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Dickinson Frozen Foods, Inc. v. J.R. Simplot Company Appellant's Reply Brief Dckt. 45580

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

DICKINSON FROZEN FOODS, INC., an Idaho Corporation,

Plaintiff/Appellant,

vs.

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 I-X, unknown individuals and entities,

Defendants/Respondents.

Supreme Court Case No. 45580
Ada County No. CV01-17-03836

APPELLANT'S REPLY BRIEF

I.A.R. 35(c)

APPELLANT'S REPLY BRIEF

An appeal taken from the District Court in the Fourth Judicial District, Ada County.

The Honorable Lynn Norton, District Judge presiding.

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REPLY ARGUMENTS: OVERVIEW

DFF concluded its opening brief by concisely stating that this Court has an important decision to make on appeal: The Court could either uphold the balanced views in *Taylor v. McNichols* and find that the Idaho litigation privilege is not unlimited, or the Court could accept the unprecedented and radical views of Simplot and its attorneys and find that the litigation privilege is unlimited and takes precedence over all other court procedures. Respondents' briefing highlights the disparities between these two views, and the Court must now decide which view is most appropriate for Idaho litigants. By way of suggestion, Judge Lynn Winmill of the Idaho Federal District Court has adopted the balanced view. In *Blaine Larsen Processing, Inc. v. Hapco Farms, Inc.*, No. 97-0212-E-BLW, 2000 U.S. Dist. LEXIS 22870 (D. Idaho Aug. 9, 2000), Judge Winmill reminds the Court that "Reputation is critically important [in the Potato packing industry] because many million dollar transactions are undertaken, at least initially, with little more than a handshake or a telephone call to verify them," and that making a published attack against the reputation of a member of the Idaho potato industry strikes "a serious blow" at the member's most important asset—its reputation for honesty. *Id.,* at pp. 36-37. In sum, Judge Winmill finds that an Idaho defamation per se claim is still a viable claim for Idaho litigants and that members of the Idaho potato industry are entitled to use the claim to defend themselves against harmful attacks on their business reputations. As a matter of policy, the Supreme Court should reverse the District Court's dismissal and remand the case so it can proceed on its true merits.

In addition to policy considerations, there are significant procedural and substantive reasons why this Court should reverse and remand the case. First, the District Court did not follow proper Rule 12(b) dismissal procedure. Second, the District Court did not follow proper Rule 15(a) amendment procedure. Third, the District Court did not follow proper Rule 56 procedure. Fourth, the District Court did not properly award attorney fees and costs. All four errors are reversible. As

stated in its opening brief, DFF respectfully asks this Court to decide all these issues on appeal, even if the Rule 12(b) errors or the Rule 15(a) errors alone are enough for reversal. This Court should use the "law of the case" doctrine to establish a complete directive for the District Court to follow on remand.

SECTION ONE: DISMISSAL ERRORS

1. This Court Must Remand the Case due to Rule 12(b) Dismissal Errors:

This Court should remand the entire case due to the District Court's Rule 12(b) dismissal errors. DFF discussed these errors at length in its opening brief. However, Respondents have tried to obscure (or sometimes even condone) the errors on appeal, thus DFF finds it necessary to further examine the errors and explain why they warrant a full remand of the case.

a. The District Court Erred by Dismissing Without Performing a Privilege Analysis:

The District Court erred by dismissing DFF's defamation claim without ever performing a correct litigation privilege analysis. The Idaho Supreme Court has consistently approved a comparative privilege analysis, whereby the trial court compares the alleged defamatory statements to the substantive litigation claims, to determine if the statements are reasonably related to the substantive claims. The Court has approved the approach in each of the mutually cited cases on appeal—including *Carpenter, Dayton, Richeson, Weitz,* and *Taylor*. (See *Appellant's Brief,* pp. 23-28). This Court's comparative privilege analysis is historical fact and is not subject to dispute. Nevertheless, Yarmuth seeks to obscure the historical facts by making clear misstatements about each of the cases. For instance, Yarmuth says that in *Richeson* the defamatory statements "had nothing to do with the claims being litigated" and that this alleged lack of relation "had no impact on the Court extending the litigation privilege analysis." (*Brief of Respondent Yarmuth Wilsdon, PLLC,* p. 17). This summary by Yarmuth is false.

In *Richeson,* the Court examined the content of the defamatory statements and then compared the statements to the actual claims being litigated. The Court found that the statements were objections and attacks by Kessler on the prior attorney's legal brief, and then concluded: "Expressing objections and requesting action in the form of a letter to a District Judge and serving copies of the same on other counsel is a customary practice well recognized and often followed. The letter was written with reference and relation to the subject matter of the cause being litigated; and was, in effect, an objection or counter-showing to the subject matter of the brief." *Richeson v. Kessler*, 73 Idaho 548, 551, 255 P.2d 707, 708-09 (1953) (emphasis added). In other words, the Court found that Kessler was entitled to the privilege precisely because his statements had "some reasonable relation to the cause." This conclusion is a far cry from Yarmuth's twisted explanation that the statements had "nothing to do with the claims being litigated." Yarmuth also says, falsely, that the partial overruling of *Dayton* by *Richeson* "amounts to a repudiation of the position that DFF has taken here." (*Brief of Respondent Yarmuth Wilsdon, PLLC,* p. 17). Again, this explanation by Yarmuth is false, and neither the *Dayton* Court nor the *Richeson* Court repudiates the comparative analysis approach.

