strike the entire Penning Affidavit for being defective on its face, the Court should nevertheless disregard and strike all of the exhibits appended to it for the following reasons: Exhibits A and B to the Penning Affidavit lack proper foundation and authenticity to be admitted to evidence; Exhibit C contains inadmissible hearsay and constitutes a violation of I.R.C.P. 37(c)(1); and Exhibit D also contains inadmissible hearsay. For these reasons, Plaintiffs request that the Court strike these exhibits from the Penning Affidavit.

As discussed above, I.R.C.P. 56(c)(4) requires an affidavit submitted to support or oppose a motion for summary judgment must, *inter alia*, “set out facts that would be admissible in evidence.” In other words, “[e]vidence presented in support of or in opposition to a motion for summary judgment must be admissible.” *Nield*, 156 Idaho at 814, 332 P.3d at 726 (citation omitted). All the exhibits appended to the Penning Affidavit have evidentiary issues which render them inadmissible.

Turning first to Exhibit A and Exhibit B of the Penning Affidavit, the Court should strike these documents for lacking proper foundation and authenticity. Exhibit A is described as a “tract description between the plaintiffs and the defendants,” while Exhibit B is described as a “sketch

of the original survey between the parties.” *Penning Affidavit*, p. 2. However, nowhere within the Penning Affidavit does Ms. Penning describe where she obtained these exhibits or where she derived the information for her hand-written notations.⁵ Although these exhibits appear to be portions of a record of survey of the properties belonging to Plaintiffs and the Crostons, there is no way to be sure. Specifically, they are neither self-authenticating pursuant to I.R.E. 902 nor are they properly identified pursuant to I.R.E. 901. Thus, Ms. Penning failed to establish the requisite foundation to sponsor Exhibit A and Exhibit B. Moreover, these documents lack the requisite authentication required the I.R.Es 901 and 902. Accordingly, Plaintiffs request that Exhibit A and Exhibit B of the Penning Affidavit be stricken.

Next, Exhibit C of the Penning Affidavit is equally inadmissible as evidence because it contains hearsay and hearsay within hearsay. Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” I.R.E. 801(c). In general, hearsay is not admissible as evidence unless specifically provided for within the rules of evidence. I.R.E. 802. Here, Exhibit C to the Penning Affidavit is identified as a statement dated September 27, 2015, made by Linda Penning “when putting up a temporary fence.” *Penning Affidavit*, at ¶ 5. This document constitutes inadmissible hearsay. Furthermore, the statement contains hearsay within hearsay pursuant to I.R.E. 805 insofar as it purports to record statements made by Plaintiff and other third parties. Because Exhibit C is clearly hearsay, the Court should strike it as inadmissible.

In addition to constituting hearsay, the inclusion of Exhibit C in the Penning Affidavit is

⁵ Indeed, their inclusion into the Penning Affidavit is ambiguous at best, given that they are never cited to within the Crostons’ Opposition.

inadmissible pursuant to I.R.C.P. 37(c)(1). This rule states as follows:

If a party fails to supplement discovery responses when required...the party is not allowed to use that information...on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Here, the Crostons never identified nor produced Exhibit C to Plaintiffs despite numerous applicable discovery requests. *Declaration of W. Forrest Fischer in Support of Plaintiff's Motion to Strike*, p. 2. Moreover, given that Exhibit C was allegedly created by Ms. Penning on September 27, 2015, the Crostons cannot argue that this document was newly discovered evidence. Even if it were, the Crostons have failed to seasonably supplement their discovery responses in violation of I.R.C.P. 26(e). Accordingly, Exhibit C to the Penning Affidavit should be stricken.

Finally, Exhibit D to the Penning Affidavit should be stricken as it also constitutes inadmissible hearsay and hearsay within hearsay. Per Ms. Penning, Exhibit D “is the police report of 9/21/15 containing the statements of the plaintiffs.” *Penning Affidavit*, at p. 1. However, Exhibit D is both hearsay and contains hearsay within hearsay. In addition to these rules, I.R.E. 803(8)(A) further states that “investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case” are not within the public records and reports exception to the hearsay rule. As such, even police reports are inadmissible hearsay and therefore are precluded from being appended to affidavits. *See Fragnella v. Petrovich*, 153 Idaho 266, 274, 281 P.3d 103, 111 (2012) (affirming district court’s grant of motion to strike police report from evidence). For these reasons, the Court should also strike Exhibit D to the Penning Affidavit.

III. CONCLUSION

The Penning Affidavit is fundamentally flawed for numerous reasons. Foremost of these reasons is that it does not meet the express requirements of affidavits under the court rules and

state law. Furthermore, the Penning Affidavit was not signed by Ms. Penning, but Counsel for the Crostons. These facts alone render the Penning Affidavit inadmissible in its entirety and the Court should strike it on these grounds. Nevertheless, if the Court allows the Penning Affidavit to be admitted, it should, at the very minimum, strike Exhibits A, B, C, and D of the Penning Affidavit because they do not comply with the Idaho Rules of Evidence.

Respectfully submitted this 11th day of January, 2017.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs

G:\WPDATA\WFF\18611 (Fischer Property)\Pleadings\6 - Motion to Strike\Memorandum in Support of Plaintiffs' Motion to Strike.docx

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 11th day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

2016 WL 7385058

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Idaho.

JOSE LUIS GARCIA and MARIA GARCIA, Plaintiffs-Appellants,
v.
ABSOLUTE BAIL BONDS, LLC., and WALTER ALMARAZ, Defendants.

Docket No. 43315-2015

Filed: December 21, 2016

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for Canyon County. Hon. George A. Southworth, District Judge. The judgment of the district court is affirmed.

Attorneys and Law Firms

Richard L. Hammond, Hammond Law Office, Caldwell, submitted a brief on behalf of the appellant.

The respondent did not submit a brief on appeal.

Opinion

EISMANN, Justice.

*1 This is an appeal out of Canyon County from a judgment against a bail bondsman who revoked a bail bond for an illegal alien at the request of an agent of United States Immigration and Customs Enforcement. The district court awarded damages in the amount of the bail bond premiums, and the appellants contend on appeal that they were entitled to additional damages. We affirm the judgment of the district court.

I.

Factual Background.

On October 14 or 15, 2012, Jose Luis Garcia was arrested in Canyon County for driving under the influence of

alcohol (“DUI”), and he was also arrested under an outstanding warrant issued in another case in which he was charged with petit theft and attempted petit theft. Mr. Garcia was thirty-one years of age and had entered the United States illegally when he was an adult. At about 8:30 a.m. on October 15, 2012, Maria Garcia, his mother, paid Walter Almaraz, a bail bondsman, to obtain bail bonds for the two cases. Mr. Almaraz was an agent of Absolute Bail Bonds, LLC. Prior to making the payment, Ms. Garcia informed Mr. Almaraz that Jose Garcia was an illegal alien and that she wanted him bonded out quickly before United States Immigration and Customs Enforcement (“ICE”) placed a “hold” (immigration detainer) on him. Mr. Almaraz posted the bail bond in the petit theft case on October 15, 2012, and he posted the bail bond in the DUI case on the next day. He then received a telephone call from an ICE agent who told him to revoke the bail bonds, and Mr. Almaraz did so before Jose Garcia was released from jail. On October 17, 2012, ICE placed an immigration hold on him.

Jose Garcia pled guilty to the petit theft charge on January 22, 2013, and he was sentenced the following week. The DUI charge was amended to driving under the influence of alcohol with an excessive alcohol concentration of 0.20. He pled guilty to that charge on December 21, 2012, and on March 18, 2013, he was sentenced. Upon completing the unsuspended portions of his jail sentences for petit theft and DUI, he was released from jail into the custody of ICE on May 3, 2013, and deported to Mexico.

On May 2, 2013, Jose Garcia and Ms. Garcia filed this action against Mr. Almaraz and Absolute Bail Bonds, LLC, seeking to recover damages for breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, failure to provide records and an accounting, and bad faith breach of contract. The Defendants were served with the summons and complaint and a request for admissions, but they did not appear in this action. On July 19, 2013, the Plaintiffs filed a motion for entry of default against them, and on December 13, 2013, the court entered their default. On November 12, 2013, the Defendants filed the affidavit of Ms. Garcia seeking a default judgment against the Defendants.

The district court set the case for a hearing for entry of a default judgment on April 23, 2015. On the morning of the hearing, the Plaintiffs filed a motion seeking to amend

their complaint to add a claim for punitive damages and a supporting affidavit of counsel. At the hearing, the court questioned the Plaintiffs' counsel about the claimed damages and took under advisement the motion to amend the complaint. On April 27, 2015, the Plaintiffs filed two additional affidavits seeking punitive damages and a judgment.

*2 On May 6, 2015, the district court issued its memorandum decision addressing the motion to amend and the amount of damages. The court denied the motion to amend the complaint to add a prayer for punitive damages, and it awarded damages of \$3,300.00, which it stated was the total amount of the premiums on the bail bonds.¹ The court found that the consequential damages claimed were not caused by the conduct of the Defendants. The court also awarded the Plaintiffs \$2,500.00 in attorney fees, which is the amount requested in the complaint if judgment was entered by default. On May 6, 2015, the court entered a judgment awarding the Plaintiffs damages against the Defendants in the sum of \$5,800, and the Plaintiffs timely appealed.

II.

Did the District Court Err in Denying the Motion for Recusal?

“A motion to disqualify for cause must be accompanied by an affidavit of the party or the party's attorney stating the specific grounds upon which disqualification is based and the facts relied upon in support of the motion.” I.R.C.P. 40(b)(2). “An affidavit includes a written certification or declaration made as provided in Idaho Code section 9-1406.” I.R.C.P. 2.7. Idaho Code section 9-1406 permits an affidavit to be a dated and signed “unsworn certification or declaration, in writing, which is subscribed by such person and is in substantially the following form: ‘I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.’” On December 5, 2013, the Plaintiffs filed a motion to recuse the district court for cause. The only part of the motion that would qualify as an affidavit under the statute was the initial paragraph, which began:

The Plaintiff in the above entitled action, by and through his attorney of record, Richard Hammond,

hereby respectfully requests this Honorable Court to recuse himself, be removed under IRCP 40(d)(2) or reconsider its position stated in chambers to deny consequential damages to a person due to his or her immigration status. AFFIDAVIT

Richard L. Hammond certifies and declares under penalty of perjury pursuant to the law of the state of Idaho that the *foregoing* is true and correct to the best of my personal knowledge:

(Emphasis added.)

The word *foregoing* means “previously stated, written, or occurring; preceding.” <http://www.dictionary.com/browse/foregoing> (accessed: October 20, 2016). What was previously stated was simply the request that the court either recuse itself or “reconsider its position stated in chambers to deny consequential damages to a person due to his or her immigration status.” There is no statement as to the words said or the context in which they were said, nor was there a transcript of what was said. It is necessary that the affidavit supporting the motion must state “the specific grounds upon which disqualification is based and the facts relied upon in support of the motion,” rather than merely conclusory allegations. Without stating the facts relied upon, the motion could simply be based upon a misunderstanding or mischaracterization of what was said or done. For example, the Plaintiffs' motion contained seven pages of argument, from which it appears that the objection was to the district court questioning whether the asserted consequential damages were caused by the Defendants or by the fact that Mr. Garcia was subject to deportation because he had entered this country illegally. Because the Plaintiffs' motion was not supported by an affidavit that complied with Rule 40(b)(2), we need not address on appeal whether the district court erred in denying the motion.

III.

Did the District Court Sua Sponte Rule That Consequential Damages Were Not Allowed Due To The Immigration Status Of The Party?

*3 The Plaintiffs assert that “The District Court erred as a matter of law when the Court sua sponte ruled that consequential damages were not allowed due to the

immigration status of the party.” They also allege, “The District Court’s *sua sponte* action to raise an affirmative defense on behalf of the Respondents and order that the Appellants are not eligible for consequential damages due to the immigration status is improper, violates due process and Equal Protections [sic] laws, is not supported by law and should be overturned.” They contend that “[t]he District Court was not given adequate notice or opportunity to respond to prevent the orders herein” and “[f]urther, the decision cannot be based on arguments or facts not before the court.”

The Plaintiffs’ argument indicates a lack of understanding regarding the meaning of the words *sua sponte*. They mean “[w]ithout prompting or suggestion; on its own motion.” Black’s Law Dictionary 1437 (7th ed. 1999). Ruling that the Plaintiffs failed to prove that all of the damages they claimed were caused by the Defendants is not making a *sua sponte* ruling.

When default has been entered against a defendant and the claim is for a sum certain or a sum that can be made certain by computation, the party seeking a default judgment must present an affidavit showing the amount due and the method of computation of that amount. I.R.C.P. 55(b) (1). In this case, the Plaintiffs’ complaint did not allege the amount of damages claimed for the various claims alleged. In their complaint, the Plaintiffs alleged that the Defendants “caused Plaintiffs damages in an amount established in trial including but not limited to over six months of incarceration, loss of wages, loss of service, loss of companionship, etc.” They then alleged:

18. There are certain elements of damages provided by law that Plaintiffs are entitled to have the jury consider in determining the sum of money that will fairly and reasonably compensate him for his damages caused by the acts of the Defendants and those elements of damage include, but are not limited to, the following, both up to the time of trial and in the future:

- a. Expenses and damages stemming from Plaintiff’s failure to be released from custody;
- b. Damages suffered by Plaintiff as a result of being incarcerated for an extended period of time including, lost earnings and lost earning capacity sustained and to be sustained by Plaintiff and loss of liberty.

- c. The reasonable amount necessary to reimburse Plaintiff for time spent on additional tasks necessitated by this injury, such as seeking further legal help;
- d. Recovery for damages to property and/or lost property;
- e. Reasonable attorney fees; and
- f. The costs of prosecuting and presenting the evidence in this case.
- g. The other natural and foreseeable consequences caused by failure to ensure that the Plaintiff Jose Luis Garcia’s bond was posted and not revoked and spending the subsequent time in custody.

19. The above paragraphs are included in each cause of action below.

The prayer did allege that the damages did not exceed \$35,000 in order to comply with Idaho Code section 12-120(1), which provides that “in any action where the amount pleaded is thirty-five thousand dollars (\$35,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney’s fees.”

Because the complaint did not allege a sum certain or a sum that could be made certain by calculation, the Plaintiffs were required to apply to the district court for a default judgment. I.R.C.P. 55(b)(2). They did so, and the district court could then “conduct hearings or make referrals when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.” I.R.C.P. 55(b)(2). The purpose of the hearing is not simply for the court to rubber stamp the damages asserted by the Plaintiffs.

