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Idaho Supreme Court
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IN THE SUPREME COURT FOR THE STATE OF IDAHO

DICKINSON FROZEN FOODS, INC., an Idaho corporation, Plaintiff/Appellant, v. J.R. SIMPLOT COMPANY, a Nevada corporation; THOMPSON COBURN, LLP, a Missouri limited liability partnership; YARMUTH WILSDON, PLLC, a Washington professional limited liability company; MARK McKELLAR, an individual; JOHN DOE 1-X, unknown individuals and entities, Defendants/Respondents.	Supreme Court No. 45580 Ada County Case No. CV01-17-03836

BRIEF OF RESPONDENT THOMPSON COBURN, LLP

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Lynn Norton, District Judge Presiding

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I. STATEMENT OF THE CASE

There are four Respondents in this case. This includes two non-Idaho law firms, Yarmuth Wilsdon, PLLC ("Yarmuth") and Thompson Coburn, LLP ("Thompson"). Yarmuth is in Seattle, Washington and Thompson is in St. Lois, Missouri. *R. p. 16.* Both of the law firms represented the co-Respondent J.R. Simplot Company ("Simplot") in the lawsuit that Simplot filed against Mr. Frank Tiegs and several entities he controls in the Federal District Court in the state of Washington, which case has generally been referred to as the "Washington litigation." The other Respondent in this appeal is Mr. Mark McKellar, president of Simplot. The two Respondents, Simplot and Mr. McKellar, are collectively referred to as "Simplot."

This brief is submitted on behalf of Respondent Thompson only. However, there is a very substantial amount of commonality of interest among all four Respondents on this appeal. The Appellant's claims against the two out of state law firms are the very same defamation claims arising out of statements made in the Complaint filed in the Washington litigation when they were counsel of record. The law firm Respondents also have the same defenses to those claims, including the two legally dispositive defenses at issue on this appeal, that is: (1) the litigation privilege which served as the basis of the claims against the law firms being dismissed; and (2) the as yet undecided lack of personal jurisdiction issue. About the only difference between the two law firms for purposes of the issues and arguments on this appeal is Respondent Yarmuth chose not to pursue a motion for an award of costs and attorney fees following the district court's orders relating to the litigation privilege, while Respondent Thompson chose to do so, and did so successfully. The Appellant has appealed from the district court's order granting Respondent Thompson an award of fees and costs, so as between the two law firm defendants, that issue is unique to Respondent Thompson.

There are also substantial commonality of interest issues between the law firm Respondents and Simplot. Since one of the claims against Simplot by the Appellant in this case was the same basic defamation claim made against the law firm Respondents, the trial court's decision dismissing the defamation claims based upon the litigation privilege, applies equally to Simplot and both law firm Respondents. In addition, Simplot also filed a successful motion to be awarded costs and attorney fees and Respondent Thompson thus shares that issue on appeal with Simplot.

All of the Respondents are making concerted efforts to avoid unnecessarily duplicative briefing to the Court on these shared issues. In this regard, every issue that relates directly to Respondent Thompson is shared with at least one other Respondent, if not all of them. So, in the interest of brevity and avoiding excessive or duplicative briefing of the same issues on appeal, Thompson will incorporate by reference and adopt the legal points, authorities, and argument offered on these common issues by both Yarmuth and Simplot. Thompson will accordingly limit the briefing here to points Thompson believes deserve particular emphasis, or points that have specific applicability to Thompson.