Almost sixty years after *Richeson*, the Idaho Supreme Court in *Weitz* followed the same comparative approach: "As the finding of slander of title in this case was premised upon a statement made in the complaint, a necessary first step in litigation, where such statement was related to the underlying claim against Respondents." *Weitz v. Green*, 148 Idaho 851, 863, 230 P.3d 743, 755 (2010). These and other cases cited by DFF are crystal clear—Idaho trial judges must first, and always, compare the alleged defamatory statements to the claims (cause(s)) of the action in which the statements are made to see if the statements have some reasonable relation to the substantive claims. If not, the privilege does not apply. Hence, the privilege is not "absolute" as self-declared by the Respondents; rather, the privilege is dependent on passing a reasonable relation (*i.e.*, comparative) anal-

ysis. This simple analysis has been in effect in Idaho since *Carpenter v. Grimes*, and has continued to-date, through *Taylor*.

The District Court erred because it dismissed DFF's defamation claims without performing this comparative privilege analysis.[1] It is beyond dispute that DFF's original Complaint only included the defamatory statements published by Simplot about DFF, but DFF did not attach a copy of the Washington federal pleadings to its Complaint. Nor did DFF include any quotations of the substantive derivative claims for relief pled by Simplot in the Washington Complaint or Amended Complaint. The District Court incorrectly pronounced its dismissal based on a surmise about what the Washington federal pleadings included as claims for relief/causes of action, but- without ever looking at the claims.[2] Thus, the District Court's conclusions were clearly erroneous as they were drawn from thin-air, *i.e.,* the court incorrectly limited itself to only an examination of DFF's Complaint.

By dismissing the defamation claim based on the litigation privilege, the District Court failed to consider an indispensable part of the privilege comparative analysis, *i.e.,* the actual substantive claims as stated in the Washington federal pleadings, and the question of reasonable relation between Simplot's defamatory statements and those claims. In short, the District Court purportedly performed the analysis with only half the relevant data. Under Rule 12(b), the Court could not possibly have found, as a matter of law, that the defamatory statements about DFF were reasonably related to Washington federal litigation claims when the Court flatly refused to follow Mr. Jan-

[1] See footnote 6 in Appellant's Opening Brief, where DFF explains that Simplot actually misled the District Court early in the case about the need for a comparative analysis in response to one of the District Court's questions on the matter. Simplot's counsel explained: "I think based on the allegations of the verified complaint, you don't need to consider the complaint in Washington." (See TR., vol. 1, p. 17, ln. 19-25, p. 18, ln. 1-25, p. 19, ln. 1-13). Contrast Simplot's position to that taken early on by Yarmuth wherein its counsel, John Janis, submitted his declaration to the District Court which attached Simplot's Washington Federal Complaint, and in supporting Yarmuth's motion to dismiss directed the District Court to perform the correct comparative analysis of the whether the alleged defamatory statements were reasonably related to the causes of action being asserted by Simplot, as drafted by its counsel.

[2] It is apparent that the District Court was tainted by Respondents' faulty arguments and merely adopted them despite knowing that it had to go outside of the pleading in order to properly consider an application of the litigation privilege.

is/Yarmuth's original recognition that the Court must review the Washington federal pleadings in the first-person.

This error is easier to grasp in the parallel context of a motion to dismiss involving contract interpretation, where a trial Court cannot possibly interpret a contract as a matter of law and decide the motion if the Complaint does not attach the contract into the record for legal analysis. On appeal, this Court should find that the District Court erred by dismissing under Rule 12(b) without ever examining the content of the federal pleadings.

b. The District Court Erred by Dismissing Based on Affiliate Relationships:

The District Court further erred by dismissing based on the affiliate relationships of "Tiegs and his entities." The Court found that the litigation privilege applied to Respondents because DFF is one of Tiegs' business affiliates and because the Washington federal litigation was generally about Tiegs and his affiliates. (R., vol. 1, pp. 1351-1352, 2031, 2045; TR., vol. 1, p. 15, ln. 17-25, p. 16, ln. 1-14). But the Court overlooked at least two important facts in reaching its conclusion (without ever reviewing the Washington federal pleadings): (1) that the Washington federal litigation was, in fact, limited to derivative claims among the Pasco and Gem State members all related to alleged breaches of the operating agreements, and neither DFF nor its food safety practices had any relationship—reasonable or otherwise—to the stated derivative claims; and (2) that there was no evidence that DFF's food safety practices were related to the stated derivative claims to the extent that they would, "in the course of the trial, become the subject of inquiry." (See *Appellant's Brief,* p. 24, fn. 13). By using a relationships analysis and its attendant false logic, the District Court embraced a novel rule which allows for defamatory statements against non-parties based on mere corporate connections.