*4 On November 12, 2013, the Plaintiffs filed a document titled “Affidavit for Default Judgment.” It began, “MARIA GARCIA certifies and declare under penalty of perjury pursuant to the law of the state of Idaho that the foregoing is true and correct to the best of my personal knowledge.” The only writing that was *foregoing* was the caption of the document. There were assertions of fact following the declaration, but the declaration did not apply to them by its terms.

On April 27, 2015, the Plaintiffs filed a document titled "Another Affidavit of Maria Garcia re Punitive Damages and Judgment." The second paragraph of that document stated, "MARIA GARCIA certifies and declare under penalty of perjury pursuant to the law of the state of Idaho that the foregoing is true and correct to the best of my personal knowledge." The only writing that was *foregoing* was the caption and the statement, "Comes now the Plaintiffs and submit this Another Affidavit of Maria Garcia in Support of the Motions filed herein including the Motion to Amend the Complaint to include Punitive Damages and in support of the Damages sustained." There were assertions of fact following the declaration, but the declaration did not apply to them by its terms.

On April 28, 2015, the Plaintiffs filed a document titled "Affidavit of Dulce I. Garcia re Punitive Damages and Judgment." The second paragraph of the document began, "DULCE I. GARCIA certifies and declare under penalty of perjury pursuant to the law of the state of Idaho that the foregoing is true and correct to the best of my personal knowledge." The only writing that was *foregoing* was the caption and the statement, "Comes now the Plaintiffs and submit this Affidavit of Dulce I. Garcia in Support of the Motions filed herein including the Motion to Amend the Complaint to include Punitive Damages and in support of the Damages sustained." There were assertions of fact following the declaration, but the declaration did not apply to them by its terms.

Thus, the Plaintiffs did not submit any affidavits setting forth the damages claimed. The Plaintiffs' assertions, unsupported by any affidavits, were that they were entitled to: \$1,300.00 for the premiums for the two bail bonds; Jose Garcia's lost wages in the amount of \$9.50 per hour for 45 hours per week; Ms. Garcia's lost wages for approximately 20 days of work at \$9.00 per hour and nine hours per day; Jose Garcia's loss of his trailer because Ms. Garcia could not pay the fees due to the money paid to the Defendants; Jose Garcia's loss of his car because Ms. Garcia sold it to hire an attorney, her suffering deep depression due to the loss of her son while he was in jail and after he was deported; and an additional ten days of lost work for Ms. Garcia because she had gone to the border twice seeking to have ICE permit Mr. Garcia to come back into the United States.

In this case, the district court had to determine the amount of damages that the Plaintiffs were entitled to recover. Walter Almaraz, the bail agent, may have been liable for the return of the premiums. I.C. § 41-1044(1). Consequential damages recoverable for breach of contract must be those which "were reasonably foreseeable and within the contemplation of the parties at the time they made the contract." *Suitts v. First Sec. Bank of Idaho, N.A.*, 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985). The Plaintiffs did not present the bail contract to the district court. With respect to their consequential damages claimed, they had the burden of showing not only that they were within the contemplation of the parties at the time of contracting, but also that the claimed damages were caused by the breach of contract. *O'Shea v. High Mark Dev., LLC*, 153 Idaho 119, 129-30, 280 P.3d 146, 156-57 (2012).

*5 The Plaintiffs contend that the district court ruled that, as a matter of law, "that consequential damages were not allowed due to the immigration status of the party." That assertion mischaracterizes the court's ruling. The district court found that they had failed to prove that the claimed consequential damages were caused by the Defendants. Rather, the court found that they were caused by the immigration hold by ICE due to Mr. Garcia's illegal entry into the United States.

As a matter of public policy, a person is not liable for damages allegedly caused by failing to enable the illegal alien to evade deportation. Allowing the recovery of such damages would be analogous to permitting recovery for breaching an illegal contract. This Court "has the duty to raise the issue of illegality *sua sponte*." *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). "Whether a contract is illegal is a question of law for the court to determine from all the facts and circumstances of each case. An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy." *Id.* A contract to enable an illegal alien to evade deportation would be contrary to public policy. For the same reason that such a contract would be unenforceable, damages allegedly resulting from failing to enable an illegal alien to evade deportation are not recoverable. The Plaintiffs have not shown that the district court erred in failing to award more damages.

IV.

Did the District Court Err in Failing to Award Damages under the Idaho Consumer Protection Act?

In their third cause of action, the Plaintiffs alleged that the revocation of the bail bonds constituted an unconscionable method, act, or practice pursuant to Idaho Code section 48-603C, which is part of the Idaho Consumer Protection Act. They contend on appeal that the district court erred in failing to award damages under that Act. In their affidavits submitted in support of a default judgment, they did not set forth any claimed damages under that Act, nor did they even mention the Act. In order to obtain damages in a default judgment, the Plaintiffs had the burden of presenting their claimed damages to the district court. The court is not required to go through the complaint and arbitrarily pick amounts to award under the various claims alleged.

V.

Did the District Court Err in Denying the Plaintiffs' Motion to Amend their Complaint to Add a Claim for Punitive Damages?

On April 23, 2015, after default was entered, the Plaintiffs filed a motion to amend their complaint to add a claim for punitive damages. Idaho Code section 6-1604(1) permits the awarding of punitive damages if the party seeking such damages “prove[s], by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” When a party moves to amend a pleading to include a prayer for punitive damages, “[t]he court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.” *Id.*

“A trial court's ruling on a motion to amend a complaint to add a claim for punitive damages is reviewed for an abuse of discretion.” *Weinstein v. Prudential Prop. and Cas. Ins. Co.*, 149 Idaho 299, 311, 233 P.3d 1221, 1233 (2010). “To determine whether a trial court has abused

its discretion, this Court considers whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason.” *Reed v. Reed*, 137 Idaho 53, 57, 44 P.3d 1108, 1112 (2002).

*6 The Plaintiffs submitted three affidavits in support of their motion to amend their complaint to include a prayer for punitive damages. The Affidavit of Counsel to Include Punitive Damages began, “Richard L. Hammond certify and declare under penalty of perjury pursuant to the law of the state of Idaho that the foregoing is true and correct to the best of my personal knowledge.” The only *foregoing* writing was the caption of the document. Likewise, the other affidavits, discussed above, did not include any facts within the scope of the declarations.

The Plaintiff did serve requests for admissions on the Defendants, which went unanswered and were therefore deemed admitted. I.R.C.P. 36(a)(4). The relevant matters deemed admitted included that Mr. Almaraz revoked Mr. Garcia's bonds “because the ICE agent advised him to revoke the bond” and that Mr. Almaraz “revoked the one or more bond(s) bond [sic] for Jose Luis Garcia despite previously knowing of our client's immigration problems.”

The Plaintiffs have not shown that the district court abused its discretion in denying their motion to amend their complaint to include a prayer for punitive damages. Acceding to the command of an ICE agent so that Mr. Garcia could not evade deportation did not constitute oppressive, fraudulent, malicious or outrageous conduct.

III.

Are the Plaintiffs Entitled to an Award of Attorney Fees on Appeal?

The Plaintiffs request an award of attorney fees on appeal pursuant to Idaho Code section 12-120(1). Attorney fees are only awardable under that statute to the prevailing party. Because the Plaintiffs are not the prevailing party on appeal, they are not entitled to an award of attorney fees under that statute.

IV.

Conclusion.

We affirm the judgment of the district court.

Justices W. JONES and HORTON CONCUR.

Justice BURDICK CONCURS.

Chief Justice J. JONES, concurring in the result.

I concur in the result of the Court's opinion. My reservations about fully concurring are: (1) my preference would be to refer to Mr. Garcia as an "undocumented alien," which might be an exercise in political correctness but not unwarranted given the charged atmosphere on immigrants that currently exists in the country; (2) I would forego the discussion of the declaration/affidavits because, although they were arranged awkwardly, they are largely irrelevant to the determination of the contract claim at issue here; and (3) I see no need to base the opinion on the ground of illegality, which could cause some confusion amongst members of the Bar in future cases. I would

affirm the district court based on the fact that the plaintiffs failed to adequately establish the terms of any contract between them and the defendants. The bail contract is not contained in the record. There is no indication as to how the oral contract alleged by the plaintiffs might have been affected by the bail contract. The terms of the oral contract are presented with less than clarity. Further, the district court observed:

I can understand a cause of action to refund the bond premium and attorney's fees and costs for that bond premium. I don't know that this Court or any court in the United States could enter an order for consequential damages because an undocumented alien who an immigration hold was placed on by ICE lost his job. That's not the bondsman's fault for doing that.

Thus, the district court properly held that any claimed breach of the alleged oral contract was not the proximate cause of any consequential damages claimed by the plaintiffs.

All Citations

--- P.3d ----, 2016 WL 7385058

Footnotes

1 According to the unsworn statements made by Ms. Garcia, she paid an \$800.00 premium for the bail bond in the DUI case and a \$500.00 premium for the bail bond in the petit theft case. In its decision determining the amount of damages, the district court wrote, "The evidence shows the cost of those bonds to Plaintiffs was \$3,300.00." There were no sworn or unsworn statements supporting that finding.

BONNEVILLE COUNTY
IDAHO

2017 JAN 11 PM 1:31

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**DECLARATION OF W. FORREST
FISCHER IN SUPPORT OF
PLAINTIFFS' MOTION TO STRIKE**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

I, W. Forrest Fischer, pursuant to Idaho Code § 9-1406 and Idaho Rule of Civil Procedure 2.7, declare under the penalty of perjury as follows:

1. I am an attorney with Holden, Kidwell, Hahn & Crapo P.L.L.C., the firm representing Plaintiffs in this matter.

2. I am familiar with these proceedings, and with the discovery conducted between the parties pursuant to the Idaho Rules of Civil Procedure. Accordingly, this declaration is made based on my personal knowledge.

3. Attached hereto as Exhibit A is a true and correct copy of excerpts of Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission ("**Plaintiffs' First Discovery Requests**"), which was served on counsel for James F. Croston and Marjorie C. Croston (the "**Croston**s") on September 7, 2016.

4. Specifically, Plaintiffs' First Discovery Requests include the following:

- a. Interrogatory No. 16, which asked the Crostons to "identify any and all documents or other tangible which has not already been identified within your answers to these Interrogatories, which support or tend to support the denials, assertions and/or affirmative defenses set forth in Defendants' Answer in this

- matter,”; along with Request for Production No. 12, which asked the Crostons to “produce all documents identified in your answer to Interrogatory No. 16.”
- b. Interrogatory No. 17, which asked the Crostons to “identify in full and complete detail any statements, affidavits, photographs, drawings, illustrations, written documents, electronic messages, diaries, calendars, notes, journals, tape recordings and/or video tapes of which you are aware that pertain to any issues in this litigation”; along with Request for Production No. 13, which asked the Crostons to “produce all documents identified in your answer to Interrogatory No. 17.”
 - c. Request for Production No. 17, which asked the Crostons to “produce any and all documents (as identified above) which support your allegation that Plaintiffs and Defendants entered into an agreement as to the construction, location, and cost of the New Fence.”
 - d. Request for Production No. 18, which asked the Crostons to “produce each and every document not already produced, which supports or tends to support the denials, assertions and/or affirmative defenses set forth in Defendants’ Answer in this matter.”

5. The document, attached as Exhibit C to the document titled “Affidavit of Lind D. Penning in Opposition of Plaintiffs’ Motion for Summary Judgment” (the “**Penning Statement**”) is responsive to the above-cited and provided discovery requests, and should have been produced in response to Plaintiffs’ Discovery Requests.

6. The Crostons have never produced the Penning Statement in discovery, nor have the Crostons supplemented their responses to Plaintiffs’ First Discovery Requests.

I certify (or declare) under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

Jan. 11, 2017

Date

Forrest Fischer

W. Forrest Fischer

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 11th day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN FISCHER,
Trustees of the William and Ann Fischer Revocable
Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES CLAIMING
ANY INTEREST IN THE FOLLOWING
DESCRIBED REAL PROPERTY:

Beginning at the Northeast corner of Lot 4, Block
12, of the Original Ammon Townsite, Bonneville
County, Idaho; running thence N. 88°33'58'' W.
330.00 feet to the Northwest corner of said Lot 4;
thence S. 00°00'21''W. along the West line of said
Lot 4 a distance of 8.99 feet to an existing fence
line; thence S. 89°41'36'' E. along said existing
fence line 329.90 feet to a point on the East line of
said Lot 4; thence N. 00°00'21'' E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**PLAINTIFFS' FIRST SET OF
INTERROGATORIES, REQUESTS FOR
PRODUCTION, AND REQUESTS FOR
ADMISSION**

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

Counterclaimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER,
Trustees of the William and Ann Fischer Revocable
Trust,

Counter Defendants.

**TO: DEFENDANTS JAMES F. CROSTON and MARJORIE C. CROSTON, and
their counsel of record, ROBIN D. DUNN ESQ.**

Plaintiffs, WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust, ("Plaintiffs") submit the following written Interrogatories, Requests for Production, and Requests for Admission to Defendants JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife ("Defendants"). Pursuant to the Idaho Rules of Civil Procedure (I.R.C.P.) Rules 26, 33, and 34, Defendants are required to answer the following Interrogatories and Requests for Production of Documents separately and fully, under oath, in writing, within thirty (30) days from the date of service, except that a defendant may serve answers within forty (40) days of the service of the summons and complaint upon that defendant.

Each Interrogatory and Request for Production of Documents is required to be answered on the basis of Defendants' entire knowledge. Defendants must furnish all requested information that is known by, possessed by, or available to them or any of their attorneys, consultants, representatives or other agents.

If any of the following Interrogatories or Requests for Production of Documents cannot be answered fully, answer to the extent possible, justifying the reason for your inability to answer the

remainder, and stating whatever information or knowledge you have concerning the unanswered portions. If your answer is qualified in any particular, set forth the details of such qualification. If you object to an Interrogatory, Request for Production of Documents, or any subpart thereof as calling for information that is beyond the scope of discovery, you must, nevertheless, answer the Interrogatory, Request for Production of Documents, or subpart thereof to the extent that it is not objectionable.

These Interrogatories, Requests for Production, and Requests for Admission are intended to be continuing in nature. Any information that may be discovered by you subsequent to the service of your answers shall be brought to the attention of the propounding party in supplemental answers pursuant to the requirements of I.R.C.P. 26(e).