A. Nature of the Case

The Appellant DFF alleges a singular claim against Thompson for defamation, based entirely upon a few factual allegations made in the Complaint filed on behalf of Simplot in the Washington litigation. *R. p. 14-46.*

The focus of this appeal for both law firm Respondents regards the scope and application of the litigation privilege, which served as the basis of the dismissal of the defamation claims against Thompson and Yarmuth. Both law firm Respondents also sought dismissal on the basis of a lack of personal jurisdiction, since they are both out of state law firms from Missouri and Washington, respectively, and neither of them did anything factually to subject them to jurisdiction

in Idaho. Since the trial court dismissed the defamation claims on the basis of the litigation privilege, the trial court never ruled on the personal jurisdiction issue. The personal jurisdiction is nevertheless briefed and presented to this Court on appeal, as it is clear from the allegations contained in Appellant's Complaint alone, that the lack of personal jurisdiction for Thompson serves as an alternative basis to dismiss the claim against Thompson as a matter of Idaho law.

B. Course of Proceedings

All of the parties to this appeal have addressed the course of the proceedings before the district court in detail. Here, Thompson will only address the course of proceedings that relate directly to Thompson.

The verified Complaint by Appellant DFF was filed on March 3, 2017. On April 13, 2017, Thompson filed a special notice of appearance which made it clear they were specifically preserving the right to challenge the jurisdictional issue. *R. pp. 132-133.*

On March 29, 2017, Thompson filed a motion to dismiss pursuant to IRCP 12(b)(6). On March 30, 2017, DFF filed a motion for partial summary judgment arguing the litigation privilege did not apply or was waived. *R. pp. 100-118*. On April 26, 2017, DFF also filed a motion for leave to amend the complaint. *R. p. 754*. On June 12, 2017, the district court issued a Memorandum Decision granting Thompson and the other Respondents' motions to dismiss the defamation claims. *R. pp. 1344-1355*. The court also denied the motion to amend the complaint. *R. p. 1354*. The trial court then entered Judgment dismissing the defamation claims against all Respondents. *R. p. 1356*.

On June 22, 2017, DFF filed a motion for reconsideration. *R. pp. 1358-59.* On that same date, it also filed a second motion to amend the complaint. *R. p. 1385*.

On June 26, 2017, Thompson filed a Memorandum in Support of Attorney Fees and Costs. *R. p. 1659*. On July 10, 2017, Appellant DFF filed a responsive Motion to disallow Thompson's Motion for Attorney Fees and Costs. *R. p. 1754*.

On August 18, 2017, the trial court issued a memorandum decision and order denying DFF's motion for reconsideration of the court's ruling dismissing the defamation claims. *R. pp. 2026-2037*. On this same date, the district court also issued a memorandum decision denying DFF's second motion for leave to amend the complaint.

On October 20, 2017, the trial court issued a Memorandum Decision and Order Granting Fees and Denying in Part Costs – McKellar and Thompson. *R. p. 2103*.

On November 8, 2017, a final judgment was entered on all claims. DFF's Notice of Appeal was then timely filed on November 20, 2017.

C. Statement of Facts

The co-Respondent Yarmuth has provided the Court with a comprehensive statement of facts that are pertinent to the defamation claims against both law firm Respondents. Since the claims against both Yarmuth and Thompson involve the same allegations arising from the statements made in Simplot's Complaint in the Washington litigation, the facts addressed by Yarmuth are of course the exact same facts that relate to the claims against Thompson. In addition, Simplot provides the Court with a statement of facts that relate exclusively to the litigation privilege issue. Rather than provide the Court with yet another statement concerning the same set of facts, Thompson will adopt and incorporate by reference the facts presented by co-Respondents.[1]

[1] Counsel for Thompson has been provided with drafts of appellate briefs by both Respondents, including the final draft before it was filed.

One particular factual point that is worth emphasizing for the Thompson Respondent is that the defamation allegations are limited to statements made in the complaint filed on behalf of Simplot as counsel of record in the Washington litigation. There can accordingly be no doubt that statements at issue in this defamation claim were made during the scope and course of their respective role as counsel of record for Simplot in the Washington litigation.