To illustrate, the District Court's new rule would allow companies, hypothetically, like Conagra Brands to make defamatory statements about Jacklin®Seed, a Simplot subsidiary, in a lawsuit by Conagra against the President of Simplot for an internal breach of the parties' joint

venture agreement—even if Jacklin®Seed was not responsible for the alleged breaches and even if Jacklin®Seed had its own independent management which did not include the President of Simplot. In that context, Jacklin®Seed would have no choice but to suffer a reputational attack just because of its corporate connection with the President of Simplot, and importantly, would have no recourse to the immediate damage to its business reputation. To further illustrate, the District Court's new rule would allow individuals like the Matt Lauer harassment victims to make defamatory statements about the Comcast Corporation and its internal harassment policies in a lawsuit by the victims against the subsidiary company NBCUniversal. These are both possible scenarios which illustrate the extent to which the District Court's untenable relationships analysis allows litigants to attack the reputations of innocent third-party affiliate companies in disputes which have nothing to do with the companies' internal affairs. This Court should reject the District's Court's relationships analysis and find that it has no place in Idaho's defamation laws or privilege analysis.[3]

Importantly, the District Court failed to appreciate the significance of Respondents' stated reasons for making the defamatory per se statements: *e.g.,* (1) as evidence Tiegs' propensity to commit safety violations (R., vol. 1, p. 141); and (2) as evidence in appointing a receiver to manage the joint ventures (Simplot's *Respondent's Brief,* p. 4). Both excuses demand that the District Court needed to examine materials outside the original Complaint to determine whether the statements were reasonably related the Washington federal pleadings and the underlying substantive claims. In fact, the Respondents' excuses suggest the District Court needed to examine not just the federal pleadings but also the evidentiary issues within the broader context of the federal litigation. Of

[3] In response to the motion for Reconsideration, Simplot candidly admitted that "Under Idaho law, the application of the litigation privilege/immunity does not include an evaluation of a person or entity's relationship to the subject lawsuit, but rather analyzes whether the alleged defamatory statements are 'reasonably related' to the subject litigation." (R., vol. 1, p. 1843). This Court should hold Respondents' to Simplot's admissions and find that the District Court's litigation privilege analysis was improper and should be reversed and remanded for a correct privilege analysis.

course, none of these federal materials or issues appeared in the four corners of DFF's original Complaint.

Under established Rule 12(b) procedure, the District Court must limit itself to the contents of that Complaint, and Respondents' efforts to direct the Court outside of the Complaint unequivocally demonstrates that even Respondents knew that there was simply not enough material in the DFF Complaint to sustain a litigation privilege defense. Yarmuth/John Janis, went so far as to introduce the Washington federal pleadings into the record as part of his own Rule 12(b) motion. (R., vol. 1, pp. 152-153). The District Court disregarded the importance of Respondents' actions and proceeded to dismiss the claim based on the litigation privilege defense, even though it did not consider the substantive information from the Washington federal pleadings to sustain the defense, and even though no Answer was ever filed to raise the litigation privilege defense.

Not surprisingly, Simplot (despite its previous admissions[4]) continues to advance the fatally flawed relationships analysis on appeal. ((See Simplot's *Respondent's Brief,* which says: "Simplot filed a lawsuit against food processing and distribution companies (all Tiegs affiliates like DFF) seeking to dissolve the business relationships" (p. 3); "The complaint detailed a number of issues Simplot had identified with these and other Tiegs affiliates, including DFF" (p. 4); "McKellar continually indicated that the DFF allegations were included in the Washington complaint as allegations of poor safety management practices by Tiegs affiliates" (p. 5)). Yarmuth likewise advances the flawed analysis. (See *Brief of Respondent Yarmuth Wilsdon, PLLC,* which says: "DFF is an entity under the control of Frank Tiegs – indeed, Tiegs verified the complaint as DFF's President. The statements at issue concerned the health and safety practices of Tiegs's entities, which was a central issue in the Washington Litigation. The statements were thus *sufficiently related* to the overall claims of mismanagement that

[4] See, Footnote 2 above.

Simplot alleged" (p. 22)). At one point in its Response, Yarmuth tries to prop up the relationships analysis by mislabeling the comparative analysis as a strict "relevance" test and by suggesting that the comparative analysis was entirely discarded in *Richeson*: Yarmuth says: "DFF is asking this Court to examine each supposedly defamatory statement, and to determine that none of them were directly relevant to the specific derivative claims asserted in the Washington Litigation. This is precisely the sort of narrow reading of the litigation privilege represented by Dayton, and which has not been good law in Idaho since at least 1953, when this Court decided *Richeson*." (*Brief of Respondent Yarmuth Wilsdon, PLLC,* p. 23). As already shown, this argument by Yarmuth is false. Both *Richeson* and the other Idaho privilege cases chose to perform a comparative analysis between the defamatory statements and the substantive claims, not the relationships analysis between the owners and their affiliate companies.

Yarmuth somehow concludes that that the District Court was right about the privilege because the defamatory statements were "reasonably related to the matters at issue in the Washington Litigation, broadly conceived." (*Id.*) (emphasis added). But whether the District Court or Respondents can broadly, *i.e.,* abstractly, conceive of the statements as being related to the Washington federal litigation is irrelevant; the District Court had no way to form its conceptions as a matter of law without going outside of the contents of the original DFF Complaint. The District Court erred by dismissing based on a fatally flawed procedural approach, and a substantively flawed affiliate relationship analysis between DFF and Tiegs. Neither error by the District Court is sustainable under Idaho law.

c. The District Court Erred by Ignoring Mark McKellar's Testimony:

To the extent the District Court considered any facts outside the original Complaint, the Court erred by refusing to accept the admissions of party opponent Mark McKellar's testimony.[5] Both below and on appeal, Simplot tries to deflect the importance of that testimony, asserting that DFF failed to allege any civil perjury claims against McKellar and so the alleged misstatements are not actionable. (Simplot's *Respondent's Brief,* p. 5, fn. 2). Simplot's assertions are but a red-herring. Since its earliest responses on the matter, DFF made it clear that it was not trying to bring a civil perjury case against McKellar, but instead demonstrated that McKellar's[6] testimony nullified the Respondents' claim to the litigation privilege defense. (R., vol. 1, pp. 391-392). Under Idaho's comparative approach, the litigation privilege defense (if asserted by way of Answer and affirmative defense) is dependent on a threshold inquiry and finding of "reasonable relation to the cause," and not the other way around. DFF explained to the District Court that as a practical matter, Simplot and the other respondents could not possibly have made a fact-based decision, before litigation, on whether the statements about DFF were "reasonably related" to the Washington federal pleadings if (as McKellar admits in sworn testimony) they lacked even a basic first-hand knowledge about the accuracy of the statements. (R., vol. 1, p. 392). If anything, McKellar's sworn admissions evidence that Respondents chose a street fighter's "shoot first, ask questions later" attitude when it came to deciding if the DFF statements were reasonably related to their derivative claims. In that context, Respondents were not legitimately acting in good faith, and Respondents blind use of the defamatory per se statements was patently unreasonable. Significantly, McKellar's sworn admissions on the issue that the statements about DFF "did not matter," within the context of the Washington derivate

[5] This deposition testimony was pleaded in DFF's requested amended complaints.
[6] McKellar, as Simplot's Food Group President, was its agent who verified the Washington federal pleadings.

claims, conclusively established that Respondents' assertion of the privilege was a farce. The admissions should have also alerted the District Court to the fact that it could not possibly find, as a matter of law, that the Respondents were claiming the privilege in good faith under the requirements of *Carpenter* and *Taylor*.

2. This Court Should Remand the Case due to Rule 15(a) Amendment Errors:

This Court should reverse and remand the case due to the District Court's Rule 15(a) amendment errors. As stated in DFF's opening brief, the District Court ignored important Rule 15(a) safeguards, *e.g.,* liberal grants of amendments, favorable constructions of all the allegations and inferences for the movant, and recognition and adherence to Idaho's minimal notice pleading standards. (*Appellant's Brief,* pp. 16-18). Even without the benefit of *Savage v. Scandit Inc.*, No. 45143, 2018 Ida. LEXIS 108 (May 1, 2018), the District Court should have recognized the need to allow DFF to amend its pleadings, to amend any alleged deficiencies. The District Court erred by denying both the first and second proposed amended Complaints. (See *Appellant's Brief,* pp. 13-15 for discussion of amendments).

In its Response Brief, Yarmuth misunderstands the issue when it says: "DFF did not add any additional statements that it claimed were defamatory…because DFF's proposed amendments did not contain any new statements or allege that defendants made any new publication, amendment would be futile." (*Brief of Respondent Yarmuth Wilsdon, PLLC,* p. 7). This argument by Yarmuth is misleading, as the District Court never actually considered the sufficiency of the original defamatory statements, as the sufficiency of the statements was never challenged by the Respondents. The District Court's conclusion focused on the legal nature of the assumed—but yet-to-be asserted answer and affirmative defenses—not the number, gravity, and substance of the defamatory statements. DFF specifically tailored its amended pleadings to the Respondents' faulty but asserted legal arguments about the privilege. DFF's failure to add more defamatory statements has no bearing on

whether the proposed amendments were futile. A more honest assessment by Respondents would have recognized that DFF's proposed amendments specifically addressed all the alleged defects to the Respondents' unpled litigation privilege defense. DFF's proposed amendments were more than sufficient to state a defamation per se claim. (See *Appellant's Brief,* pp. 17-20 for discussion on ways in which DFF's proposed amendments cured the alleged defects in its original Complaint).

The District Court erred in suggestively requiring DFF to rebut the litigation privilege defense in its Complaint. In its opening brief, DFF challenged the notion that Idaho law somehow requires a claimant to anticipate and refute the other sides' affirmative defenses in its own pleadings. (*Appellant's Brief,* p. 17). Respondents failed to address this issue in their briefs, and so the issue stands uncontested in DFF's favor. But by way of further explanation, the Court should consider the recent case *Hammer v. Ribi*, 162 Idaho 570, 401 P.3d 148 (2017), in which this Court rejected the requirement of such anticipatory pleadings. After explaining that "immunity" (similar in nature to privilege) is an affirmative defense, the Court said: "A complaint is not subject to dismissal simply because it does not negate an affirmative defense…a plaintiff is not required to 'plead around' affirmative defenses [and] the district court erred by dismissing [the] complaint pursuant to Idaho Rule of Civil Procedure 12(b)(6)." *Id.,* at p. 575. Importantly, this Court explained in a footnote that Hammer's complaint satisfied the "more rigorous" standard of having to anticipate and negate an affirmative defense. The Court cited to two of Hammer's allegations—both of which contained formulaic legal terms about "scope of duty" and "malice or reckless disregard." *Id.,* at fn. 1. This Court might have construed the allegations by Hammer as mere legal conclusions, but the Court found instead that they were factual allegations under Idaho's notice pleading standards. *Id.* Here, the District Court erred by rejecting similar allegations by DFF as "legal conclusions" and by refusing to accept the allegations as true for purposes of Rule 12(b) or Rule 15(a). (R., vol. 1, p. 1304, fn. 1; p. 1312; pp. 1346-1347; p. 1350). In all material respects, DFF's proposed amendments were

sufficiently plead under the *Hammer v. Ribi* standards. (See R., vol. 1, pp. 1388-1401 for DFF's proposed amended allegations). This Court should apply the *Hammer v. Ribi* holdings and find that the District Court erred in rejecting DFF's amendments.