DEFINITIONS

With respect to these interrogatories and requests for production of documents, the following definitions apply:

1. "And" or "or" means "and/or," with any word presented in the singular form deemed to include the plural and vice versa, where appropriate. The disjunctive shall be read as propounded in the conjunctive and vice versa.
2. "Person" and/or "persons" mean natural persons, proprietorships, sole proprietorships, corporations, nonprofit corporations, whether public or private, public corporations, municipal corporations, local, state, federal or foreign government, or governmental agencies, political subdivisions, general or limited partnerships, business trusts, trusts, estates, clubs, groups, unincorporated associations, associations, or other business or public organizations.

3. "Document" is used in the broadest possible sense and means the original (or a copy, if the original is not available) and any non-identical copy (whether different from the original because of notes made on such copies or otherwise) of any written, printed, typed, photographed, recorded or otherwise produced or reproduced communication or representation of any kind and description, whether comprised of letters, words, numbers, pictures, sounds or symbols, or any combination thereof, or inscribed by hand or by mechanical, electronic, magnetic, microfilm, photographic or other means, as well as phonic (such as tape recordings) or visual reproductions of communications, oral statements, conversations or events, and including material in any form including, but not limited to, any book, pamphlet, periodical, letter, memorandum, file, note, calendar, newspaper, magazine, statement, bill, invoice order, policy, telegram, correspondence, summary, receipt, opinion, investigation statement or report, schedule, manual, financial statement, audit, tax return, articles of incorporation, by laws, stock book, minute book, agreement, contract, deed, security agreement, mortgage, deed of trust, title or other insurance policy, report, study, record, handwritten note, map, drawing, working paper, chart, paper, draft, index, tape, microfilm, data sheet, computer-stored or computer-readable data, data processing card, computer printout, computer program, check bank statement, passbook, or any other written, typed, printed, photocopied, dittoed, mimeographed, recorded, transcribed, taped, filmed, photographic or graphic matter, all other data compilations from which information or communications can be obtained, however produced or reproduced, and any drafts or revisions of any of the foregoing. The term "document" also includes the file and folder tabs associated with each such aforesaid original and/or copy, all correspondence transmitting such document or explanation or commenting on the contents thereof, and all working or supporting papers.

4. "Identify" or "identity," with regard to a natural person, means disclosure of his or her full name, present residence address, and telephone number, present or last known business address and telephone number, and employment position.

5. "Identify" or "identity," with regard to persons who are not natural persons, means disclosure of its present or last known complete address and telephone number, including the area code, of its headquarters and its nearest or local office or agent.

6. "Identify" or "identity," with regard to a document, means disclosure of the name of the person who prepared it, the name of the person who signed it or over whose signature it was issued, the name of each person to whom it was addressed or distributed, the nature and substance of the writing with sufficient particularity to enable it to be identified, the date when it was prepared, the date when it was signed, the physical location of it and name and address of its custodians, whether it will be voluntarily made available to defendants for inspection and copying, and whether copies are attached to your answers to these interrogatories. If any such document was but is no longer in your possession or subject to your control, disclose what disposition was made of it and the reason for its disposition. When the identification of a document is requested, you may alternatively attach a copy of that document as an exhibit to your answers to these interrogatories.

7. "Custodian" refers to any person having possession, custody, or control of the subject referred to.

8. "Regarding" and "with regard to" mean pertinent, relevant or material to, evidencing, having a bearing on, or concerning, affecting, discussing, dealing with, considering or otherwise relating in any manner whatsoever to the subject of the inquiry.

9. "Defendants" refers to Defendants James F. Croston, Marjorie C. Croston, and their respective agents.

10. "You" or "your" refers to Defendants James F. Croston, Marjorie C. Croston, and their respective agents.

11. "Croston Property" refers to real property owned by Defendants which is located to the south of the Old Fence, commonly known as 3020 S. Western Avenue, Ammon, Idaho.

12. "Fischer Property" refers to real property owned by Plaintiffs which is located north of the Old Fence, commonly known as 3000 S. Western Avenue, Ammon, Idaho.

13. "Old Fence" refers to a post-and-wire fence which ran along the Fischer Property's southern boundary, dividing the Fischer Property and the Croston Property which existed for more than twenty years until it was recently removed.

14. "Access Road" refers to a dirt road located immediately north of the Old Fence, running parallel to the Old Fence for approximately 230 feet.

15. "New Fence" refers to a new wired fence constructed by Defendants which they claim follows the platted boundary line of the Croston Property.

16. "Tract 1" refers to that certain area of real property legally described in the Complaint as the area located in between the Old Fence and the New Fence.

I. INTERROGATORIES

INTERROGATORY NO. 1: Please identify all persons who provided information for the preparation of answers and responses to these Interrogatories and Requests for Production of Documents and state the specific answer(s) and/or response(s) to which they contributed.

PAGE 7 OMITTED

INTERROGATORY NO. 10: Please state all facts upon which you base your answer to paragraph 13 of the complaint. Specifically, please identify the date upon which you allege Plaintiffs “turned his large truck on the defendant property,” and identify who witnessed this alleged event.

INTERROGATORY NO. 11: Please state all facts upon which you base your allegation that “a survey was completed” in respect to your answer to paragraph 20 of the Complaint.

INTERROGATORY NO. 12: Please state all facts upon which you base your allegation that “plaintiffs had previously desired that the new fence be placed on the survey markings” as stated within your answer to paragraph 25 of the Complaint.

INTERROGATORY NO. 13: Please state all facts upon which you base your denial of paragraph 31 of the Complaint.

INTERROGATORY NO. 14: Please state all facts upon which you base your denial of paragraph 33 of the Complaint.

INTERROGATORY NO. 15: Please state all facts upon which you base your allegation that Plaintiffs “indicated to the defendants that the survey would control” and that Plaintiffs “would pay one-half of the [fence] cost,” as stated within your second affirmative defense.

INTERROGATORY NO. 16: Please identify any and all documents or other tangible evidence which has not already been identified within your answers to these Interrogatories, which support or tend to support the denials, assertions and/or affirmative defenses set forth in Defendants’ Answer in this matter.

INTERROGATORY NO. 17: Please identify in full and complete detail any statements, affidavits, photographs, drawings, illustrations, written documents, electronic messages, diaries,

calendars, notes, journals, tape recordings and/or video tapes of which you are aware that pertain to any issues in this litigation.

INTERROGATORY NO. 18: Please identify and describe in detail the factual basis for each affirmative defense Defendants assert in their Answer, and identify each document Defendants contend constitutes evidence of or provides support for each affirmative defense Defendants assert in this action.

INTERROGATORY NO. 19: Identify any information that Defendants, or anyone acting on Defendants' behalf, have that Plaintiff, or anyone acting on Plaintiff's behalf, made any admission or declaration against interest in any way that would tend to support Defendants' version of the facts of this case. If you contend such information or statements exist, please state: the time and place where such admission or declaration was made, the substance of the admission or declaration and the names, addresses, and phone numbers of all persons present when such admission or declaration was made.

INTERROGATORY NO. 20: If your answers to the Requests for Admission (below) are anything other than unqualified admissions, please state each and every qualification and objections, and each and every fact and reason supporting your response, and describe each and every document upon which you rely or intent to rely in support of, or which forms in whole or in part the basis for your response.

INTERROGATORY NO. 21: If you have withheld any document from production on the basis of a claim of privilege, please state the following:

- (1) identify the document, including the author, date, number of pages, recipient and topic; and
- (2) identify the privilege claimed.

PAGE 10 OMITTED

REQUEST FOR PRODUCTION NO. 7: Please produce all documents identified to support your answer to Interrogatory No. 11.

REQUEST FOR PRODUCTION NO. 8: Please produce all documents identified to support your answer to Interrogatory No. 12.

REQUEST FOR PRODUCTION NO. 9: Please produce all documents identified to support your answer to Interrogatory No. 13.

REQUEST FOR PRODUCTION NO. 10: Please produce all documents identified to support your answer to Interrogatory No. 14.

REQUEST FOR PRODUCTION NO. 11: Please produce all documents identified to support your answer to Interrogatory No. 15.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents identified in your answer to Interrogatory No. 16.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents identified in your answer to Interrogatory No. 17.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents identified in your answer to Interrogatory No. 18.

REQUEST FOR PRODUCTION NO. 15: Please produce all documents identified in your answer to Interrogatory No. 19.

REQUEST FOR PRODUCTION NO. 16: Please produce any and all photographs, surveys, maps, or other documents which depict the Old Fence.

REQUEST FOR PRODUCTION NO. 17: Please produce any and all documents (as identified above) which support your allegation that Plaintiffs and Defendants entered into an agreement as to the construction, location, and cost of the New Fence.

REQUEST FOR PRODUCTION NO. 18: Please produce each and every document not already produced, which supports or tends to support the denials, assertions and/or affirmative defenses set forth in Defendants' Answer in this matter.

REQUEST FOR PRODUCTION NO. 19: Please produce any and all expert reports prepared by any expert retained by you in this matter.

REQUEST FOR PRODUCTION NO. 20: If you deny any of the following Requests for Admissions, please produce any and all documents on which you base your denial.

III.
REQUESTS FOR ADMISSION:

REQUEST FOR ADMISSION NO. 1: Admit that Plaintiffs and Defendants treated and recognized the Old Fence as the legal boundary between the Fischer Property and Croston Property since at least 1991 until August of 2015.

REQUEST FOR ADMISSION NO. 2: Admit that no one has legally resided and physically occupied the structure on the Croston Property since at least 1991.

REQUEST FOR ADMISSION NO. 3: Admit that the Old Fence existed at the time Defendants purchased the Croston Property in 1959.

REQUEST FOR ADMISSION NO. 4: Admit that no written contract exists between Plaintiffs and Defendants evidencing that they were in agreement as to ownership of Tract 1, the location of the New Fence, and that Plaintiffs would pay Defendants one-half of the cost of constructing the New Fence.

REQUEST FOR ADMISSION NO. 5: Admit that you received a letter in September 2015 from Plaintiffs attorney wherein Plaintiffs assert their ownership of Tract 1.

REQUEST FOR ADMISSION NO. 6: Admit that Plaintiffs objected to Defendants constructing the New Fence prior to its construction on September 27, 2015.

REQUEST FOR ADMISSION NO. 7: Admit that you paid no portion of the survey conducted by Ellsworth & Associates, PLLC as identified within paragraph 20 of the Complaint.

REQUEST FOR ADMISSION NO. 8: Admit that, since completing the New Fence, no livestock have been placed on the Croston Property.

REQUEST FOR ADMISSION NO. 9: Admit that you have never claimed ownership of or maintained Tract 1 prior to the construction of the New Fence.

Dated this 7th day of September, 2016.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 7th day of September, 2016, I served an original of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with Rule 5(b), I.R.C.P.

Document Served: Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission

Persons Served: Method of Service:

Robin D. Dunn, Esq.
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby, Idaho 83442
Fax No. (208) 745-8160

mail hand fax



W. Forrest Fischer

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN FISCHER,)
Trustees of the William and Ann Fischer)
Revocable Trust,)
)
Plaintiffs,) MINUTE ENTRY
)
vs.) Case No. CV-2016-2894
)
JAMES F. CROSTON and MARJORIE C. CROSTON)
Husband and wife, and all unknown)
Owners and/or other person or entities)
Claiming any interest in the following)
Described property,)
)
Defendants.)
)
_____)

On January 18, 2017, at 9:01 a.m. in Courtroom 5, Plaintiffs' motion for summary judgment and motion to strike came before the Honorable Joel E. Tingey, District Judge, appearing by telephonic connection in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Ms. Marlene Southwick, Court Clerk, were present.

Mr. Forrest Fischer and Mr. Andrew Rawlings appeared on behalf of the Plaintiffs.

Mr. Robin Dunn appeared on behalf of the Defendants.

Mr. Fischer presented Plaintiffs' motion to strike. Mr. Dunn addressed the Court in opposition to the motion to strike. Mr. Fischer presented rebuttal argument.

Mr. Fischer presented Plaintiffs' motion for summary

judgment. Mr. Dunn presented argument in opposition to the motion. Mr. Fischer presented rebuttal argument. Further argument was heard.

The Court will take the matter under advisement and issue a decision as soon as possible.

Court was thus adjourned.


JOEL E. TINGEY
District Judge

CERTIFICATE OF MAILING

I certify that on the 18 day of January, 2017, I caused a true and correct copy of the foregoing document to be delivered to the following:

PENNY MANNING


Deputy Court Clerk

Karl R. Decker
W. Forrest Fischer
PO Box 51030
Idaho Falls, ID 83405
Plaintiffs

FAX: 523-9518

Robin D. Dunn
PO Box 277
Rigby, ID 83422
Defendants

FAX: 745-8160

Send Result Report

MFP

ECOSYS M3550idn

Firmware Version 2NM_2000.002.304 2015.03.05

01/18/2017 16:56
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN FISCHER,)
Trustees of the William and Ann Fischer)
Revocable Trust,)

Plaintiffs,)

Vs.)

JAMES F. CROSTON and MARJORIE C. CROSTON)
Husband and wife, and all unknown)
Owners and/or other person or entities)
Claiming any interest in the following)
Described property,)

Defendants.)

MINUTE ENTRY

Case No. CV-2015-2894

On January 18, 2017, at 9:01 a.m. in Courtroom 5, Plaintiffs' motion for summary judgment and motion to strike came before the Honorable Joel E. Tingey, District Judge, appearing by telephonic connection in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Ms. Marlene Southwick, Court Clerk, were present.

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Mr. Fischer presented Plaintiffs' motion for summary

MINUTE ENTRY

-1-

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
001	01/18/17 16:54	95239518	0°00'28"	FAX	OK	200x100 Normal/On
002	01/18/17 16:56	97458160	0°00'19"	FAX	OK	200x100 Normal/On

17 JAN 19 P1 46

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fisher Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife, et al.,

Defendants/Counterclaimants.

Case No. CV-2016-2894

**MEMORANDUM DECISION
AND ORDER**

THIS MATTER is before the Court on Plaintiffs' Motion for Summary Judgment. Following the hearing and oral argument, the Court took the motion under advisement.

I. FACTS

This case revolves around a fence line separating Plaintiffs and Defendants' properties. The Fischers acquired the subject property in 1992 and transferred it to a trust on November 2, 2001. The Fishers are the trustees of the trust. They originally purchased the property from Douglas M. Ackerman and Cheryl A. Ackerman. The Ackermans acquired the property from the Kennedys, and the Kennedys acquired the property from the Barzee's. The Barzees lived on the property beginning in 1943.