One other additional fact that should be emphasized on behalf of Thompson is that the Appellant DFF's original Complaint in this case acknowledges that Thompson is a law firm located in St. Lois, Missouri and that all defamatory conduct alleged by the Appellant against Thompson were made inside the pleadings filed in the Washington litigation. *R. p. 16*. There is no allegation by the Appellant that Thompson did anything that either occurred in Idaho or for any other reason subjected them to the personal jurisdiction of this state.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Thompson adopts Respondent Yarmuth's Counterstatement of Issues Presented on Appeal, as each apply equally to Respondent Thompson. In addition, Thompson restates the attorney fee issue applicable to Thompson as follows:

- The trial court correctly applied Idaho law and awarded attorney fees and certain costs to Thompson under Idaho Code §12-120(3) and Rule 54(d).
- Thompson objects to DFF's request for attorney's fees and costs on appeal.

III. STANDARDS OF REVIEW

For the Thompson Respondent, there are four issues for which there is a need to address the legal standard of review: (1) the trial court's rulings dismissing the case based upon the litigation privilege; (2) the trial court's denial of Appellant DFF's motions for leave to amend its Complaint; (3) the trial court's award of attorney fees and certain costs to Respondent Thompson;

and (4) if this Court were to address the personal jurisdiction issue, which the trial court has yet to do, the standards pursuant to IRCP 12(b)(2).

A. Motions to Dismiss

The standard for reviewing a trial court's granting of a motion to dismiss under IRCP 12(b)(6) is the same as the standard for reviewing a trial court's grant of a summary judgment motion. As this Court has stated:

> When this Court reviews an order dismissing an action pursuant to I.R.C.P. 12(b)(6), we apply the same standard review we apply to a motion for summary judgment. After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated.

Losser v. Bradstreet, 145 Idaho 670, 672, 138 P.3d 758 (2008); *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642 (2010). The Court has also succinctly stated: "A district court's dismissal of a complaint, under I.R.C.P. 12(b)(6) shall be reviewed *de novo*." *Taylor*, 149 Idaho 832.

B. Motion to Amend Complaint

The standard of review on appeal for a trial court's denial of a motion for leave to amend their complaint is an abuse of discretion standard. In doing so, the Court considers the now familiar three factors:

> (1) Whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason.

Estate of Becker v. Calahan, 140 Idaho 522, 527, 96 P.3d 623 (2004); *Taylor v. McNichols*, 149 Idaho 826, 832, 243 P.3d 642 (2010). And, while it is clear trial courts are encouraged to treat motions to amend liberally, the Idaho Appellate Courts have also made it clear that a trial court has just as much discretion to deny motions to amend the pleadings where the proposed

amendments would be futile. *See, e.g. McCann v. McCann*, 138 Idaho 228, 237, 61 P.3d 585 (2002). In this regard, the Idaho Appellate Courts have also often ruled that it is not an abuse of discretion for a trial court to deny motions to amend the pleadings where the proposed amendments do not set out a valid claim. *See, e.g. Black Canyon Racquet Ball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 175, 804 P.2d 900 (1991); *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co.*, 132 Idaho 318, 971 P.2d 1142 (1998).

C. Attorney Fees and Costs Decisions

Decisions of a trial court whether to award attorney fees and/or costs are also reviewed on appeal under an abuse of discretion standard. *See, e.g. Ballard v. Kerr*, 160 Idaho 674, 378 P.3d 464 (2016). The party who disputes the award of attorney fees or costs at the trial court level bears the burden of showing the requisite abuse of discretion on appeal. *Id.* Whether an action is based on a commercial transaction is a question of law over which the appellate court exercises free review. *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 778, 264 P.3d 400 (2011).

D. Personal Jurisdiction Issue

As indicated earlier, both law firm Respondents also filed a motion to dismiss pursuant to Rule 12(b)(6), claiming the Idaho courts did not have personal jurisdiction. The trial court did not address that issue below, since the defamation claims against the law firm Respondents were dismissed based upon the application of the litigation privilege. Nevertheless, based upon the pleadings alone the law firm Respondents did nothing to subject themselves to the personal jurisdiction of the Idaho courts regarding the claims at issue here as a matter of Idaho law, and the lack of personal jurisdiction is an alternative basis for dismissal.