3. This Court Must Remand the Case due to Rule 56 Errors:

This Court should reverse the District Court's dismissal of the breach of the non-disclosure agreement claim. The parties had several material disputes about the meaning of the agreement, including: (1) the intended scope of the term "business relationship," as stated in the non-disclosure agreement (R., vol. 1. p. 1940); and (2) the intended purpose of the non-disclosure agreement (R., vol. 1. pp. 1940-1942). Simplot's only supporting declarant, Tom Clark, provides a purely self-serving interpretation about the scope of the non-disclosure agreement which is directly at odds with the plain language of the agreement. (R., vol. 1, pp. 383-385; See also chart, R., vol. 1. p. 1940). Specifically, Clark says that the non-disclosure agreement was limited to a three-month potato shreds deal. But this testimony is adverse to Helen Stone's testimony that the non-disclosure agreement was valid for a stated period of three years, and that DFF only released its confidential food safety report to Simplot because Tom Clark had earlier signed a non-disclosure agreement. (R., vol. 1. pp. 1944-1946). The District Court was required to have drawn all reasonable inferences from these disputes in favor of DFF's position, *i.e.*, that the non-disclosure agreement covered the parties' ongoing business relationship and that Simplot's public disclosure of the food safety report took place within the time frame covered by the agreement. (R., vol. 1. p. 1940). The Court's decision to do otherwise was clear error under established summary judgment procedures about favorable inferences.

Ultimately, the District Court found that the non-disclosure agreement was unambiguous, and that the agreement was limited to only protecting information received by Simplot during the parties' preliminary discussions about their business relationship. (R., vol. 1, p. 2099). The Court

went on to hold "…had DFF meant for the non-disclosure agreement to cover all information sent to or received by Simplot within a three-year period as part of a consulting working relationship, the language should have reflected this requirement." (R., vol. 1, p. 2100). Yet, the Court completely disregarded the fact that the agreement contains a three-year obligation of confidentiality (R., vol. 1, p. 1951), and that the agreement's recipient (i.e., Simplot) had a duty to keep any confidential information it had received a secret until DFF did one of the following: (1) made a written demand for the information: or (2) the agreement was terminated. (R., vol. 1, p. 1952). This explanatory language, when compared with the language relied on by the District Court—at a minimum—creates an ambiguity as to the intended scope of the agreement and provides a reasonable basis for DFF's theory that the confidentiality requirements would continue even after the formation of the proposed business agreement, as explained in the Helen Stone Declaration. (R., vol. 1. pp. 1944-1946). Idaho case law is clear on this point: "Ambiguity results when reasonable minds might differ or be uncertain as to its meaning." *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 469, 111 P.3d 148, 154 (2005). The District Court erred by disregarding these ambiguities and by construing only part of the agreement's language: "In determining the intent of the parties, [the] Court must view the contract as a whole." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004). This Court should find that the District Court erred in its findings on ambiguity and should remand the claim for further proceedings.

Simplot makes the misleading statement that "DFF does not specifically address the plain language of the NDA and its interpretation, thus bypassing any analysis of the trial Court's decision on a lack of ambiguity." (*Respondent's Brief,* p. 12). This statement by Simplot is false. On p. 39 of its opening brief, DFF begins its discussion with the District Court's findings on ambiguity and proceeds over the next two pages to address the Court's errors in regard to ambiguity. In addition, Simplot makes the puzzling statement that "DFF attempts to encourage this Court to find that there are

ambiguities based upon the way DFF would like the Court to interpret the Contract." (*Respondent's Brief,* p. 12). Again, Simplot mischaracterizes DFF's position. In its opening brief, DFF was entitled to offer its "own" interpretation of the agreement and to show that there is a material dispute about the meaning of the agreement, and that it is possible for reasonable persons to reach different conclusions about the meaning of the agreement. In making these arguments, DFF was following established summary judgment procedure which says that non-movants are entitled to show material disputes and alternative, reasonable interpretations of documents. Summary judgment is supposed to be limited to just those cases where there are no material disputes and where there is no possibility of differences of interpretation. Here, DFF established that there are still material disputes and that there are reasonable alternative interpretations which preclude summary judgment as a matter of law.

In the end, DFF recognizes that Simplot's view of the agreement may be a reasonable alternative view—at least in the abstract. But DFF has also offered a reasonable view of the agreement, one that much more closely matches the parties' actual course of conduct as per the Helen Stone declaration. (R., vol. 1. pp. 1944-1946). This Court is entitled to review the agreement on appeal. As Simplot says, if the Court finds that the agreement was ambiguous, the Court should remand the issue to the District Court for further proceedings. (*Respondent's Brief,* p. 10, fn. 4).

4. This Court Must Remand the Case due to Errors in Awarding Fees and Costs:

This Court should remand the case due to errors in awarding attorney fees and costs. DFF has extensively argued these issues in its opening brief. (*Appellant's Brief,* pp. 41-47). DFF makes the following additional arguments in reply to the Respondents' briefs.

a. The District Court Erred in Awarding Idaho Code § 12-120(3) Fees:

The District Court erred in awarding § 12-120(3) attorney fees. Both Simplot and Thompson rely on Thompson's general arguments on the issue. (*Brief of Respondent Thompson Coburn, LLP,* pp.