James F Croston and Marjorie C. Croston own the adjacent property to the south of the Fischer property. The north boundary of The Crostons' property is the south

boundary of the Fischers' property. The Croston's acquired their property in March 1959. At the time the Crostons purchased their property, there was an existing post-and-wire fence running along the Fischer property's southern boundary, dividing the Fischer property from the Croston property. Evidence indicates that the fence had been in place at least since 1951.

In 2015, the Fischers noticed the old fence was in decay with portions of it falling on the Fischer property. The Fischers decided to replace it with the new more aesthetically pleasing fence in August 2015. However, in the midst of replacing the old fence the Crostons sent the Fischers a letter, dated September 4, 2015, threatening to sue the Fischers for trespass and malicious injury to their property. The Fischers then commissioned Ellsworth and associates to conduct a survey. Fischers claim that the purpose of the survey was to locate the line of the old fence so a new fence could be placed accurately on the old fence line. The Fischers further believed that the survey would reflect that the old fence line would be the same as the platted boundary between the properties.

Before the survey was conducted, Mrs. Fisher had a conversation with Jim Croston (the Croston's son) discussing her intention to have the land surveyed so that there could be no dispute about where the fence should be placed. The survey was done and revealed that the old fence line was south of the platted property line. As compared to the platted property line, the old fence line extended approximately 9 feet in to the Fischers property on the west side, and approximately 3 feet in onto the Fischers property on the east side. The tract of land between the old fence line and the platted boundary line, according to the survey, has been identified by the parties as "Tract 1".

After the survey, the Crostons built a new fence along the platted boundary. The Fischers then filed a Complaint against the Crostons seeking: 1) a declaration that the old fence is the true boundary line between the Fischer property and the Croston property under the doctrine of boundary line by agreement or acquiescence; 2) treble damages and attorney's fees for the Crostons' "willful and intentional trespass" and for committing waste under § 6-202 (or in the alternative, costs and attorney's fees under § 12-121). The Fischers now move for summary judgment on their claims as well as summary judgment dismissing Crostons' counter-claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate if "the pleadings, depositions, and admissions on file, if any, 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." I.R.C.P. 56(c). When considering a motion for summary judgment, any disputed facts are construed in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the nonmoving party. *Finholt v. Cresto*, 143 Idaho 894, 896, 155 P.3d 695, 697 (2007). If reasonable minds might come to different conclusions, summary judgment is inappropriate. *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

The party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009). Once the moving party establishes the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). In order to survive a motion for summary judgment,

the nonmoving party must show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *McGilvray v. Farmers New World Life Ins. Co.*, 136 Idaho 39, 42, 28 P.3d 380, 383 (2001), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). The non-moving party’s case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 960, 963 (1994).

In actions where the court is the trier of fact, the court may, in ruling on a motion for summary judgment, draw the most probable inferences arising from the undisputed evidentiary facts despite the possibility of conflicting inferences. *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009).

Drawing probable inferences under such circumstances is permissible because the court, as trier of fact, would be responsible for resolving conflicting inferences at trial. *Id.* Thus, although conflicting and disputed evidence must be viewed in a light favorable to the nonmoving party, conflicting inferences need not be. *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009).

Johnson v. McPhee, No. 39669, 2013 WL 6008690, at *5 (Idaho Ct. App. July 19, 2013).

III. ANALYSIS

A. Motion to Strike.

Fischers have move to strike the Affidavit of Linda D. Penning. The Court finds that the portions of the Affidavit that refer to Exhibits A, B, and D should be stricken on the basis of hearsay and lack of foundation. Penning has no personal knowledge as to the contents of those exhibits.

To the extent Fischers seek to strike other portions of the Affidavit, the motion is denied.

B. Motion for Summary Judgment.

The Fischers seek summary judgment on their claim to establish a boundary by agreement. The Fischers also seek summary judgment dismissing the Crostons counterclaim. The law regarding boundary by agreement is well settled.

A boundary by agreement thus “has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary.” *Luce v. Marble*, 142 Idaho 264, 271, 127 P.3d 167, 174 (2005). “[I]f the location of the true boundary is unknown to either of the parties, and is uncertain or in dispute, such coterminous owners may agree upon a boundary line.” *Id.* “[I]gnorance as to what is later deemed the true boundary” is sufficient to show uncertainty. *Morrissey*, 124 Idaho at 873, 865 P.2d at 964. Regarding the element of agreement, “[a]n agreement can be implied from the surrounding circumstances and conduct of the landowners,” or inferred from “[a] long period of acquiescence.” *Marble*, 142 Idaho at 271, 127 P.3d at 174. “Once a boundary line has been fixed under the doctrine of agreed boundary, that boundary is binding upon successors in interest who purchase with notice of the agreement. The general rule is that one purchasing property is put on notice as to any claim of title or right of possession which a reasonable investigation would reveal.” *Id.*

With particular regard to fences, this Court has “repeatedly found a boundary by agreement where a fence is treated as the property line for a number of years, there is no information about why the fence was built, and no evidence to disprove that the fence was intended to be a boundary.” *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 14, 232 P.3d 330, 335 (2010).

Sims v. Daker, 154 Idaho 975, 978, 303 P.3d 1231, 1234 (2013).

A presumption in favor of boundary by agreement exists “where such right has been definitely defined by erection of a fence ... on the line followed by such adjoining landowners treating it as fixing the boundary for such length of time that neither ought to be allowed to deny the correctness of its location.” *Edgeller*, 74 Idaho at 365, 262 P.2d at 1010; *see also Wakamatsu*, 75 Idaho at 241, 270 P.2d at 835 (noting that the law presumes boundary by agreement from the long existence and recognition of a fence as a boundary). In addition, in *Paurley v. Harris*, 75 Idaho 112,

117, 268 P.2d 351, 353 (1954), this Court noted that the period of acquiescence is regarded as competent evidence of the agreement. In the present case, the existence of the fence and maintenance of it for sixty years as well as the exclusive use and possession of the property by the Newports and the Johnsons and their predecessors on their respective sides of the old fence is sufficient to find an implied agreement that the old fence was to act as a boundary.

Johnson v. Newport, 131 Idaho 521, 523, 960 P.2d 742, 744 (1998).

“Thus, the statute does not require Cornwall to move the fence because there is no evidence the fence was erected in its current location by accident. Although the fence encroaches on Flying Elk's deeded property, it now marks the legal boundary between the parties.

In this case, there is no genuine dispute that the “old fence” that divided the properties for over 60 years constituted a boundary by an agreement. As such, the fence line set the boundary between the properties. While the fence line, or portions thereof, may have fallen over or been removed, the boundary between the properties would still be the old fence line. *Flying Elk Inv., LLC v. Cornwall*, 149 Idaho 9, 15–16, 232 P.3d 330, 336–37 (2010): “Once there is an agreed upon boundary, the parties to the agreement are no longer entitled to the amount of property provided for in their deeds and must absorb the effect of any increase or decrease in the amount of their property as a result of the new boundary” (citing *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001)). While there does not appear to be a disagreement as to the location of the old fence line, if there was, the Court would determine the location of the old fence line based upon evidence presented.

Once the fence line had fallen down or was removed, it would be possible for the Parties to make an oral agreement fixing a new fence line as the properties' boundary. *Morrissey v. Haley*, 124 Idaho 870, 872–73, 865 P.2d 961, 963–64 (1993) (quoting *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990)): “The doctrine of boundary

by agreement is well established in this state: “[w]here the location of a true boundary line on the ground is unknown to either of the parties, and is uncertain or in dispute, [the] coterminous owners [of the parcels involved] may orally agree upon a boundary line.”

Croston argues that there was a new boundary agreement based upon statements made by the Fischers and the Ellsworth survey of the platted property line. This Court disagrees for a number of reasons.

First, such an agreement must be between the actual owners of the adjacent properties. There is no evidence to support a claim that the Defendant Crostons, as owners of their property, reached an actual agreement with the Fischers regarding a new fence line and boundary.

Second, the evidence as to Ann Fischer’s alleged agreement is ambiguous at best. Considering the evidence in the best light to the Crostons, the Fischers intended to conduct a survey and put a new fence upon on the survey line. However, the reference to a “line” or “survey line” could only refer to the old fence line. It is undisputed that Ann Fischer had no knowledge that the survey would reflect that the old fence line differed from the platted boundary. Indeed, no party in interest had knowledge that the platted boundary line differed from the old fence line until after the survey. Where she believed that the old fence line was the same as the platted boundary line, she could not have been referring to some line other than the old fence line.¹ In any event, the comments made by Fischer are not sufficiently clear and precise to give rise to an enforceable agreement to change the property line.

¹ Boundaries by agreement are not subject to the statute of frauds. It is worth noting that once the survey was performed identifying the true boundary, there could be no boundary by agreement since a lack of knowledge as to the true boundary line is a prerequisite to an enforceable boundary by agreement. After the survey, any change to the property line would have to comply with the statute of frauds.

This Court has stated that for a contract to be specifically enforceable, it “must be complete, definite and certain in all of its material terms, or contain provisions which are capable in themselves of being reduced to certainty.” *Giacobbi Square v. PEK Corporation*, 105 Idaho 346, 348, 670 P.2d 51, 53 (1983).

P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust, 144 Idaho 233, 238, 159 P.3d 870, 875 (2007). There was not a clear or definite statement that the new fence (and alleged new boundary) would be on a line different from the old fence line.

Finally, to the extent the Fischers made comments to the effect that they had unilaterally intended to move the fence line further onto their property, there would be no enforceable agreement to that effect since there was no consideration given by the Crostons. Idaho Jury Instruction No. 6.04.1 provides as follows:

A promise is not enforceable as a contract unless something of value was given or was agreed to be given in exchange for it. In law, the giving of value or agreement to give value is called “consideration.” Consideration is the benefit given or agreed to be given by one party in exchange for the other party’s performance or promise to perform.

There is nothing in the record to suggest the Crostons gave up anything of value in exchange for the alleged decision of the Fischers to move the fence line northward thereby giving the Crostons more property.

It is true that a boundary by agreement can be abandoned by the adjacent landowners through a new agreement. See e.g. *Woodland v. Hodson*, 35 Idaho 514, 207 P. 715, 716 (1922). However, in this case, the Court finds that there was no abandonment for the same reasons that the Court finds that no contract was formed to adopt a new boundary line.

Accordingly, the Court finds that the old fence line constituted a boundary by agreement between the Fischer and Croston properties. The Court further finds that there was no agreement or contract to adopt a new boundary line. There does not appear to be a

genuine dispute as to the location of the old fence line such the area between the old fence line and the lot line (Tract 1) should be quieted in the Fischers. The Fischers would also be entitled to remove any encroachments.

Croston's counterclaim generally alleges that the Fischers breached an agreement as to a new boundary line, and breached an agreement to pay one-half of the cost of the fence Croston installed on the lot line. As indicated above, the Court found that there was no agreement as to a new boundary line and correspondingly, there could be no agreement to share in the cost of a fence in a location different than the old fence line. Again, the evidence does not support the claims made in the counterclaim and Fischers are entitled to summary judgment on the counterclaim.

C. Trespass.

Fischers allege in their complaint a right to recover for trespass and damages to their property under I.C. § 6-202. The evidence establishes that while this dispute was ongoing, the Fischers posted "No Trespassing" signs along the old fence line. The evidence also establishes that the Crostons, through their agents, crossed the old fence line into the Fischers' property and installed a fence. Such action constitutes a trespass pursuant to I.C. § 6-202. *Weitz v. Green*, 148 Idaho 851, 863, 230 P.3d 743, 755 (2010).

Pursuant to § 6-202, damages for such a trespass are \$50 or treble the amount of the damages for injury to "any tree or timber" on the property. Exhibit M to the Declaration of Forest Fischer constitutes a bid to remove the Crostons' fence in the amount of \$1278 and the cost of a new survey in the amount of \$600. Fischers claims that those costs are trebled under the statute. However, § 6-202 only allows for treble

damages arising from injuries to trees. Absent an injury to trees or timber, the statutory remedy is \$50.

C. Attorney Fees.

Section 6-202 also allows for a reasonable attorney fee for a party who prevails on a trespass claim. Such attorney fees are to be taxed as costs in reference to Rule 54, IRCP, which calls consideration of costs and attorney fees after the entry of judgment. As such, it is the Court's opinion that Fischers claims for attorney fees in the motion for summary judgment was premature. However, following the entry of a judgment in this matter, the Fischers are free to pursue costs and attorney fees pursuant to Rule 54.

IV. CONCLUSION

The Fischers' motion for summary judgment is granted. The old fence line constitutes the boundary between the Fischer and Croston properties and the Fischers are entitled to quiet title in Tract 1. The Fischers are entitled to recover \$50 for the Crostons' trespass onto the Fischer property. The Crostons' counter-claim is dismissed.

IT IS SO ORDERED.

Dated this 19 day of January, 2017.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of January, 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Karl R. Decker
W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO
1000 Riverwalk Dr., Suite 200
P.O. Box 50130 523-9518

Robin D. Dunn
Dunn Law Offices
477 Pleasant County Lane
P.O. Box 277
Rigby, ID 83422 745-8160

Clerk of the District Court
Bonneville County, Idaho

By ms
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife, et al.,

Defendants/Counterclaimants.

Case No. CV-2016-2894

JUDGMENT

Judgment is entered as follows:


1. Title in the following property is quieted and vested in William R. Fischer and
M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust:

Beginning at the Northeast corner of Lot 4, Block 12, of the Original
Ammon Townsite, Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest corner of said Lot 4; thence S.
00°00'21" W. along the West line of said Lot 4 a distance of 8.99 feet to
an existing fence line; thence S. 89°41'36" E. along said existing fence
line 329.90 feet to a point on the East line of said Lot 4; thence
N.00°00'21" E. along said East line 2.50 feet to the POINT OF
BEGINNING.

2. Plaintiffs are entitled to recover \$50 in trespass damages against Defendants,
with interest accruing at the statutory rate; and

3. Defendants' counterclaim is dismissed with prejudice.

Dated this 19 day of January, 2017.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of January, 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Karl R. Decker
W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO
1000 Riverwalk Dr., Suite 200
P.O. Box 50130

Robin D. Dunn
Dunn Law Offices
477 Pleasant County Lane
P.O. Box 277
Rigby, ID 83422

Clerk of the District Court
Bonneville County, Idaho

By ms
Deputy Clerk

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone (208) 523-0620
Facsimile (208) 523-9518

BONNEVILLE COUNTY, IDAHO

2017 JAN 31 PM 4: 35

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**AFFIDAVIT OF W. FORREST
FISCHER IN SUPPORT OF
MEMORANDUM OF ATTORNEYS'
FEES AND COSTS**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

STATE OF IDAHO)
)ss.
County of Bonneville)

W. Forrest Fischer, being first duly sworn on oath, deposes and says:

1. I am an attorney with the law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C., which is the law firm which represents Plaintiffs in the above-captioned matter.