IV. LAW AND ARGUMENT

The issues relating to the application of the litigation privilege are very ably addressed by the Respondent Yarmuth. For that reason, and for the Court's convenience in avoiding duplicative briefing, Thompson incorporates by reference the briefing of the co-Respondent Yarmuth on the issue of the litigation privilege. The same is true of the personal jurisdiction issue, which again is based upon the same material facts and points and authorities as it is for Respondent Thompson. Respondent Thompson thus incorporates by reference the briefing by Yarmuth on the personal jurisdiction issue as well. Thompson would, however, like to address some points believed worthy of additional emphasis or consideration.

As a general proposition, the Appellant DFF selectively extracts words from the history of Idaho case law going back for more than a century, all for the purpose of arguing in favor of a very restrictive legal standard regarding the applicability of the litigation privilege. But, there is no actual controversy or confusion in Idaho case law regarding the standard for the applicability of the litigation privilege. The *Richeson* decision, which overruled prior case law, laid out the standard in 1953 as clear as can be. *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953). A couple of decades before the *Richeson* decision, the First Restatement of Torts' treatment of the litigation privilege was adopted in section 586. *Restatement (First) of Torts §586.* The *Richeson* Court overruled any inconsistent prior case law and adopted the First Restatement provisions relating to the litigation privilege in Idaho. In so doing, this Court stated:

> With certain exceptions, unimportant here, defamatory matter published in the due course of a judicial proceeding, having some *reasonable relation to the cause,* is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsehood.

Richeson, 73 Idaho at 551-52. This Court thus laid out a very clear standard in *Richeson* which has never been overturned. In fact, this Court quoted the *Richeson* opinion as accepted Idaho law in *Taylor v. McNichols*, 149 Idaho 826, 837, 243 P.3d 642 (2010). These are the exact words of this Court that comprise a very clear legal standard for the applicability of the litigation privilege, which have spanned more than 60 years worth of Idaho precedent, including the most recent pronouncements. The Appellant's efforts of extracting words from ancient case law to try and create a different or more restrictive standard thus boils down to trying to create confusion about such a legal standard where none actually exists.

Likewise, the Appellant's coverage of cherry picked words in the case law outside of Idaho also amounts to trying to create confusion concerning the Idaho legal standards that does not exist. This Court has already spoken on these standards for the law in our state and did so clearly. In fact, in the *Taylor* case, where the Court expanded the privilege to include conduct by an attorney in addition to statements made by an attorney, the Court reviewed case law from elsewhere throughout the country regarding the treatment of the litigation privilege. In other words, the case law throughout the country has already been considered, addressed, and analyzed by this Court in depth in a relatively recent opinion that specifically approved the legal standard the Idaho Supreme Court laid out more than 60 years ago in *Richeson*. There simply is no confusion on the applicable legal standard regarding when the litigation privilege applies.

The Appellant closes its brief asking the Court to rule the litigation privilege applies only to "legitimate representation." This too ignores the actual words used by this Court to describe the applicability of the litigation privilege. For example, in the above quoted language from the *Richeson* decision the Court made it clear that even statements made by lawyers in a litigation context that are outright defamatory and made with malicious intent are protected. *Richeson*, 73

Idaho 551. How can an attorney's conduct consisting of completely false allegations that are made with malicious intent be considered "legitimate representation?"

This Court has also indicated the litigation privilege extends to protect "wrongful" conduct by an attorney in the context of an underlying lawsuit. As stated in the *Taylor* decision:

> Thus, to promote zealous representation, courts have held that an attorney is qualifiedly immune from civil liability with respect to non-clients for actions taken in connection with representing a client in litigation.
>
> This qualified immunity generally applies even if conduct is wrongful in the context of the underlying lawsuit. For example, a third party has no independent right of recovery against an attorney for filing motions in a lawsuit, even if frivolous or without merit, although such conduct is sanctionable or contemptable, as enforced by the statutory or inherent powers of the court. Courts have refused to acknowledge an independent cause of action in such instances 'because making motions is conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit…. Thus, an attorney's conduct even if frivolous or without merit is not independently actionable if the conduct is part of the discharge of the lawyer's duties in representing his or her client.