15-16).[7] But these arguments are only generic arguments about the occasional propriety of awarding commercial transaction fees in tort cases. After citing to several Idaho decisions, Thompson concludes: "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." (*Brief of Respondent Thompson Coburn, LLP,* p. 16). This is simply more faulty "relationships" analysis by Respondents. DFF never alleged—nor is it factually accurate—that its general business dealings with Simplot forms the basis of its defamation claims. And the fact that the Washington federal litigation was "a business divorce type litigation" is completely irrelevant, as DFF was not a party to that litigation and DFF did not have any commercial transactions at-issue in the litigation—with Simplot or with anyone else. DFF's defamation claim is based solely on the fact that Simplot unilaterally and independently attacked DFF's food safety reputation when DFF did not have any reasonable connection to the federal litigation. It simply cannot be said, with any degree of intellectual honesty, that general business dealings between Simplot and DFF (or, between Simplot/McKellar or Thompson) were at the center of the Washington federal litigation, much less as the center of this defamation action. There is simply no basis for § 12-120(3) fees.

In addition to Thompson's arguments, Simplot points to a narrow conclusion by the District Court, wherein the Court suggests that the substance of DFF's § 12-120(3) argument on fees against Simplot was untimely as a motion to reconsider the Court's earlier fees decisions. (*Respondent's Brief,* p. 24) (See also R., vol. 1, p. 2233). But Simplot mischaracterizes the issue as a waiver of the § 12-

[7] Simplot says in its Response Brief: "DFF also argues that the trial court erred in awarding fees for defense of Count I (Defamation) under Idaho Code § 12-120(3). The merits of this argument are covered by Respondent Thompson, and Simplot incorporates that argument by reference." (*Respondent's Brief,* p. 23).

120(3) arguments. Simplot fails to mention that the District Court went on to discuss and to reaffirm its holdings in the earlier fees decisions and then applied the same holdings to Simplot. (R., vol. 1, p. 2234). And so, even if DFF's arguments were not timely as a reconsideration of the McKellar and Thompson fees decisions, the substance of the arguments was clearly timely as a challenge to Simplot's fees requests. There is no dispute that DFF filed a timely motion to disallow Simplot's fees and costs. (R., vol. 1, p. 2125; p. 2164). During its review of that motion, the District Court made new § 12-120(3) findings as to Simplot, thus providing an independent basis for review on appeal.[8] DFF has now fully addressed the Court's § 12-120(3) legally faulty findings, including: (1) that a commercial transaction was the gravamen of the defamation claim, which it was not; (2) that the business relationship between DFF and Simplot was a qualifying commercial transaction, which it was not; (3) that the defamation would not have arisen but-for DFF's and Simplot's business relationship, which is factually false; and (4) that the defamation claim was fundamentally related to "commercial transaction" [sic] between the parties, which is legally and factually false.. (See District Court's findings, R., vol. 1, p. 2234). This Court should reverse the award of § 12-120(3) fees to Simplot for its failure to identify a relevant commercial transaction which gave rise to, and was the gravamen of, the defamation claim. In any event, DFF has challenged Simplot's fees on other grounds, including lack of apportionment. If this Court accepts DFF's arguments on dismissal errors

[8] It is absurd to think that DFF could only challenge Simplot's fees request through the arguments which DFF had made in the much earlier McKellar/Thompson fees requests, or that DFF was somehow prohibited from making similar arguments in both the Simplot and the McKellar/Thompson fees requests. It is undisputed that DFF made timely § 12-120(3) objections and arguments in all three instances. Whether the District Court was afraid of making inconsistent rulings between the different fees requests is irrelevant. Any conclusion by the District Court that DFF's § 12-120(3) challenge to Simplot's fees was a "reconsideration" of its earlier fees decisions is a procedural non-sequitur and should be ignored due to the Court's independent § 12-120(3) findings for Simplot. It is inconsistent to say (as Simplot does on appeal) that Simplot was entitled to make an independent § 12-120(3) fees request, and that District Court was entitled to issue an independent order on the request, but that DFF was not entitled to challenge either event due to a similarity in language with its previous motions.

and remands the case, the Court must then overturn all fees awards for Respondents' lack of prevailing party status.

In sum, this Court should reverse the Respondents' awards of § 12-120(3) fees as to the defamation claim. The Court should also reverse Simplot's award of § 12-120(3) fees for lack of apportionment. The Court should reverse the award costs, as set out in the opening brief.

SECTION TWO: ADDITIONAL ISSUES ON APPEAL

1. This Court Should Not Consider Issues of Personal Jurisdiction:

This Court should not consider issues of personal jurisdiction on appeal. Both Yarmuth and Thompson present personal jurisdiction arguments as additional issues on appeal. But the District Court did not dismiss, nor make any findings on, the causes of action based on lack of personal jurisdiction. (R., vol. 1, p. 1354). This Court has made it clear that it will not issue advisory opinions on such hypothetical issues. See *PHH Mortg. v. Nickerson*, 160 Idaho 388, 399, 374 P.3d 551, 562 (2016).

In the unusual chance the Court does consider Yarmuth's and Thompson's personal jurisdiction arguments on appeal, DFF relies on its extensive trial-level arguments on the matter, incorporated and re-argued herein by reference. (See R., vol. 1, pp. 1274-1283; pp. 1289-1293).