2. This affidavit is made according to my personal knowledge, except to the extent that allegations are expressly made on information and belief., and in support of the Memorandum of Attorneys' Fees and Costs filed simultaneously herewith.

3. I have reviewed the billing and costs records of Holden, Kidwell, Hahn & Crapo, P.L.L.C. maintained for the above captioned matter and represent that, to the best of my knowledge and belief, the following items of costs and expenses are claimed in compliance with the Idaho Rules of Civil Procedure and were necessarily expenses and incurred in the above-entitled action on behalf of Plaintiffs:

a. Costs as a Matter of Right (Idaho R. Civ. P. 54(d)(1)(C))

DATE	EXPENSE	AMOUNT
May 25, 2016	Filing Fee – Complaint	\$221.00

June 14, 2016	Service of Process Fee	\$45.00
July 13, 2016	Publication of Summons	\$418.26
	TOTAL COSTS OF RIGHT	\$684.26

b. Costs as a Matter of Discretion (Idaho R. Civ. P. 54(d)(1)(D))

DATE	EXPENSE	AMOUNT
January 25, 2017	Recording Fee for Judgment	\$13.00
	TOTAL DISCRETIONARY COSTS	\$13.00

TOTAL COSTS: \$697.26

4. The law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C. expended 171.70 hours through January 29, 2017, in prosecuting the issues involved in this action for Plaintiffs and defending them against Defendants' Counterclaim. An itemization of the legal services provided by Holden, Kidwell, Hahn & Crapo, P.L.L.C. in connection with such matters is attached hereto as **Exhibit A**. The law firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C. has invoiced Plaintiffs for the legal services itemized on **Exhibit A** attached hereto which were provided in prosecuting this action in the total amount of \$31,131.00, which is allocated among the following attorneys at the following billing rates:

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NAME	HOURS	RATE	TOTAL FEES
Charles A. Homer	2.50	\$250.00	\$625.00
Peter D. Christofferson	2.70	\$200.00	\$540.00
Luke H. Marchant	0.40	\$180.00	\$72.00
D. Andrew Rawlings	13.40	\$150.00	\$2,010.00
Karl R. Decker	35.00	\$225.00	\$7,875.00
W. Forrest Fischer	117.70	\$170.00	\$20,009.00
TOTAL ATTORNEYS' FEES			\$31,131.00

5. I believe that the hourly rates charged by each of the attorneys listed above are consistent with the hourly rates charged by attorneys of similar experience, ability, and specialization within Southeast Idaho.

- a. Charles A. Homer has been a licensed attorney in Idaho since 1974;
- b. Peter D. Christofferson has been a licensed attorney since 2003, and has been admitted to practice in Idaho since 2009;
- c. Luke H. Marchant has been a licensed attorney in Idaho since 2008;
- d. D. Andrew Rawlings has been a licensed attorney in Idaho since 2014;
- e. Karl. R. Decker has been a licensed attorney in Idaho since 1985; and
- f. W. Forrest Fischer has been a licensed attorney since 2011, and has been admitted to practice in Idaho since 2016.

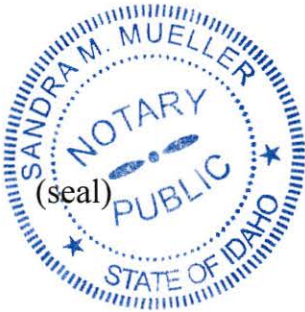
6. I believe that the total amount of attorneys' fees and costs incurred in this matter are reasonable, given the time and labor required, the novelty and difficulty of the legal questions in the case, the prevailing charges for like work, the experience, skill and ability of the attorneys performing the work, and the results obtained.

7. I have personal knowledge of the foregoing, am over eighteen (18) years of age, and would so testify if called upon in a court of law.

DATED this 31st day of January, 2017.

Forrest Fischer
W. Forrest Fischer

SUBSCRIBED and sworn to before me this 31st day of January, 2017.



Sandra M. Mueller
Notary Public for Idaho
Residing at Shelley, Idaho
My Commission Expires: 4/2/2022

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 31st day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

G:\WPDATA\WFF\18611 (Fischer Property)\Pleadings\9 - Memorandum of Fees and Costs\Aff of W. Forrest Fischer.docx

Date	Explanation	Fees	Hours	Atty.	Rate
Sep 22/2015	Review correspondence prepared by W. Fischer in regard to boundary line dispute; email correspondence to W. Fischer	\$100.00	0.40	CAH	\$250.00
Sep 25/2015	Client telephone conference to discuss property and fence-line history; review demand letter and settlement offer; discuss strategy with W. Fischer.	\$260.00	1.30	PDC	\$200.00
Sep 28/2015	Review correspondence from W. Fischer; compile quiet title complaint form to provide to W. Fischer.	\$75.00	0.30	CAH	\$250.00
Sep 28/2015	Compile complaint, summons, and prior case law to assist W. Fischer in instigating lawsuit with regard to fence-line dispute.	\$180.00	0.90	PDC	\$200.00
Sep 30/2015	Telephone conference with W. Fischer to discuss filing of complaint and summons; reviewed-mail correspondence exchanged between W. Fischer and R. Dunn regarding dispute.	\$80.00	0.40	PDC	\$200.00
Oct 13/2015	Review settlement proposal letter.	\$20.00	0.10	PDC	\$200.00
Jan 29/2016	Edit and revise complaint, phone call with title company regarding litigation guarantee.	\$374.00	2.20	WFF	\$170.00
Feb 4/2016	Conference with K. Decker regarding revisions and edits to verified complaint.	\$68.00	0.40	WFF	\$170.00
Feb 4/2016	Review and edit draft complaint. Intraoffice conference W. Fischer regarding case issues.	\$292.50	1.30	KRD	\$225.00
Feb 5/2016	Edit and revise complaint to add quiet title, declaratory judgment, and additional statements of fact; conference with K. Decker regarding the same; review court rules regarding service of process in another state.	\$272.00	1.60	WFF	\$170.00
Feb 5/2016	Intraoffice conference with W. Fischer regarding case issues.	\$112.50	0.50	KRD	\$225.00
Apr 6/2016	Review draft verified complaint to quiet title.	\$180.00	0.80	KRD	\$225.00
Apr 7/2016	Continue review and revision of draft complaint.	\$630.00	2.80	KRD	\$225.00
Apr 8/2016	Edit revise and continue drafting complaint.	\$340.00	2.00	WFF	\$170.00
Apr 14/2016	Adverse possession research; edit and revise complaint.	\$119.00	0.70	WFF	\$170.00
May 2/2016	Edit and revise pleadings, summons, publication, and affidavit.	\$221.00	1.30	WFF	\$170.00
May 9/2016	Legal research, conference with K. Decker, finalize complaint.	\$272.00	1.60	WFF	\$170.00
May 9/2016	Intraoffice conference regarding draft Complaint.	\$22.50	0.10	KRD	\$225.00
May 17/2016	Review draft verified complaint to quiet title.	\$180.00	0.80	KRD	\$225.00
May 18/2016	Review and revise draft complaint. Intraoffice conference with W. Fischer regarding case issues.	\$180.00	0.80	KRD	\$225.00
May 23/2016	Phone call with client; conference with K. Decker regarding complaint; edit and finalize complaint.	\$272.00	1.60	WFF	\$170.00

Date	Explanation	Fees	Hours	Atty.	Rate
May 23/2016	Intraoffice conference with W. Fischer regarding draft Complaint. Review draft complaint and documents.	\$180.00	0.80	KRD	\$225.00
May 31/2016	Intraoffice conference with W. Fischer. Final draft complaint.	\$22.50	0.10	KRD	\$225.00
Jun 13/2016	Review copy of order for service by publication and summons received from court today. Intraoffice conference regarding default deadline.	\$45.00	0.20	KRD	\$225.00
Jun 13/2016	Follow up on affidavit of service; legal research regarding default procedure; scheduling time for default; review order granting publication; review publication from post register.	\$85.00	0.50	WFF	\$170.00
Jun 21/2016	Review notice of appearance; conference with K. Decker regarding the same.	\$51.00	0.30	WFF	\$170.00
Jun 21/2016	Review email of fax of notice of appearance. Intraoffice conference regarding case issues.	\$67.50	0.30	KRD	\$225.00
Jun 27/2016	Legal research regarding changes in rules for notice of intent to take default.	\$51.00	0.30	WFF	\$170.00
Jun 28/2016	Preparation of notice of intent to take default.	\$90.00	0.40	KRD	\$225.00
Jun 28/2016	Draft, edit and revise notice of intent to take default; review repository regarding notice of intent to take default.	\$187.00	1.10	WFF	\$170.00
Jul 1/2016	Review answer and counterclaims; conference with K. Decker; e-mail opposing counsel regarding deposition dates.	\$170.00	1.00	WFF	\$170.00
Jul 1/2016	Review fax of answer to complaint. Intraoffice conference W. Fischer regarding case issues. Calendar answer to counterclaim.	\$180.00	0.80	KRD	\$225.00
Jul 5/2016	Draft answer to counterclaim; legal research regarding statute of frauds on oral contracts for boundaries; draft notice of trial setting.	\$459.00	2.70	WFF	\$170.00
Jul 6/2016	Intraoffice conference regarding issues in drafting answer to counterclaim.	\$90.00	0.40	KRD	\$225.00
Jul 6/2016	Edit and revise answer; conference with K. Decker regarding the same.	\$102.00	0.60	WFF	\$170.00
Jul 8/2016	Review email from W. Fischer regarding amended survey monument statute. Review draft letter to Robin Dunn. Revise draft answer to counterclaim. Revise draft request for trial setting.	\$180.00	0.80	KRD	\$225.00
Jul 11/2016	Conference with K. Decker regarding case.	\$119.00	0.70	WFF	\$170.00
Jul 11/2016	Intraoffice conference regarding case issues. Review proof of publication from Post Register regarding service of summons.	\$67.50	0.30	KRD	\$225.00
Jul 12/2016	Edit and revise pleadings.	\$153.00	0.90	WFF	\$170.00
Jul 12/2016	Intraoffice conference regarding case issues. Revise draft answer to counterclaim.	\$112.50	0.50	KRD	\$225.00

Date	Explanation	Fees	Hours	Atty.	Rate
Jul 13/2016	Email opposing counsel regarding deposition times.	\$17.00	0.10	WFF	\$170.00
Jul 13/2016	Conference with K. Decker regarding survey; phone call with surveyor; review Ammon survey	\$272.00	1.60	WFF	\$170.00
Jul 13/2016	Intraoffice conference regarding case issues. Review recorded record of survey. Review draft and final email to Robin Dunn regarding depositions.	\$112.50	0.50	KRD	\$225.00
Jul 14/2016	Review and respond to e-mail from opposing counsel regarding depositions.	\$34.00	0.20	WFF	\$170.00
Jul 14/2016	Review email regarding deposition location. Intraoffice conference with W. Fischer regarding deposition issues.	\$22.50	0.10	KRD	\$225.00
Jul 15/2016	Intraoffice conference regarding case issues.	\$67.50	0.30	KRD	\$225.00
Jul 15/2016	Assist with review of aerial imagery available to show fence line.	\$72.00	0.40	LHM	\$180.00
Jul 18/2016	review emails from opposing counsel; conference with K. Decker regarding the same.	\$187.00	1.10	WFF	\$170.00
Jul 18/2016	Intraoffice conferences regarding case issues.	\$225.00	1.00	KRD	\$225.00
Jul 22/2016	review order for telephonic status conference	\$17.00	0.10	WFF	\$170.00
Jul 22/2016	Review fax order for telephonic status conference. Calendar hearing on August 23, 2016 at 8:30 a.m. File order.	\$90.00	0.40	KRD	\$225.00
Jul 27/2016	Draft discovery.	\$646.00	3.80	WFF	\$170.00
Aug 23/2016	Prepare for status conference regarding trial schedule.	\$67.50	0.30	KRD	\$225.00
Aug 23/2016	Telephonic status conference with Judge Tingy.	\$34.00	0.20	WFF	\$170.00
Aug 24/2016	Review Order and Notice Setting Court Trial. Calculate deadlines.	\$90.00	0.40	KRD	\$225.00
Sep 2/2016	Edit and revise discovery.	\$119.00	0.70	WFF	\$170.00
Sep 6/2016	Conference with C. Homer regarding discovery.	\$34.00	0.20	WFF	\$170.00
Sep 6/2016	Conference with C. Homer regarding discovery; edit and revise first interrogatories and requests for production.	\$119.00	0.70	WFF	\$170.00
Sep 6/2016	Review and revise discovery pleadings.	\$150.00	0.60	CAH	\$250.00
Sep 7/2016	Review case law on implied boundary line; finalize discovery.	\$272.00	1.60	WFF	\$170.00
Oct 10/2016	Review rules regarding discovery and service in preparation for Defendant's failure to respond to discovery; conference with C. Homer regarding the same; review rules regarding failure to respond to requests for admission.	\$272.00	1.60	WFF	\$170.00
Oct 11/2016	Review incoming discovery responses; conference with C. Homer and K. Decker; phone call with client.	\$323.00	1.90	WFF	\$170.00