Taylor, supra, 149 Idaho 837 (emphasis added). This Court has thus gone to the length of making it clear the litigation privilege is to be applied very broadly, going to the lengths of statements or conduct by an attorney that are "wrongful," "malicious," "frivolous," "sanctionable," etc. Idaho law is clear that the scope of the litigation privilege extends far beyond the kind of "legitimate" representation asserted by the Appellant here.

The basic notion of trying to get this Court to adopt a restrictive view of the litigation privilege also flies in the face of the numerous statements made by this Court in case law concerning the fundamental importance of the litigation privilege which goes to the very core of our legal system. Throughout the case law concerning the litigation privilege the Court has made numerous statements stressing the powerful and compelling reasons for the litigation privilege in

the first place. For example, in the *Taylor* opinion, the Court began its analysis noting the litigation privilege is "deeply rooted in the common law." *Taylor,* 149 Idaho 836. It also referenced the reasoning underlying the litigation privilege was "long-established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of reprisal for a civil suit." *Id.* The *Richeson* decision also emphasized its importance:

> Proceedings connected with judicature of the country are so important to the public good, it is only in extreme cases or circumstances that a libelous publication in a judicial proceeding can be used as a basis for damages in a libel suit. Further, the Court has noted the litigation privilege is based upon a public policy of securing to attorneys and officers of the court the utmost freedom in their efforts to secure justice for their clients.

Malmin v. Engler, 124 Idaho 733, 735, 864 P.2d 179 (Ct. App. 1993).

The *Taylor* Court also decided and quoted with approval similar statements made by courts elsewhere regarding the fundamental importance underlying the litigation privilege. For example, the Court quoted a Florida Supreme Court stating:

> The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Taylor v. McNichols, 149 Idaho 826, 838, 243 P.3d 642 (2010) quoting *Levin, et al. v. U.S. Fire Ins. Co.*, 639 So. 2nd 606, 608 (Fla. 1994). In short, the overall effort by the Appellant here to adopt a very restrictive application of the litigation privilege is completely inconsistent with the overwhelming amount of authority in Idaho and elsewhere expressing how deeply rooted,

powerful and important the underlying principles are that support the application of the litigation privilege being applied as broadly as possible.

One other point worthy of addressing is the Appellant's suggestion the litigation privilege could or should only apply to statements made by the lawyer concerning his client's direct adversary party in the lawsuit, and not to non-parties. There is no legal justification for the imposition of this newly created restriction on the litigation privilege, and it too flies squarely in the face of the basic principles underlying the reasoning for the litigation privilege in the first place. The entire point of the privilege is to avoid lawyers generally advocating for their client's interests zealously while at the same time trying to protect themselves from a lawsuit for things the lawyer may say or do in the course of representing that client. As this Court stated in *Taylor*:

> It is presumed that an attorney who is acting or communicating in relation to his representation of a client is acting on behalf of that client and for that client's interests. (citations omitted). To find otherwise would invite attorneys to divide their interest between advocating for their client and protecting themselves from retributive suit. Allowing such a divided interest would run contrary to the Idaho Rules of Professional Conduct because, as noted by the district judge below:
>
> > While attorneys must not knowingly counsel or assist a client in committing a crime or fraud, Idaho's Rules of Professional Conduct require an attorney to pursue matters on behalf of a client despite opposition, obstruction or personal inconvenience to the attorney, and require an attorney to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

