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### Lujan v. Hillbroom Appellant's Reply Brief Dckt. 48168

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID LUJAN,

Plaintiff-Appellant, Cross-Respondent,

vs.

JUNIOR HILLBROOM, Individually and as the  
Trustee of the JLH Trust, akas Junior Larry  
Hillbroom Trust,

Defendant/Respondent, Cross-Appellant,

KEITH A. WAIBLE, as an Individual and as  
Trustee of the JLH Trust, aka Junior Larry  
Hillbroom Trust, and John Does 1-10, Individuals  
and entities presently unknown,

Defendant.

Supreme Court No: 48168-2020

Bonner County No. CV09-19-1604

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

Honorable Barbara A. Buchanan, Presiding

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**APPELLANT'S REPLY BRIEF**

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**I. Junior Hillbroom has improperly sought to introduce facts not in this record which arguably could support the District Court’s inference that Lujan could have discovered the relevant transaction sooner and those facts should not be considered.**

Junior Hillbroom (hereinafter “Junior”) begins his recitation of the facts of the case with the following: “The circumstances giving rise to this lawsuit are lengthy, complicated, largely irrelevant, and, for the most part, not in the record below.”<sup>1</sup> The rest of that paragraph as well as the entire next paragraph contain facts which are not in this record. Among the unsupported factual assertions are that Junior sued Lujan for defrauding him of millions of dollars and that Junior has sued Lujan for legal malpractice, fraud, conspiracy, and breach of fiduciary duty. These are disparaging allegations, and it is improper for this information to be included in any appellate brief since they are not relevant, nor in the record.

Of greater concern are references to facts that are not in the record that would possibly support the District Court’s inferences that Lujan could have reasonably discovered the fraudulent transfer sooner than he did.

1. The main thrust of Lujan’s argument on appeal is that nothing in this record supports the District Court’s inference that Lujan could have conducted a “name search” and easily discovered these transfers. In response to this argument, Junior supplies the missing facts which might support that District Court’s inference:

Alternatively, Lujan could have employed an asset location service, a private investigator, he could have searched Bonner County’s online property records which are indexed by grantor and grantee’s name from 1986 through present,<sup>6</sup> he could have simply called the Bonner County recorder’s office and requested property records in Junior’s name, or he could have (and in fact, did) obtained this very information from a title company. Each of these tools are available to both reasonable persons and practicing real estate attorneys.<sup>2</sup>

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<sup>1</sup> Respondent/cross-appellant’s brief at 1.

<sup>2</sup> Id at 14-15.

Footnote six from Junior's brief refers the Court to a Bonner County Web site. None of the statements of fact in the forgoing argument, nor any information regarding the Bonner County web site, are in the record.

2. The sophistication of the person who should have discovered the transfer would be a factor to consider when determining if a transfer "reasonably should have been discovered" by a certain date. An attorney who practices in title work would be held to a different standard than your average citizen. To establish that Lujan should be held to this higher standard, Junior states as fact that Lujan "...is a real estate attorney licensed to practice law in Guam and the United States District Courts.<sup>5</sup> He was educated at the University of Notre Dame Law School. Lujan is an extraordinarily sophisticated litigant and knows how to search property records.<sup>3</sup> Footnote three refers the Court to Guam's bar directory. Again, none of the facts are in the record and are improperly put forth to support the District Court's conclusion.

**II. Junior told Lujan he bought property in Bonner County, Idaho. He did not tell him the property was titled in his name free of trust. When Lujan should have discovered that the property was titled in Junior's name free of trust and from whom Junior obtained that title are questions of fact.**

Junior argues that there is no due diligence factor to consider when considering whether a transaction reasonably could have been discovered.<sup>4</sup> When something "reasonably" should be discovered is when it should have been discovered by the exercise of reasonable efforts -- due diligence. In April 2018, Lujan did not know any transaction had occurred, only that Junior was living in Hope, Idaho and that he said he bought the property he lived on.. When Lujan should

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<sup>3</sup> Id at 14.

<sup>4</sup> Id at 9.

have discovered that Junior owned the subject property free of any trust is a question of fact and reasonable people could reach differing conclusions as to when that was.<sup>5</sup>

The only finding of fact by the District Court was that "...Junior Hillbroom told David Lujan at the deposition in April 2018, that he lived at 357 David Thompson Road in Hope, Idaho ("hereafter, "subject property"), and that he owned two houses on the subject property." (R.148). Junior did not tell Lujan that he owned the property free of trust, nor that he had acquired it from a trust. (R.71, Ln.4-6). The difference is crucial because a trustee is the legal owner of trust property. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 745, 215 P.3d 457, 465 (2009). Junior never said he owned the property, just that he bought it, which necessarily implies he owns it, but provides no hint as to the capacity in which he owns it.