2. Respondents Are Not Entitled to Attorney Fees or Costs on Appeal:

Respondents are not entitled to attorney fees or costs on appeal. The District Court clearly erred in dismissing the case. Respondents fail to recognize these errors and insist that the District Court "got it exactly right," (*Brief of Respondent Yarmuth Wilsdon, PLLC,* p. 31), despite the Court's neglect of several Rule 12(b), Rule 15(a), and Rule 56 standards. On procedural grounds alone, DFF is entitled to have the entire case remanded, and that means Respondents cannot possibly be considered the prevailing parties on appeal. DFF tried everything it could to convince the District Court to follow rational and mandatory litigation standards—but to no avail. The Court should recognize that

DFF is not to blame for this appeal, and that Respondents should not be rewarded with fees and costs on appeal for having manufactured the need for appeal through their unfounded motions.

Respondents are not entitled to any Section § 12-121 fees. Even if DFF's arguments about civil procedure and the comparative privilege analysis are wrong, the arguments are not unreasonable. Idaho case law is clear: "A misperception of law or of one's interest under the law is not, by itself, unreasonable con-duct. If it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing party under I.C. § 12-121. Rather, the question must be whether the position adopted by the owner was not only incorrect but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation." *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 911, 684 P.2d 307, 313 (Ct. App. 1984). At a minimum, DFF's arguments were well founded, with plenty of support from both Idaho and non-Idaho law. The arguments are clearly not fallacious. If anything, the Court should find that Respondents have unreasonably resisted these arguments on appeal and award DFF its fees and costs, as set out in Section Four of this Brief.

SECTION THREE: MISCELLANEOUS REPLY ARGUMENTS

1. Reply Arguments to Respondents' Misstatements of Fact and Law:

The following list contains miscellaneous reply arguments to some of the Respondents' more noticeable misstatements of fact and law. These misstatements warrant at least passing discussion, even if the discussions are somewhat cumulative of DFF's prior briefing on the issues. For convenience, DFF has presented these reply arguments in bullet format, with the Respondents' statements in quotations and DFF's substantive replies following each quotation:

- **Statement:** "The clear purpose of the defamation action was to disrupt – and distract from – the Washington Litigation, and to drive a wedge between Simplot and its lawyers." (*Brief of Respondent Yarmuth Wilsdon, PLLC,* pp. 1-2).

Reply: The purpose of DFF's complaint was to sue for defamation damages and breach of contract damages. There is nothing on the face of the pleadings to suggest otherwise. In the Rule 12 context—both at trial and on appeal—Yarmuth is not entitled to have the Court accept, nor consider, any hidden motives which do not appear in the pleadings.

- **Statement:** "DFF offers a misleading portrait of this Court's treatment of the privilege, and argues that it applies only in narrow, limited circumstances." (*Id.,* p. 2).

  Reply: DFF has never said that the litigation privilege should only apply in narrow, limited circumstances. Rather, DFF has consistently said that while the privilege may apply broadly, it does not apply in cases where the defamatory statements have no reasonable relation to the substantive claims of the action in which the statements were made. This is one of those cases.

- **Statement:** "The privilege, moreover, is absolute, not conditional or qualified. It cannot be 'waived' or 'overcome.'" (*Id.,* p. 3).

- **Reply:** This appeal is not about whether the Idaho litigation privilege is conditional as opposed to absolute. Rather, the appeal is about whether the privilege applies in the first place, absent a showing that the defamatory statements had some reasonable relation to the substantive claims of the action in which the statements were made. Here, Respondents failed to make this showing, relying instead on "broadly conceived" notions about Tiegs' affiliate relationships. Respondents are not entitled to any privilege, let alone an absolute privilege, under these circumstances.

- **Statement:** "One other point should be stressed here. DFF argues—as it did below—that Yarmuth has already 'admitted' that the statements were not related to the Washington Litigation and were made only to 'attack Tiegs's character.' This is simply false. As Judge Norton noted in the District Court, DFF's contention that Yarmuth 'admitted' any sort of

wrongdoing is 'patently false' and 'is not a valid representation of the facts in evidence.'" (*Id.,* p. 6).

- **Reply:** Yarmuth cites to a point in the record which does not actually address the issue of prohibited character evidence. Rather, the District Court says at that point in the record that DFF was not entitled to opine on the nature of Simplot's later retraction of the defamatory statements and the legal significance of its retraction. (See R. Vol. 1, pp. 2042-43). To-date, Respondents have not addressed their admitted use of the DFF statements as prohibited character evidence against Tiegs, and how the attempted use of such evidence would be considered legitimate under *Taylor v. McNichols.*
- **Statement:** "The second proposed amended complaint also contained a series of conclusory assertions to the effect that Frank Tiegs 'does not oversee…the day-to-day operations at any of DFF's facilities,' and that DFF 'was not legally responsible' for the actions of the entities involved in the Washington Litigation." (*Id.,* p. 8).
- **Reply:** DFF's allegation about its' own internal management was not conclusory. Respondents were not entitled to discount or ignore the allegation in a Rule 12(b) or Rule 15(a) context. DFF was entitled to all favorable inferences from the allegation.
- **Statement:** "In essence, DFF contends that statements must be sufficiently relevant that they would be admissible at trial under the Rules of Evidence." (*Id.,* p. 11).
- **Reply:** DFF never said that the defamatory statements had to be relevant to the point of actual admissibility. If anything, Respondents are the ones who put undue emphasis on the admissibility of the evidence. (See *Respondent's Brief,* p. 4, where Simplot explains the DFF statements were used as "evidentiary support" for appointment of a third-party receiver.). DFF merely points out that the Respondents' intended evidentiary uses of the statements

were clearly prohibited by the Federal Rules of Evidence, and, hence, could not pass a comparative analysis and were illegitimate under *Taylor*.