Taylor, 149 Idaho 826, 842, 243 P.3d 642 (2010) (emphasis added). The whole point is to allow attorneys to fulfill their obligation of zealous advocacy without worrying about "retributive suit[s]" by anyone, not just lawsuit adversaries of their clients. Any such distinction would defy common sense and belie the whole purpose of the privilege. The Court further noted this would go to the

length of protecting some bad behavior by lawyers - just like the privilege protects false and malicious defamatory statements - but the principles underlying the litigation privilege were so important to our fundamental principles of justice, the balancing of the competing interests weighed in favor of making for a very broad application of the litigation privilege. *Taylor*, 149 Idaho 841. The *Taylor* Court also specifically indicated the privilege extended to "non-clients" generally, not just lawsuit adversaries of their client:

> Thus, to promote zealous representation, courts have held that an attorney is qualifiedly immune for civil liability with respect to non-clients for actions taken in connection with representing a client in litigation.

Taylor, 149 Idaho 838 (emphasis added). There was absolutely no limitation implied or expressed to have the privilege apply only to lawsuit adversaries; it applies to all non-clients.

Considering these basic principles concerning the litigation privilege, there is simply no way to justify the application of the privilege would go to bad conduct or false/malicious statements made by the lawyer against his client's adversary, but not by other people who are not parties to the case. The whole idea is to put the lawyer in the position of feeling fully able to zealously advocate for his client's interest, without having to weigh the possibility of getting sued after the fact for conduct or statements of the lawyer during the lawsuit. That basic principle can only be properly served by the assurance to attorneys that they can zealously advocate without any serious concern of getting sued by anyone for that zealous advocacy.

One can easily envision the pandora's box of lawsuits arising if the litigation privilege did not extend to lawyer's statements or conduct during the course of a judicial proceeding extending only to things he says or does about the client's adversary inside that lawsuit. Lawyers have to be free to make accusations against parties committing alleged wrongful conduct in defense of their client's interests all the time, at least as much as claiming the adversary party has committed some

kind wrongful conduct. There simply is no reason to distinguish between statements or conduct by an attorney in a lawsuit being protected against one party, but not against non-parties. The absurdity of this position is illustrated here, as the Appellant DFF in this case is so closely intertwined with the Respondents in the Washington litigation, which are several entities also owned by Mr. Tiegs, just like DFF.

A. The Trial Court Correctly Denied DFF's Motions for Leave to Amend its Complaint

The trial court was well within its discretion in denying DFF's motion for leave to amend its complaint in this case. None of the amendments added any alleged additional defamatory statements and did not change the fundamental problem with the Appellant's claims against Thompson and Yarmuth: all the alleged defamatory statements were made in pleadings filed on behalf of their client Simplot in the Washington lawsuit and protected by the litigation privilege. Thompson again otherwise adopts and incorporates by reference here the points and legal authorities offered by co-Respondent Yarmuth regarding the trial court's decision denying DFF's motions for leave to amend the complaint.

B. Appellant Cannot Establish Jurisdiction Against Thompson Under Idaho's Long Arm Statute

Again, the claims against Thompson and Yarmuth are basically identical. They relate only to statements made in the Complaint filed in the Washington litigation when they were counsel of record for Simplot. No act by either law firm occurred in the state of Idaho and there are no allegations to that effect. The law firms are both out of state law firms and everything they did on behalf of Simplot in preparing, drafting and filing the Complaint in the Washington litigation was undeniably done outside of Idaho. As such, it is beyond clear that Idaho's long arm statute does not allow for personal jurisdiction against either of the law firm Respondents in this case. Idaho

Code §5-514(b) permits jurisdiction by Idaho courts over non-resident persons or entities, but only for causes of action "arising from… the commission of a tortious act within this state." There is simply no act of any kind committed by either law firm Respondent in the state of Idaho, no less a tortious one. Here again, Thompson would otherwise adopt and incorporate by reference the additional points and authorities offered by co-Respondent Yarmuth on this appeal.