Having obtained a judgment against Junior in his capacity as trustee, Lujan authenticated it in Bonner County and ordered a title report. Lujan does not say why he ordered a title report,<sup>6</sup> but likely because he intended to execute upon the Hope property and needed to provide notice to interested parties. The judgment was against Junior as trustee and Junior was living on the subject property so it would not be unreasonable for Lujan to assume that the property was still owned by the trustee. When Lujan received his litigation guarantee, he discovered the property was owned personally by Junior and he filed suit well within a year of that discovery.

Lastly, even if the record supported the District Court's finding that a name search would have revealed that Junior owned the property personally, the relevant inquiry would be when Lujan should have conducted this name search. The District Court found that the clock started

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<sup>5</sup> Junior argues that the point that reasonable people could reach a different conclusion regarding Lujan's due diligence or lack thereof was not raised below. Whether reasonable people could reach a different conclusion in this regard is not an argument it is a standard to be applied by the District Court when considering inferences on summary judgment.

<sup>6</sup> Junior argues that Lujan obtained the litigation guarantee as part of the process of authenticating his judgment. Respondent/cross-appellant's brief at 8. Nothing in the record supports this assertion of fact and nothing about the process of authenticating a foreign judgment would require a litigation guarantee.

ticking the day that Junior told Lujan that he lived in Hope, Idaho. (R.148-149). A “name search” could not have been conducted during the deposition, so it would have to be conducted at some point in the future and then Lujan would have a year from the date he conducted the “name search” to take action. When this “name search” should have reasonably been conducted is a question of fact.

What is reasonable due diligence is a question of fact. No evidence supports the District Court’s inference that Lujan could have discovered the relevant transaction with a “name search” but even if such evidence existed, it still would not answer the question of when Lujan should have taken this action.

**III. Junior has not pointed to anything in the record which would support the District Court’s inference that Lujan could have discovered the transfer sooner with a “name search” and has argued that the inference is supported by facts not in the record. Lujan is entitled to an award of attorney’s fees on appeal.**

Lujan’s primary argument is that nothing in the record supports the District Court’s inference that he could have discovered this transaction sooner with a “name search.” In response to this, Junior has attempted to introduce facts to support the District Court’s inference and has attempted to introduce other facts which are not in the record. Lujan is entitled to an award of fees on appeal.

In this case, Robert attempts to reargue facts that he was unable to establish at trial. He also attempts to introduce on appeal new facts and evidence that were not in the record below. No cogent legal arguments are made and there is nothing in Robert’s argument requesting a repeal or modification of existing law. Accordingly, we deem an award of attorney fees under I.C. § 12–121 to be appropriate in the case.

*Huerta v. Huerta*, 127 Idaho 77, 81, 896 P.2d 985, 989 (Ct. App. 1995).

**IV. The District Court did not abuse its discretion when it refused to award Junior fees because the action was not without a reasonable basis in law or fact.**

Junior argues that the District Court should have awarded him some fees because some of Lujan's claims were without merit. Lujan's primary objective in this case was to set aside the transfer of the subject property from a trust to Junior personally. The resolution of that issue involved the determination of a legitimate question of fact and attorney's fees cannot be awarded pursuant to Idaho Code 12-121. The only other remedy sought in the complaint was for the imposition of a constructive trust and the facts support that it would be inequitable for Junior to retain title to this property when he never would have owned it but for Lujan's efforts.

As decision to award attorney's fee pursuant to Idaho Code 12-121 is reviewed for an abuse of discretion. *Owen v. Smith*, 477 P.3d 193, 206 (Idaho 2020), reh'g denied (Dec. 30, 2020). The District Court cited *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 419 P.3d 1139 (2018) language that the decision to make an award of fees pursuant to Idaho Code 12-121 was a discretionary decision (R.154) and although the District Court recited different authority, the District Court applied the correct legal standard and although it did lay out the reasoning of its decision, the reasons for the District Court's conclusion appear from the record. See *Lola L. Cazier Revocable Tr. v. Cazier*, 167 Idaho 109, 468 P.3d 239, 251 (2020).