Date	Explanation	Fees	Hours	Atty.	Rate
Oct 11/2016	Intraoffice conference regarding discovery responses.	\$112.50	0.50	KRD	\$225.00
Oct 19/2016	Begin review of discovery pleading.	\$25.00	0.10	CAH	\$250.00
Oct 21/2016	Review correspondence to attorney R. Dunn.	\$25.00	0.10	CAH	\$250.00
Oct 24/2016	Email to R. Dunn requesting CD from discovery.	\$17.00	0.10	WFF	\$170.00
Nov 2/2016	Email to R. Dunn requesting production of documents pursuant to Rule 37.	\$17.00	0.10	WFF	\$170.00
Nov 7/2016	Review CD contents; draft email to opposing counsel requesting missing documentation.	\$68.00	0.40	WFF	\$170.00
Nov 14/2016	Draft email to Opposing Counsel regarding missing documentation.	\$34.00	0.20	WFF	\$170.00
Nov 14/2016	Review incoming discovery documents from opposing party.	\$51.00	0.30	WFF	\$170.00
Nov 16/2016	Review transcript of voice mail; conference with client regarding the same.	\$51.00	0.30	WFF	\$170.00
Nov 17/2016	Discuss potential summary judgment with C. Homer.	\$119.00	0.70	WFF	\$170.00
Nov 17/2016	Intra-office conference to review discovery pleadings and discuss preparation of pleadings on Motion for Summary Judgment.	\$250.00	1.00	CAH	\$250.00
Nov 28/2016	Legal research in preparation for Motion for Summary Judgment.	\$391.00	2.30	WFF	\$170.00
Nov 28/2016	Intraoffice conference with C. Homer regarding case issues. Intraoffice conference with W. Fischer regarding case issues.	\$45.00	0.20	KRD	\$225.00
Nov 28/2016	Intraoffice conference regarding hearing scheduling issues.	\$22.50	0.10	KRD	\$225.00
Nov 30/2016	Assess claims, counterclaims, and facts in preparation for Motion for Summary Judgment.	\$105.00	0.70	DAR	\$150.00
Nov 30/2016	Conference with A. Rawlings regarding case; legal research; begin draft of motion for summary judgment.	\$680.00	4.00	WFF	\$170.00
Dec 1/2016	Continue draft of motion for summary judgment; phone call with City of Ammon; investigation of prior owners of respective properties.	\$459.00	2.70	WFF	\$170.00
Dec 1/2016	Intraoffice conferences regarding case issues.	\$90.00	0.40	KRD	\$225.00
Dec 2/2016	Phone call with L. Kennedy and Sharon Anderson; draft affidavits regarding the same; continue drafting motion for summary judgment.	\$714.00	4.20	WFF	\$170.00
Dec 2/2016	Intraoffice conference regarding case issues.	\$45.00	0.20	KRD	\$225.00
Dec 5/2016	Continue draft of motion for summary judgment.	\$510.00	3.00	WFF	\$170.00

Date	Explanation	Fees	Hours	Atty.	Rate
Dec 6/2016	Legal research regarding statute of frauds as applied to boundary line by agreement; phone call with local attorney regarding boundary line cases; edit and revise motion for summary judgment; conference with A. Rawlings regarding counterclaim section.	\$561.00	3.30	WFF	\$170.00
Dec 6/2016	Email to S. Anderson regarding declaration concerning Old Fence.	\$68.00	0.40	WFF	\$170.00
Dec 6/2016	Intraoffice conference regarding summary judgment motion issues.	\$67.50	0.30	KRD	\$225.00
Dec 6/2016	Discuss motion for summary judgment regarding Creston's counterclaims; start editing draft memorandum.	\$105.00	0.70	DAR	\$150.00
Dec 7/2016	Phone call with S. Anderson; edit and revise motion for summary judgment; counterclaim	\$425.00	2.50	WFF	\$170.00
Dec 7/2016	Finish editing draft of memorandum.	\$435.00	2.90	DAR	\$150.00
Dec 8/2016	Edit and revise motion for summary judgment.	\$442.00	2.60	WFF	\$170.00
Dec 9/2016	Edit and revise motion for summary judgment; legal research regarding authority to contract; draft section on agent authority; begin drafting declarations and assembling exhibits.	\$799.00	4.70	WFF	\$170.00
Dec 9/2016	Edits to motion for summary judgment.	\$375.00	2.50	DAR	\$150.00
Dec 13/2016	Edit and revise motion and supporting declarations; begin assembling exhibits; conference with K. Decker regarding the same.	\$697.00	4.10	WFF	\$170.00
Dec 13/2016	Review draft memorandum in support of motion for summary judgment.	\$517.50	2.30	KRD	\$225.00
Dec 14/2016	Intraoffice conference with W. Fischer. Continue revising draft memorandum in support of motion for summary judgment.	\$945.00	4.20	KRD	\$225.00
Dec 14/2016	Add additional argument regarding statute of frauds into motion for summary judgment; legal research regarding the same; edit and revise motion.	\$986.00	5.80	WFF	\$170.00
Dec 15/2016	Intraoffice conference regarding case issues.	\$45.00	0.20	KRD	\$225.00
Dec 15/2016	Continue work on motion for summary judgment; assemble exhibits for declarations; arrange declaration for S. Anderson; conference with K. Decker regarding the same.	\$731.00	4.30	WFF	\$170.00
Dec 19/2016	Intraoffice conference regarding case issues. Revise draft declarations of Johnson and Fischer.	\$112.50	0.50	KRD	\$225.00
Dec 19/2016	Finalize motion for summary judgment with associated exhibits and declarations; prepare for filing and service on Tuesday.	\$544.00	3.20	WFF	\$170.00

Date	Explanation	Fees	Hours	Atty.	Rate
Dec 19/2016	Review email from W. Fischer with draft memorandum. Revise draft memorandum. Email revisions to Forrest Fischer.	\$337.50	1.50	KRD	\$225.00
Dec 20/2016	Visit with L. Kennedy regarding declaration; prepare documents for filing; fax to R. Dunn; prepare for court filing; complete the same.	\$578.00	3.40	WFF	\$170.00
Jan 3/2017	Review motion to continue trial; conference with K. Decker regarding the same.	\$68.00	0.40	WFF	\$170.00
Jan 3/2017	Intraoffice conference regarding attorney Robin Dunn's motion to continue trial.	\$90.00	0.40	KRD	\$225.00
Jan 4/2017	Review opposition to summary judgment.	\$136.00	0.80	WFF	\$170.00
Jan 4/2017	Intraoffice conferences with W. Fischer regarding case issues to reply to Crostons' response to summary judgment. Share research regarding Garcia v. Absolute Bail Bonds, LLC.	\$292.50	1.30	KRD	\$225.00
Jan 4/2017	Discuss motion to strike affidavit with K. Decker.	\$85.00	0.50	WFF	\$170.00
Jan 5/2017	Legal research in preparation for motion to strike affidavit.	\$289.00	1.70	WFF	\$170.00
Jan 9/2017	Draft Motion to Strike; Draft Decl of W. Fischer in support of motion to strike; draft response to motion to continue; legal research for motion to strike; edit and revise motions.	\$765.00	4.50	WFF	\$170.00
Jan 9/2017	Draft Motion to Shorten Time; discuss Reply Memorandum with Forrest Fischer; draft Reply Memorandum.	\$450.00	3.00	DAR	\$150.00
Jan 9/2017	Intraoffice conference regarding Motion to Strike. Revise draft Motion to Strike.	\$180.00	0.80	KRD	\$225.00
Jan 10/2017	Draft, edit, and revise Response in support of motion for summary judgment; additional edits to motion to strike and motion to shorten time; conference with A. Rawlings and K. Decker regarding the same.	\$1,054.00	6.20	WFF	\$170.00
Jan 10/2017	Research and draft portions of Reply Memorandum; edit first draft of Reply Memorandum.	\$540.00	3.60	DAR	\$150.00
Jan 10/2017	Intraoffice conference regarding Motion to Strike issues. Revise draft Motion to Strike affidavit of Linda Penning, revise draft declaration in support of Motion to Strike. Revise draft notice of hearing on Motion to Strike. Revise draft Memorandum in Support of Motion to Strike. Revise draft Motion to Shorten Time. Revise Notice of Hearing. Revise draft Reply in support of Summmary Judgment Memorandum.	\$562.50	2.50	KRD	\$225.00

Date	Explanation	Fees	Hours	Atty.	Rate
Jan 11/2017	Edit and finalize reply in support of motion for summary judgment; prep for file with the Court and service upon opposing counsel.	\$765.00	4.50	WFF	\$170.00
Jan 11/2017	Continue revising draft reply memorandum in support of motion for summary judgment. Intraoffice conference with W. Fischer regarding draft memorandum.	\$112.50	0.50	KRD	\$225.00
Jan 17/2017	Prep for oral argument.	\$714.00	4.20	WFF	\$170.00
Jan 17/2017	Intraoffice conference with W. Fischer regarding summary judgment oral argument issues. Review accord and satisfaction research, evaluate with W. Fischer.	\$472.50	2.10	KRD	\$225.00
Jan 18/2017	Intraoffice conference with W. Fischer regarding case issues.	\$67.50	0.30	KRD	\$225.00
Jan 18/2017	Travel to and from courthouse; prepare for hearing; hearing on MSJ; phone call with client regarding outcome.	\$442.00	2.60	WFF	\$170.00
Jan 18/2017	Review minute entry from court.	\$34.00	0.20	WFF	\$170.00
Jan 19/2017	Review Decision and Judgment from Court.	\$85.00	0.50	WFF	\$170.00
Jan 29/2017	Prep attorney fees and costs affidavit and memorandum.	\$969.00	5.70	WFF	\$170.00
Jan 29/2017	Prep attorney fees and costs affidavit and memorandum.	\$450.00	2.00	KRD	\$225.00
TOTAL		\$31,131.00	171.70		

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
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Idaho Falls, ID 83405
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Facsimile (208) 523-9518

BONNEVILLE COUNTY, IDAHO
2017 JAN 31 PM 4:35

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58'' W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21''W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36'' E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21'' E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**MEMORANDUM OF ATTORNEYS'
FEES AND COSTS**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

Plaintiffs/Counter Defendants, William R. Fischer And M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“Plaintiffs”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., herby submit this Memorandum of Attorneys’ Fees and Costs (“Memorandum”) pursuant to Rule 54 of the Idaho Rules of Civil Procedure. By submitting this Memorandum, Plaintiffs claim the right, pursuant to Rule 54 of the Idaho Rules of Civil Procedure, Idaho Code § 6-202, and Idaho Code § 12-121, to recover from Defendants the costs and attorneys’ fees incurred in maintaining the above-captioned matter. The amount of attorneys’ fees and costs is supported by the Affidavit of W. Forrest Fischer in Support of Memorandum of Attorneys’ Fees and Costs (“Affidavit”) which is filed concurrently herewith.

As of the date of this Memorandum, Plaintiffs have incurred the following attorneys’ fees and costs in the above-captioned matter: **\$31,131.0** in attorneys’ fees; **\$684.26** in costs as a matter of right; and **\$13.00** in discretionary costs which are specifically described and itemized in the Affidavit. To the best of the knowledge and belief of the undersigned, these amounts are correct and such costs and fees are claimed by Plaintiffs in compliance with Rule 54 of the Idaho Rules of Civil Procedure. This Memorandum is supported by the Affidavit of the undersigned, which is incorporated herein by reference.

DATED this 31st day of January, 2017.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 31st day of January, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

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2017 FEB -2 AM 11:02

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

rdunn@dunnlawoffices.com

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

William R. Fischer, et. al.)	Case No. CV-16-2894
)	
Plaintiffs,)	OBJECTION TO THE
vs.)	PLAINTIFFS' REQUEST
)	FOR FEES AND COSTS
James F. Croston, et. al.)	
)	
Defendants.)	
_____)	

COMES NOW, Defendant and OBJECTS to the Plaintiffs' request for fees and costs. The objection is based upon Rule 54 IRCP and specifically Rule 54(d)(6) and 54(e)(6).

Idaho follows what has been named "the American Rule"¹ when deciding the issue of attorney fees. The Supreme Court of the State of Idaho has in place, for numerous years, guidance on this issue. The first major treatise on the issue was written by *Lon Davis, Esq* in 1990. He was the personal attorney for the Idaho Supreme Court for numerous years. A treatise was updated by the Hon. Jesse Walters entitled, "*A Primer for Awarding Attorney*

1 The American Rule only allows for fees if there is an underlying statute or contract for entitlement.

Fees in Idaho", Idaho Law Review, Volume 38, Number 1 (2001)². The Walters publication explains the major statutes and all cases through the date of the publication. His treatise walks the reader through every step in the fee award process. According to the Justice, fees cannot be awarded as an "equity" determination or by the court sua sponte if not claimed under a pertinent statute. There is no inherent power of the court to award attorney fees. In sum, there must be a statute or rule to rely upon except in limited circumstances.³

Therefore, in the instant case the plaintiff relies upon the statutory language of I.C. Section 12-121 which must be read in conjunction with IRCP, Rule 54 wherein the case must be[defended] frivolously, without foundation and so forth. IRCP, Rule 54(e)(1). This is the "frivolous" section that applies to fees.

The court is well aware that the fence in question was not maintained, was in disrepair and did not even exist in places throughout the fence line. Further, there was gravel stacked on the property of the defendants encroaching on the line. An examination of the affidavits granting summary judgment calls into question the verbal agreement of the parties as to placing the new fence on the existing boundary.

Remember that the plaintiffs sought a new survey which should persuade the court that there was some reason for the parties to believe that the new survey was important to settle the case. The court did not even need the survey; yet, the plaintiffs desired a survey. It does provide that the parties were of some belief that the survey was important.

Additionally, the court was aware that only a temporary fence was placed on the survey line by the defendants until the court could rule. Thus, the defendants were trying to wait until a solution could be resolved.

Plaintiffs also rely on I.C. § 6-202 for fees under the trespass statute. The court

² Justice Walters personally awarded this primer to the undersigned, after its publication, on March 29, 2002.

³ One noted exception is the Private Attorney General provision which is not relevant in the case at bar.

should examine the affidavit for fees and determine that little, if any relevant time, was spent on the trespass issue. Moreover, the court only awarded nominal damages of \$50 for trespass. This is hardly a reason to award fees for the pyric victory of the plaintiffs on trespass.

Costs of a matter of right cannot be argues and the discretionary cost is minor.

The defendants object to any award of fees since a contractual or statutory basis does not exist. Costs are set by statute.

The factors of 54(e) are as follows:

Rule 54(e)(3). Amount of attorney fees. In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

In sum, a statutory basis must exist for the award of fees; and, the rule [54] provides fees for the prevailing party. Costs are determined as of right and by discretion pursuant to IRCP, Rule 54(d)(1). Therefore, the court fixes the appropriate award. As discussed above, §12-121 cannot apply because the case was defended properly and in good faith. Without belaboring the point, it is alleged that the defendant did not pursue or

defend this cause without basis. The testimony of both parties was heavily contested. The court believed the plaintiffs' version of the facts.

CONCLUSION

The defendant objection is well founded because a contract or statutory basis does not exist to support fees.

Dated this 2nd day of February, 2017.



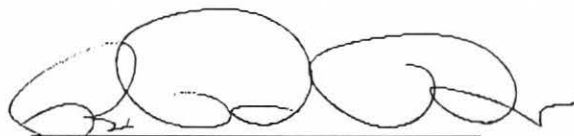
Robin D. Dunn, Esq.