C. The Trial Court Properly Awarded Attorney Fees and Costs to Thompson

The Respondents Simplot and Thompson both successfully moved for an award of attorney fees and costs following the trial court's granting the Rule 12(b)(6) motions to dismiss pursuant to Idaho Code §12-120(3). Although the Appellant had also included a request for attorney fees pursuant to I.C. §12-120(3) in its Complaint, it nevertheless objected to the prevailing Respondents being awarded fees under that same statute, now arguing that the statute did not apply to this case.

It is by now well settled that parties can recover attorney fees under §12-120(3) even though the direct cause of action involved is a tort, where the case arose out of a commercial transaction setting. *Stevens v. Eyer*, 161 Idaho 407, 410-11, 387 P.3d 75 (2016). In one of the seminal cases on this subject, this Court succinctly explained this principle as follows:

> The prevailing party may be entitled to attorney fees under §12-120(3)… so long as a commercial transaction occurred between the prevailing party and the party from whom that party seeks fees. A commercial transaction includes all transactions except transactions for personal or household purposes. Further, Idaho Code §12-120(3) applies where a commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover, and thus as long as a commercial transaction is at the center of the lawsuit, the prevailing party may be entitled to attorney fees for claims that are fundamentally related to the commercial transaction yet sound in tort.

Reynolds v. Trout Jones Gledhill Fuhrman, P.A., 154 Idaho 21, 26-27, 293 P.3d 645 (2013) (emphasis added). The Court has also explained this same legal principle as regarding a test as to

whether the "gravamen" of the underlying claim was a commercial transaction. *Sims v. Jacobson,* 157 Idaho 980, 985, 342 P.3d 907 (2015). In the present case, the trial court quoted from the *Sims* opinion regarding the dictionary definition of "gravamen": "A gravamen is 'the material or significant part of a grievance or complaint.'" *Sims,* 157 Idaho 985 (quoting *Merriam Webster's Collegiate Dictionary* 509 (10th ed. 1993)). The trial court also cited two cases decided in 2016 by the Idaho Supreme Court both of which further clarified the "gravamen" language as indicating that: "A party is entitled to attorney fees under §12-120(3) where the claim would not have arisen absent the claimed commercial transaction." *R. p. 2110; Simono v. House*, 160 Idaho 788, 793, 379 P.3d 1058 (2016); *H-D Transp. v. Pogue,* 160 Idaho 428, 436, 374 P.3d 591 (2016).

In this case, the trial court correctly ruled that this case would not have existed except for the commercial transaction relationship between Simplot and Mr. Tiegs and his various business entities. The specific lawsuit from which these claims were spawned was in fact a business divorce type of litigation, which is a quintessential commercial setting between two parties. Thompson was merely acting as an agent for Simplot in that business divorce litigation, and for all intents and purposes was Simplot as well. The trial court correctly observed and held that because the defamation claims were based on a commercial transaction between Simplot and DFF, the defamation claims would not have been made against Thompson but for the attorney-client relationship between Thompson and Simplot. In sum, the Thompson Respondent respectfully submits the trial court acted well within its bounds of discretion and well within the applicable standards for awarding attorney fees and costs to the Thompson Respondent.

V. REQUEST FOR ATTORNEY FEES ON APPEAL

For the same reasons as argued above, Thompson Respondent also seeks an award of attorney fees and costs incurred on this appeal, pursuant to §12-120(3). The argument in favor of attorney fees being awarded to Thompson on appeal is the same basic argument made in the trial court proceedings below. Rather than repeat the same argument, Thompson references and adopts the argument made above seeking to uphold the trial court's award of fees for purposes of this request for fees on appeal as well.

DATED this 25th day of July, 2018.

HEPWORTH HOLZER, LLP

By /s/ John J. Janis
John J. Janis
Attorneys for Respondents
Thompson Coburn, LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July 2018, a true and correct copy of the foregoing was served on the following by the manner indicated:

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