As pointed out by Junior, the existence of any legitimate issue of fact no longer shields litigants from an award of attorney's fees pursuant to Idaho Code 12-121. *Galvin v. City of Middleton*, 164 Idaho 642, 648, 434 P.3d 817, 823 (2019). "Instead, we now take a more holistic view to examine whether the non-prevailing party argued the issues in 'good faith' or acted 'without a reasonable basis in fact or law.'" Id citing *Manwaring Investments, L.L.C. v. City of Blackfoot*, 162 Idaho 763, 774, 405 P.3d 22, 33 (2017). The District Court utilized this standard, even if it cited to different authority. "Even though the plaintiff's claims have been dismissed on summary judgment, this Court, in the exercise of its discretion, and taking into account the entire course of the litigation, is not left with the abiding belief that this case was brought or

pursued by the plaintiffs frivolously, unreasonably, or without foundation.” (R.154). The District Court did not rely upon the fact that a legitimate issue of fact existed pertaining to when Lujan should have discovered this transaction. It considered the entire litigation and concluded that it was not brought unreasonably and without foundation.

Unlike the defendants in *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 329 P.3d 1072 (2014 ) who “...had no legitimate triable claims of fact on the question that necessitated the initiation of [the] action”, id at 632, 1080, Lujan did have a legitimate, triable, question of fact as to the question that necessitated the litigation – whether Lujan reasonably should have known of the subject transaction sooner than he did.

Junior claims the District Court should make a partial award of fees to him because Lujan’s breach of contract claim was clearly barred. Lujan had no breach of contract claim. The complaint’s only reference to breach of contract is in paragraph XIX which alleges “[d]efendants have breached their contractual duties and obligations under the contract and/or agreement with Plaintiffs and such breach is without justification or legal cause. (R.12). The relief sought in the complaint is set forth at paragraphs XXIV to XXII and none of them seek an award of damages for breach of contract.

Junior moved for summary judgment on the breach of contract claim without having first sought clarification if the complaint contained a breach of contract by way of communication with opposing counsel or a motion for a more definitive statement. In response to summary judgment on the breach of contract issue, Lujan argued that the “... non-payment under this contract for services, and the breach thereof, which forms the basis of the Judgment obtained in the Superior Court of Guam On September 7, 2018, and therefore the breach of contract claims should not be dismissed.” (R.94). Then Lujan explained at the hearing that he was not seeking to do anything but set aside the transfer to Junior and that the contract claims are just explanations



for what formed the basis of Lujan's judgment. (R.26). Despite this, the District Court ruled on the breach of contract claim even though it was clear that no such claim existed. Junior cannot prevail on a breach of contract claim that never existed.

Junior further claims that Lujan failed to present any evidence or argument as to why the judgment would attach to Junior's property so the District Court should have awarded him fees for having to defend that claim. The point in the lawsuit is to set aside the transfer to Junior from the trustee. If that occurred, because the judgment was authenticated and recorded, it would attach to the subject property. Idaho Code 10-1110. Whether the judgment would attach to the property is the result of the suit, not the point of the suit. Junior successfully defended the action to set aside the transfer to him which is why the judgment lien did not attach and the issue of when Lujan should have discovered the relevant transaction was a legitimate question of fact.

As to the constructive trust claim, as set forth in Lujan's opening brief, the facts before the Court on summary judgment<sup>7</sup> considered in the light most favorable to Lujan establish that Junior acquired title to the subject property from a trust he created at a time when a different trust was incurring obligations to Lujan and that Junior did not tell Lujan any of this in the relevant deposition. In light of these facts, bringing an action to impose a constructive trust is not an act of bad faith.

The District Court considered the entire litigation and acted within its discretion when it refused to award Junior any fees.

DATED this 4<sup>th</sup> day of February, 2021.



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ARTHUR M. BISTLINE  
Attorney for Plaintiffs/Appellants

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<sup>7</sup> Which included Lujan's declaration which incorporated by reference all the facts set forth in his complaint.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of February, 2021, I served a true and correct copy of foregoing APPELLANTS' REPLY BRIEF by the method indicated below, and addressed to the following:

Josh Kickey	<input type="checkbox"/>	Regular mail
Attorney at Law	<input type="checkbox"/>	Certified mail
312 S. First Avenue, Ste. A	<input checked="" type="checkbox"/>	Email: <a href="mailto:toby@sandpointlaw.com">toby@sandpointlaw.com</a>
Sandpoint, ID 83864	<input type="checkbox"/>	Facsimile: (208)263-7557
	<input type="checkbox"/>	iCourt: <a href="mailto:josh@sandpointlaw.com">josh@sandpointlaw.com</a>

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s/Nichole Foreman

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NICHOLE FOREMAN