NOTICE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2017, I delivered a true and correct copy of the foregoing to:

Forrest Fischer, Esq.
523-9518

- Hand Delivery
- Postage-prepaid Mail
- Facsimile Transmission
- Courthouse Box



Robin D. Dunn, Esq.
Dunn Law Offices, PLLC

Karl R. Decker, ISB #3390
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BONNEVILLE COUNTY
IDAHO
2017 FEB -6 PM 3:24

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants.

Case No. CV-2016-2894

**REPLY IN SUPPORT OF
MEMORANDUM OF ATTORNEYS'
FEES AND COSTS**

JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife;

Counter Claimants,

vs.

WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,

Counter Defendants.

Plaintiffs/Counter Defendants, William R. Fischer And M. Ann Fischer, Trustees of the William and Ann Fischer Revocable Trust (“Plaintiffs”), by and through their counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., herby submit this Reply in Support of Plaintiffs’ Memorandum of Attorneys’ Fees and Costs (“Reply”), pursuant to Rule 54 of the Idaho Rules of Civil Procedure.

ARGUMENT

1. Defendants do not object the amount of attorneys’ fees and costs requested by Plaintiffs.

As a preliminary matter, the Court should take notice that within their “Objection to the Plaintiffs’ Request for Fees and Costs” (“Objection”), Defendants James F. Croston and Marjorie C. Croston (“Defendants”) **do not** challenge, or otherwise object to: (1) the reasonableness of the attorneys’ fees and costs requested by Plaintiffs; (2) the amount of time expended; (3) the hourly rates charged by Plaintiffs’ attorneys; or (4) the total amount of fees requested, as detailed in the Affidavit of W. Forrest Fischer in Support of Memorandum of Attorneys’ Fees and Costs. By failing to object on these grounds, Defendants waived their ability and right to contest the amount of attorneys’ fees. *Farris Whsle., Inc. v. Howell*, 105 Idaho 699, 704, 672 P.2d 577, 582 (Ct. App. 1983). Therefore, if the Court deems that Plaintiffs are entitled to an award of attorneys’ fees and

costs, it should consider the amounts claimed as unchallenged and subject only to the Court's discretion.

2. An award of Plaintiffs' attorneys' fees is mandatory under Idaho Code § 6-202.

Defendants' sole argument alleges that Plaintiffs lack a statutory basis to support an award of attorneys' fees and costs in their favor. *Objection*, p. 4. Defendants are incorrect. The Court found that Defendants trespassed upon Plaintiffs' property pursuant to Idaho Code § 6-202. Violation of this statute carries with it a mandatory award of attorneys' fees for the prevailing party.

Idaho Code § 6-202 states that any person who commits trespass "is liable to the owner of such land...for treble the amount of damages which may be assessed therefor or fifty dollars (\$50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails." In applying this statute, Idaho case law clearly holds that "in a trespass action...I.C. § 6-202 **mandates** that a reasonable attorney fee be awarded to the prevailing 'plaintiff.'" *Bubak v. Evans*, 117 Idaho 510, 512, 788 P.2d 1333, 1335 (Ct. App. 1989) (**emphasis added**); *see also Akers v. Mortensen*, 156 Idaho 27, 36, 320 P.3d 418, 427 (2014).

In this case, an award of Plaintiffs' attorneys' fees and costs is mandatory. Specifically, the Court found that Defendants, "through their agents, crossed the old fence line into [Plaintiffs'] property and installed a fence" and therefore held that Defendants committed trespass under Idaho Code § 6-202. *Memorandum Decision and Order*, p. 9 ("Decision"). Thus, the Court awarded Plaintiffs' the statutory fine of \$50.00 in damages, while reserving the award of attorneys' fees for subsequent briefing:

Section 6-202 also allows for a reasonable attorney fee for a party who prevails on a trespass claim....such attorney fees are to be taxes as costs in reference to Rule 54.

Decision, at 10. Because Defendants violated Idaho Code § 6-202 and because Plaintiffs are the prevailing party, the Court is required to award Plaintiffs their attorneys' fees as a matter of law. *Buback*, 117 Idaho at 512, 788 P.2d at 1335. Defendants' counter argument that Plaintiffs are not entitled to an award of fees is incorrect and should be disregarded.

3. Defendants' apportionment argument is inapplicable because Plaintiffs' claims for relief are inextricably intertwined.

Defendants also argue that the "[t]he court should examine the affidavit for fees and determine that little, if any relevant time, was spend on the trespass issue." *Objection*, at pp. 2-3. While not specifically stated, it appears that Defendants are making a one-lined argument for an apportionment of attorneys' fees. However, Defendants provide no statutory basis or case law to support such an apportionment argument. Furthermore, Defendants place the onus of determining the amount of apportionment on the Court – *i.e.* they want the Court make their arguments for them. This is improper. As stated by the Idaho Supreme Court, any motion objecting to fees must comply with Idaho Rule of Civil Procedure 7(b)(1) which requires that it "state with particularity the grounds therefor." *Fagen, Inc. v. Rogerson Flats Wind Park, LLC*, 159 Idaho 624, 628, 364 P.3d 1189, 1193 (2016). In *Fagen*, the Idaho Supreme Court affirmed the lower court's ruling that failing to provide specific objections functionally results in a failure to object altogether:

Defendants fail to raise any specific objection, or to point out any specific time/work entry or other billing entry of Fagen's materials submitted in support of its attorney fees claim as objectionable. Absent such specific objection, the Court concludes that Defendants have failed to identify or demonstrate with any degree of particularity any manner in which Fagen's claimed attorney fees are unreasonable, disproportionate, excessive, or otherwise inappropriate.

Id. In this case, Defendants similarly failed to “identify or demonstrate with any degree of particularity” that Plaintiffs’ claim of attorneys’ fees are “unreasonable, disproportionate, excessive, or otherwise inappropriate.” Accordingly, the Court should disregard Defendants’ objections and consider Plaintiffs’ request for fees and costs as unopposed.

Even if Defendants brought a proper objection, Plaintiffs are still entitled to the full amount of their attorneys’ fees and costs because issues in this case are inextricably intertwined. Plaintiffs’ trespass claim against Defendants is inseparable from their other claims within the Complaint. In cases where a claim for trespass is intertwined or overlaps with other causes of action, Idaho courts have awarded attorneys’ fees under Idaho Code §6-202 to cover those associated claims. *See Bumgarner v. Bumgarner*, 124 Idaho 629, 644, 862 P.2d 321, 336 (Ct. App. 1993) (“some of the legal work performed on those claims overlapped with Kent’s successful claim for trespass to the west end of his lot, and that Kent was entitled to recover those fees.”); *Bubak v. Evans*, 117 Idaho 510, 513, 788 P.2d 1333, 1336 (Ct. App. 1989) (finding that the district court did not abuse its discretion when it awarded all of plaintiffs attorney’s fees under I.C. § 6-202 even though the lawsuit included a quiet title action). Moreover, Plaintiffs’ trespass claim goes to the heart of Defendants’ Counterclaim. Plaintiffs’ claim for trespass entirely depended upon establishing that the Old Fence marked the true boundary line between the parties’ respective properties and that Tract 1 legally belonged to them by operation of boundary line by agreement or acquiescence. *See Memorandum in Support of Plaintiffs’ Motion for Summary Judgment*, p. 27, Dec. 20, 2016 (“Memorandum”). One of the required elements of Idaho Code § 6-202 to establish a trespass is entry “upon the real property of another.” In order to establish this element, Plaintiffs had to demonstrate that Tract 1 legally belonged to them, while at the same time refuting Defendants’

counterclaim claiming title to Tract 1. Thus, Plaintiffs could not prevail on their claim for trespass without establishing and prevailing on their other claims and rebutting Defendants' Counterclaim.

For these reasons, apportionment of the fees claimed by Plaintiff are unwarranted because all the time expended in this case culminated in the Court holding Defendants guilty of trespass under Idaho Code § 6-202. Accordingly, Plaintiffs are entitled to recover all their attorneys' fees and costs under the provisions of Idaho Code §6-202.

4. If the Court apportions Plaintiffs' award of attorney' fees based on trespass, the remainder of their attorneys' fees should be awarded pursuant to Idaho Code § 12-121.

Plaintiffs also requested attorneys' fees under Idaho Code § 12-121. This statute provides that the "judge may award reasonable attorney's fees to the prevailing party or parties." If the Court apportions Plaintiffs' award of attorneys' fees based on trespass, then the remainder of their attorneys' fees should be awarded to Plaintiffs as the prevailing party pursuant to Idaho Code § 12-121.

Currently, Idaho Rule of Civil Procedure 54(e)(2) – which is set to be struck on March 1, 2017 – limits the courts' discretion to award attorney fees to those instances where the case was "brought, pursued or defended frivolously, unreasonably or without foundation." A claim is frivolous if it is "[l]acking a legal basis or legal merit." Black's Law Dictionary (10th ed. 2014). Idaho courts have found that a party's failure to provide argument or authority to support his or her claim is sufficient for an award of attorneys' fees to the prevailing opposing party, under Idaho Code § 12-121. *See Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 305, 939 P.2d 1382, 1384 (1997); *see also Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 744, 979 P.2d 605, 617 (1999) (failure to provide proper authority in briefing and failing to provide evidence showing a cause of action are grounds for an award of attorneys' fees under I.C. §12-121).

Here, Defendants' Counterclaim and overall opposition in this matter was frivolous and pursued without foundation. Defendants conclusively demonstrated this fact by failing to provide even a scintilla of legal authority or evidence to support their claims during the summary judgment proceedings. Defendants' Objection is also frivolous for the same reasons. Defendants make allegations and claims of fact within their Objection that are not supported by the record or the Court's Decision. They argue that an oral agreement existed between the parties, and that this agreement justified their Counterclaim. However, this Court clearly held that there was no evidence that such an agreement between the parties existed. *Decision*, at 7. Furthermore, Defendants seek to introduce a new argument that the new fence they erected was only "temporary," as though (1) there was evidence of this temporary nature; and (2) that the nature of the fence somehow renders their Counterclaim and defenses reasonable. *Objection*, at 2. There are simply no facts within the record that support this claim.

In the end, Defendants' Objection serves as yet another illustration that their Counterclaim and opposition in this matter was frivolous and without basis or foundation. Defendants cannot simply throw out haphazard arguments, lacking any support whatsoever, only to then claim that these arguments were based on law and fact without consequence.

If the Court does not find that Defendants defended frivolously, unreasonably, or without foundation, Plaintiffs are nevertheless entitled to their fees and costs under Idaho Code §12-121 due to the reasoning in the Idaho Supreme Court's recent decision *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681, 696 (2016). In *Hoffer*, the Idaho Supreme Court stated that "prevailing parties in civil litigation have the right to be made whole for attorney fees they have incurred 'when justice so requires.'" *Id.* (citation omitted). Though the court made this ruling prospective, taking effect on March 1, 2017, the court's reasoning for the change arguably warrants that it take effect

immediately. Specifically, the Idaho Supreme Court found that the court lacked authority to change a clear legislative pronouncement when it adopted Idaho Rule of Civil Procedure 54(e)(2), which limits recovery under Idaho Code §12-121 to cases where claims were brought or defended “frivolously, unreasonably or without foundation.” If the court had no authority to restrict the effect of Idaho Code § 12-121, then the restrictions of Idaho Rule of Civil Procedure 54(e)(2) are void *ab initio*, and not merely after March 1, 2017 if the legislature chooses not to act. Accordingly, the Court should award Plaintiffs their reasonable attorneys’ fees under Idaho Code § 12-121.

CONCLUSION

Plaintiffs request that they be awarded all their attorneys’ fees and costs pursuant to Idaho Codes §§ 6-202 and 12-121. As set forth by the *Affidavit of W. Forrest Fischer in Support of Memorandum of Attorneys’ Fees and Costs*, the total amount of attorneys’ fees and costs requested are reasonable, given the time and labor required, the novelty and difficulty of the legal questions in the case, the prevailing charges for like work, the experience, skill and ability of the attorneys performing the work, and the results obtained. Importantly, Defendants do not challenge Plaintiffs on these issues. Instead, Defendants sole contention is that no fees should be awarded at all. This argument is flawed because Idaho courts have expressly held that attorneys’ fees are mandatory to the prevailing party in a trespass action. Accordingly, Plaintiffs request that they be awarded all their attorneys’ fees and costs in this action.

DATED this 6th day of February, 2017.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 6th day of February, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

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P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

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rdunn@dunnlawoffices.com

Attorney for Defendants/Appellants James F. and Marjorie C. Croston

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER,
Trustees of the William and Ann Fischer
Revocable Trust,

Plaintiffs/Respondents,

Case No. CV-16-2894

NOTICE OF APPEAL

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

I.A.R. 11, 17

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4, Block
12, of the Original Ammon Town site, Bonneville
County, Idaho; running thence N. 88°33'58" W.
330.00 feet to the Northwest corner of said Lot 4;
thence S 00°00'21"W. along the West line of said
Lot 4 a distance of 8.99 feet to an existing fence
line; thence S. 89°41'36" E. along said existing
fence line 329.90 feet to a point on the East line of
said Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING.

Defendants/Appellants.

TO: THE ABOVE NAMED RESPONDENTS; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants appeal against the above named Respondents to the Idaho Supreme Court from the final Order Re: Memorandum Decision and Order (Summary Judgment) and Judgment entered in the above entitled action with the judgment being entered on the 19th day of January, 2017 the Honorable Joel E. Tingey, presiding.

2. The Appellants have a right to appeal to the Idaho Supreme Court, and the judgment/order described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a) I.A.R., as follows: (1) Final judgments, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure including judgments of the district court granting or denying peremptory writs of mandate and prohibition

3. The issue(s) on appeal include, but are not limited, to the following:

- a. The findings of fact are inconsistent with the conclusions of law as to the issue of preexisting boundary line.
- b. Material issues of fact precluded summary judgment.
- c. The defendants counterclaim was improperly dismissed.
- d. Attorney fees are pending and may be included in the appeal.
- e. Attorney fees and costs should be awarded to the Appellants at trial and on appeal.

4. No order has been entered sealing all or any portion of the record.

5. A reporter's transcript IS NOT requested as oral argument was all that occurred before the court reporter and is not testimony.

6. The Appellants request that the following documents be included in the NOTICE OF APPEAL

clerk's record in addition to those automatically included under Rule 28, I.A.R.:

- The repository of the case.
- The minute entry.
- All affidavits and declarations.
- The court's memorandum decision and Judgment as dated above.
- The court's post-trial rulings.