- **Statement:** "This Court again expanded the breadth of the litigation privilege more recently in *Taylor v. McNichols*, 149 Idaho 826, 243 P.3d 642 (2010)." (*Id.,* p. 18).

  Reply: While this Court may have expanded the privilege in some ways, i.e., extending it beyond defamation and libel claims, the Court did not expand the privilege in terms of relaxing the standards for attorney conduct. If anything, the Court reminded us that: "The litigation privilege does not provide attorneys with blanket immunity against all claims raised against them, merely because they are acting as an attorney in litigation." *Id.,* at p. 839. Here, Respondents seem to think they enjoy an "absolute" privilege just because they were acting within the Washington federal litigation. The *Taylor* Court has already rejected that notion, explaining that the actions must be reasonably related to the claims and within the scope of the attorney's legitimate representation. Making unnecessary and harmful allegations about a non-party's business reputation is not legitimate representation as a matter of law.
- **Statement:** "DFF's contention that *Iowa Park* supports its narrow reading is wrong." (*Id.,* p. 20).
- **Reply:** DFF cited to *Taylor v. Iowa Park Gin Co.*, 199 S.W. 853, 855 (Tex. Civ. App. 1917) for the holding that privileged matters must be "legitimately related" to the subject matter of the pleadings to the extent that "it may become the subject of inquiry in the course of trial." (See *Appellant's Brief,* pp. 27-28). This holding is fully consistent with DFF's positions on appeal.
- **Statement:** "DFF's entire argument against Judge Norton's ruling thus rests on the notion that she failed to apply the privilege analysis that this Court once adopted in *Dayton*, but then entirely repudiated in *Richeson* and *Taylor*." (*Id.,* p. 21).

- **Reply:** This is simply not true. *Dayton* did not establish the comparative analysis approach, and neither *Richeson* nor *Taylor* abandoned the approach.
- **Statement:** "In making this determination, Judge Norton joined other courts that have unanimously held that the litigation privilege applies whenever allegedly defamatory materials are provided to third parties that have some interest in the proceedings." (*Id.,* p. 25).
- **Reply:** As a procedural matter, the District Court was not entitled to weigh questions of third-party relations to the Washington federal litigation. The Court was required to construe all facts in DFF's favor—including DFF's proposed facts about NFCS's lack of interest in the judicial proceedings. (See R., vol. 1, pp. 1397-1398). In the end, this argument is another attempt by Respondents to distract from the District Court's faulty "wholly unconnected" publication standard. The relevant standards for publication and waiver of privilege center on the connection between the publication and the judicial proceedings, not on the connection between the third party and the proceedings. (See *Appellant's Brief,* pp. 32-35).
- **Statement:** "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." (*Brief of Respondent Thompson Coburn, LLP,* p. 9).
- **Reply:** DFF is not trying to create a more restrictive standard. Rather, DFF is trying to get the Court to enforce the existing standards—including the comparative component of the reasonable relation standard as seen in each of the published Idaho privilege cases.
- **Statement:** "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 of wrongful conduct." (*Id.,* pp. 13-14).

- **Reply:** True. But here, DFF was not a party to the federal litigation, and Respondents were not making the DFF statements in defense of any of the Pasco and Gem State member-interests. DFF had not committed any conduct, let alone any wrongful conduct in any way related to the federal derivative disputes.

These are just some of the Respondents' misstatements. It is unnecessary for DFF to address all the misstatements, as the issues which they raise are all subordinate to the District Court's primary errors of judgment, i.e., the District Court's failure to perform a correct litigation privilege analysis and its disregard for important Idaho procedural rules. No amount of equivocation by Respondents on these errors can excuse the errors on appeal. The entire case must be remanded.

SECTION FOUR: ATTORNEY FEES AND COSTS ON APPEAL

1. This Court Should Award DFF It's Attorney Fees and Costs on Appeal:

DFF has already requested an attorney fees and costs on appeal for having to defend against any frivolous or unfounded arguments. See Idaho Code § 12-121, I.A.R. 35(a)(5) and I.A.R. 40, 41. As predicted, DFF has had to defend against such arguments. Respondents have: (1) asserted the same legally unsupportable and unfounded arguments about the litigation privilege; (2) ignored the same critical Rule 12(b) and Rule 15(a) procedural errors; (3) made the same self-serving Rule 56 arguments; and (4), repeated the same unfounded positions about commercial transaction fees.

This Court should remand this case in its entirety and should award DFF its prevailing party fees and costs under Idaho Code § 12-121, I.A.R. 35(a)(5) and I.A.R. 40, 41, to be set out in a memorandum of costs upon entry of opinion on appeal.

CONCLUSION

This Court has an easy choice to make on appeal. DFF is entitled to the protection of Idaho's defamation laws. DFF is also entitled to a correct procedural and substantive analysis of its claims. The Court should reverse and remand the entire case back to the District Court, with suffi-

cient instructions to allow DFF's claims to proceed on their real merits. The Court should reverse the District Court's award of attorney fees for Respondents, and it should award DFF its attorney fees and costs on appeal, in amounts to be set out in a later memorandum of fees and costs.

DATED August 15, 2018

TROUT LAW, PLLC

/s/ Kim J. Trout
Kim J. Trout
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2018, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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