7. The undersigned certifies:

a. That a copy of the notice of appeal has NOT been served on the certified short hand reporter because there is not a request for a record; and, all that exists is oral argument on the summary judgment motion.


b. That the Appellants have made contact with the clerk of the district court and are in the process of obtaining the estimated fee for preparation of the clerk's record;

c. That the estimated fee for preparation of the clerk's record has been paid or will be paid;

d. That appellate filing fee has been paid; and

e. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 23 day of February, 2017.



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on the 23 day of February, 2017, a true and correct copy of the foregoing was delivered to the following persons(s) by:

DOCUMENT SERVED: Notice of Appeal

ATTORNEYS AND/OR INDIVIDUALS SERVED:

Forrest Fischer, Esq.
Andrew Rawlings, Esq.
HOLDEN, KIDWELL, HAHN AND CRAPO, PLLC
P.O. Box 50130
Idaho Falls, ID 83405

Facsimile 523-9518



Robin D. Dunn, Esq.
DUNN LAW OFFICES, PLLC

17 FEB 24 A9:54

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife, et al.,

Defendants/Counterclaimants.

Case No. CV-2016-2894

**JUDGMENT OF COSTS AND
ATTORNEY FEES**

Judgment is entered as follows:

Plaintiffs are awarded costs in the amount of \$266 and attorney fees in the amount of \$2,670.50 for a total award of \$2,936.50, with interest accruing thereon at the statutory rate.

Dated this 24 day of February, 2017.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of February, 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Karl R. Decker
W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO
1000 Riverwalk Dr., Suite 200
P.O. Box 50130 523-9518

Robin D. Dunn
Dunn Law Offices
477 Pleasant County Lane
P.O. Box 277
Rigby, ID 83422 745-8160

Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

17 FEB 24 A9:53

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife, et al.,

Defendants/Counterclaimants.

Case No. CV-2016-2894

ORDER

This matter has come before the Court upon Plaintiffs' motion for an award of costs and attorney fees as against Defendants. Defendants have objected to the request. Neither Party has requested a hearing on this issue.

Costs

Inasmuch as Plaintiffs prevailed on their motion for summary judgment, the Court finds that Plaintiffs are the prevailing party in this matter. Based upon Plaintiffs' memorandum of costs, the Court finds that Plaintiffs are entitled to an award of costs in the amount of \$266. The Court declines to award discretionary costs.

Attorney Fees

Plaintiff seeks attorney fees pursuant to I.C. §12-121 and § 6-202. Section 12-121, read in conjunction with Rule 54(e)(2), IRCP allows for an award of attorney fees when

the court “finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation . . .”

While the Court granted Plaintiffs’ motion for summary judgment, the Court cannot conclude that Defendants’ claim was unreasonable, frivolous, or without foundation. Once the subject fence was no longer standing, reasonable minds could question the location of the boundary between the properties. Accordingly, the Court finds that attorney fees are not awardable under § 12-121.

Section 6-202 provides that when a party recovers for trespass under that section, that party is also entitled to a “reasonable attorney’s fee . . .” In considering this action, it is the Court’s opinion that the primary claim in this matter was to quiet title based upon a boundary by agreement. The trespass claim was incidental to that primary claim. Accordingly, when considering the factors of Rule 54(e)(3), IRCP and the “reasonableness” requirement of § 6-202, the Court finds that the award of attorney fees should be tempered and limited to the trespass issue. In consideration of the foregoing, the Court awards \$2,670.50 in attorney fees.

Therefore, Plaintiffs are awarded costs in the amount of \$266 and attorney fees in the amount of \$2,670.50 for a total award of \$2,936.50.

IT IS SO ORDERED.

Dated this 24 day of February, 2017.



JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of ~~January~~ February, 2017, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon, or by placement in the courthouse mailbox.

Karl R. Decker
W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO
1000 Riverwalk Dr., Suite 200
P.O. Box 50130

Robin D. Dunn
Dunn Law Offices
477 Pleasant County Lane
P.O. Box 277
Rigby, ID 83422

Clerk of the District Court
Bonneville County, Idaho

By ms
Deputy Clerk

Send Result Report



MFP

ECOSYS M3550idn

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<p>IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE</p>		<p>SEVENTH JUDICIAL DISTRICT COURT BONNEVILLE COUNTY, IDAHO</p> <p>17 FEB 24 09 53</p>
<p>WILLIAM R. FISCHER and M. ANN FISCHER, Trustees of the William and Ann Fischer Revocable Trust,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>JAMES F. CROSTON and MARJORIE C. CROSTON, husband and wife, et al.,</p> <p style="text-align: center;">Defendants/Counterclaimants.</p>	<p>Case No. CV-2016-2894</p> <p style="text-align: center;">ORDER</p>	
<p>This matter has come before the Court upon Plaintiffs' motion for an award of costs and attorney fees as against Defendants. Defendants have objected to the request. Neither Party has requested a hearing on this issue.</p> <p><u>Costs</u></p> <p>Inasmuch as Plaintiffs prevailed on their motion for summary judgment, the Court finds that Plaintiffs are the prevailing party in this matter. Based upon Plaintiffs' memorandum of costs, the Court finds that Plaintiffs are entitled to an award of costs in the amount of \$266. The Court declines to award discretionary costs.</p> <p><u>Attorney Fees</u></p> <p>Plaintiff seeks attorney fees pursuant to I.C. §12-121 and § 6-202. Section 12-121, read in conjunction with Rule 54(e)(2), IRCP allows for an award of attorney fees when</p>		
<p>ORDER - 1</p>		

No.	Date and Time	Destination	Times	Type	Result	Resolution/ECM
001	02/24/17 09:52	95239518	0°00'52"	FAX	OK	200x100 Normal/On
002	02/24/17 09:53	97458160	0°02'22"	FAX	OK	200x100 Normal/Off

2-20
#-Birch

BONNEVILLE COUNTY
IDAHO

2017 MAR -8 PM 4:10

Karl R. Decker, ISB #3390
W. Forrest Fischer, ISB #10009
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone (208) 523-0620
Facsimile (208) 523-9518

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

WILLIAM R. FISCHER and M. ANN
FISCHER, Trustees of the William and Ann
Fischer Revocable Trust,

Plaintiffs/Respondents,

vs.

JAMES F. CROSTON and MARJORIE C.
CROSTON, husband and wife;

AND ALL UNKNOWN OWNERS AND/OR
OTHER PERSONS OR ENTITIES
CLAIMING ANY INTEREST IN THE
FOLLOWING DESCRIBED REAL
PROPERTY:

Beginning at the Northeast corner of Lot 4,
Block 12, of the Original Ammon Townsite,
Bonneville County, Idaho; running thence N.
88°33'58" W. 330.00 feet to the Northwest
corner of said Lot 4; thence S. 00°00'21"W.
along the West line of said Lot 4 a distance of
8.99 feet to an existing fence line; thence S.
89°41'36" E. along said existing fence line
329.90 feet to a point on the East line of said
Lot 4; thence N. 00°00'21" E. along said East
line 2.50 feet to the POINT OF BEGINNING

Defendants/Appellants

Case No. CV-2016-2894

**REQUEST FOR ADDITIONAL
RECORD**

TO: THE ABOVE NAMED APPELLANTS AND THEIR ATTORNEY, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN, that Respondents in the above entitled proceeding hereby request pursuant to Rule 19 of the Idaho Appellate Rules (“I.A.R.”), the inclusion of the following material in the clerk’s record in addition to that required to be included by the I.A.R. and the notice of appeal:

- Plaintiffs’ Motion for Summary Judgement, filed 12/20/2016;
- Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, filed 12/20/2016;
- Declaration of W. Forrest Fischer in Support of Plaintiffs’ Motion for Summary Judgment, filed 12/20/2016;
- Declaration of M. Ann Fischer, filed 12/20/2016;
- Declaration of Sharon Anderson, filed 12/20/2016;
- Declaration of Larry Kennedy, filed 12/20/2016;
- Memorandum of the Defendants in Opposition to Plaintiffs’ Motion for Summary Judgment, filed 01/04/2017;
- Affidavit of Linda D. Penning in Opposition of Plaintiffs’ Motion for Summary Judgment, filed 01/04/2017;
- Verification, filed 01/04/2017;
- Plaintiffs’ Reply Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, filed 01/11/2017;
- Plaintiff’s Motion to Strike Affidavit of Linda D. Penning, filed 01/11/2017;
- Declaration of W. Forrest Fischer in Support of Plaintiffs’ Motion to Strike, filed 01/11/2017;

- Plaintiff's Memorandum in Support of Plaintiff's Motion to Strike Affidavit of Linda D. Penning, filed 01/11/2017;
- Minute Entry, dated 1/18/2017;
- Memorandum Decision and ORDER, filed 01/19/2017;
- Judgement, entered 01/19/2017;
- Memorandum of Attorneys' Fees and Costs, filed 01/31/2017;
- Affidavit of W. Forrest Fischer in Support of Memorandum of Attorneys' Fees and Costs, filed 01/31/2017;
- Objection to the Plaintiff's Requests for Fees and Costs, filed 02/02/2017;
- Reply in Support of Memorandum of Attorneys' Fees and Costs, filed 02/06/2017; and
- Order, filed 02/24/2017.

I certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 8th day of March, 2017.



W. Forrest Fischer
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE


I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 8th day of March, 2017, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with IRCP 5(b).

Persons Served:

Robin D. Dunn
Dunn Law Offices, PLLC
477 Pleasant Country Lane
P.O. Box 277
Rigby ID 83422
Fax: (208) 745-8160

Method of Service:

- Mail
- Fax
- Hand Delivery
- Other: _____



W. Forrest Fischer

G:\WPDATA\WFF\18611-001 Fischer Property Appeal\Request for Additional Record.docx

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

WILLIAM R. FISCHER AND M. ANN)
 FISCHER)
 Trustees of the William and Ann Fischer)
 Revocable Trust,)
)
 Plaintiffs/Respondents,)

Case No. CV-2016-2894

Docket No. 44887

v.)

**CLERK'S CERTIFICATION
OF EXHIBITS**

JAMES F. CROSTON and MARJORIE)
 C. CROSTON, husband and wife;)

AND ALL UNKNOWN OWNERS)
 AND/OR OTHER PERSONS OR)
 ENTITIES CLAIMING ANY)
 INTEREST IN THE FOLLOWING)
 DESCRIBED REAL PROPERTY:)

Beginning at the Northeast corner of Lot)
 4, Block 12, of the Original Ammon)
 Town site, Bonneville County, Idaho;)
 running thence N. 88 33'58" W. 330.00)
 feet to the Northwest corner of said Lot)
 4; thence S 00 00'21"W. along the West)
 line of said Lot 4 a distance of 8.99 feet)
 to an existing fence line; 329.90 feet to a)
 point on the East line of said Lot 4;)
 thence N. 00 00'21" E. along said East)
 line 2.50 feet to the POINT OF)
 BEGINNING.,)

Defendants/Appellants.)

STATE OF IDAHO)
)
 County of Bonneville)

I, Penny Manning, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were

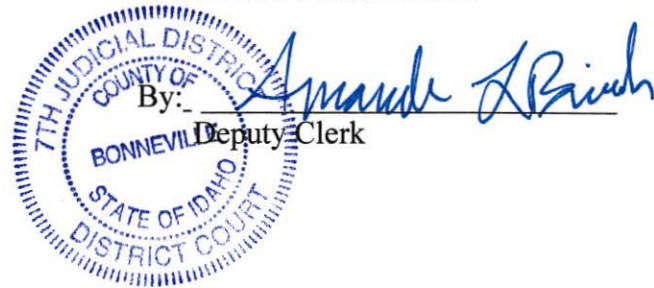
marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination:

No Exhibits were admitted.

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court this 10 day of May, 2017.

PENNY MANNING
Clerk of the District Court



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

WILLIAM R. FISCHER AND M. ANN)
FISCHER)
Trustees of the William and Ann Fischer)
Revocable Trust,)

Case No. CV-2016-2894

Plaintiffs/Respondents,)

Docket No. 44887

CLERK'S CERTIFICATE

v.)

JAMES F. CROSTON and MARJORIE)
C. CROSTON, husband and wife;)

AND ALL UNKNOWN OWNERS)
AND/OR OTHER PERSONS OR)
ENTITIES CLAIMING ANY)
INTEREST IN THE FOLLOWING)
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line of said Lot 4 a distance of 8.99 feet)
to an existing fence line; 329.90 feet to a)
point on the East line of said Lot 4;)
thence N. 00 00'21" E. along said East)
line 2.50 feet to the POINT OF)
BEGINNING.,)

Defendants/Appellants.)

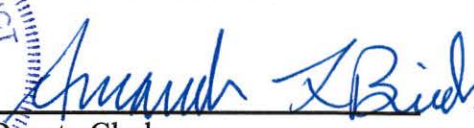
STATE OF IDAHO)
County of Bonneville)

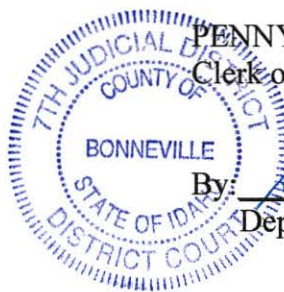
I, Penny Manning, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the above and foregoing

Record in the above-entitled cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above-entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript (if requested) and the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand affixed the seal of the District Court this 10 day of May, 2017.

PENNY MANNING
Clerk of the District Court
By: 
Deputy Clerk



**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

WILLIAM R. FISCHER AND M. ANN)
FISCHER)
Trustees of the William and Ann Fischer)
Revocable Trust,)

Case No. CV-2016-2894

Plaintiffs/Respondents,)

Docket No. 44887

CERTIFICATE OF SERVICE

v.)

JAMES F. CROSTON and MARJORIE)
C. CROSTON, husband and wife;)

AND ALL UNKNOWN OWNERS)
AND/OR OTHER PERSONS OR)
ENTITIES CLAIMING ANY)
INTEREST IN THE FOLLOWING)
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to an existing fence line; 329.90 feet to a)
point on the East line of said Lot 4;)
thence N. 00 00'21" E. along said East)
line 2.50 feet to the POINT OF)
BEGINNING.,)

Defendants/Appellants.)

I HEREBY CERTIFY that on the 10 day of May, 2017, I served a copy of the


Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in
the above entitled cause upon the following attorneys:

Robin D. Dunn
477 Pleasant County Ln.
Rigby, ID 83442

Karl R. Decker
1000 River Walk Dr. # 200
Idaho Falls, ID 83402

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

PENNY MANNING
Clerk of the District Court

By: 
Deputy Clerk

