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IN THE SUPREME COURT FOR THE STATE OF IDAHO

Michael CLARKE, and Sue Clarke,
individually and as husband and wife,

Plaintiffs-Appellants,

vs.

Holly LATIMER,

Defendant-Respondent.

Supreme Court Docket No. 45012

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada,
the Honorable Samuel Hoagland, District Judge, Presiding

Eric R. Clark, Esq.
CLARK & ASSOCIATES,
ATTORNEYS
P.O. Box 2504
Eagle, ID 83616

For the Appellants

Holly Latimer, *Pro Se*
91-1183 Wiapuhia St.
Ewa Beach, HI 96706

For the Respondent

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Statement of the Case.

This is a “Uniform Voidable Transactions Act” case filed against a wife and transferee who received money from husband who was in significant debt to the Plaintiffs.

The course of the proceedings in the trial and its disposition.

The case was tried before District Judge Hoagland on February 6, 2017, and took approximately one half day to complete. Subsequently, Judge Hoagland issued Findings of Fact & Conclusions of Law on March 17, 2017. (R. pp. 18-30.) Judge Hoagland then entered Judgment for the Clarke’s for \$252,868.41, (R. p. 31.), the exact amount identified in Plaintiffs’ Exhibit 10 and sought for damages at trial.

A concise statement of the facts.

The Plaintiffs (“Clarke’s”) hereby incorporate the Court’s Findings of Facts as stated in its decision. (R. pp. 18-20.) Additionally, Defendant Holly Latimer (“Holly”) is married to Zach Latimer, (“Zach”) who through a fraudulent investment scheme obtained literally the Clarke’s entire retirement savings of \$1,000,000.00 in 2008. The Clarke’s sued Zach and obtained a judgment against him in March 2012, which totaled over \$7,000,000.00.¹ *Clarke v. Latimer, et al*, Ada County Case No. CV - OC 1019701. Ultimately, the Idaho Department of Finance pursued Zach as well and obtained a Default Judgment and Permanent Injunction.² That judgment was nearly \$1,000,000.00. Zach also sought to discharge his debt to the Clarke’s and filed a Chapter 7 Bankruptcy proceeding in Hawaii. After a two-day hearing, the Bankruptcy

¹ Plaintiffs’ Exhibit 1.

² Plaintiffs’ Exhibit 2.

Judge ruled that Zach had defrauded the Clarke's pursuant to bankruptcy law and denied his discharge.³ The Hawaii Bankruptcy Court entered Judgment for the Clarke's that incorporated the Idaho Judgment and accumulating interest, including the \$2,000,000.00 in punitive damages Judge Wilper awarded originally. The Bankruptcy Court also awarded the Clarke's their litigation costs and nearly \$200,000.00 in attorney fees.⁴ Although the Clarke's have diligently pursued collection of this debt, their recovery has been minimal.

Following his stint as a securities fraud, Zach obtained employment with Vivint Solar, whose headquarters is in Utah. In April 2012, the Clarke's recorded their Idaho Judgment as a foreign judgment in Utah and began to garnish Zach's wages. Ultimately, the Clarke's learned that Zach had instructed Vivint Solar to direct deposit his earnings into one of two Wells Fargo Accounts titled VVL, LLC or Z.V. Latimer Investments, Inc. Although each entity was formed legitimately in Utah, Zach was essentially using the respective bank accounts as his personal accounts.⁵ Eventually, around mid-2015, Zach opened a Bank of Hawaii account and directed Vivint Solar to deposit his earnings. The Bank of Hawaii statements show that Zach had deposited funds from other and unknown sources, separate and apart from his earnings from Vivint Solar.⁶ The Clarke's proved at trial that starting in December 2011,⁷ Zach has transferred significant sums from his accounts to Holly's Wells Fargo or Bank of Hawaii accounts.⁸

³ Plaintiffs' Exhibit 15.

⁴ Plaintiffs' Exhibit 3

⁵ Plaintiffs' Exhibits 4 and 5.

⁶ Plaintiffs' Exhibit 6.

⁷ This date reflects the 4 year statute of limitations.

⁸ Plaintiffs Exhibits 7, 8, 9, 10.

Issues Presented on Appeal.

- a. Whether the District Court erred when it ruled the Appellants were not the prevailing party when the Appellants prevailed on their only claim and were awarded every penny of the \$252,868.41 they sought at trial, and the Respondent was denied all proffered affirmative defenses?
- b. Whether the District Court erred when it ordered the Appellants to file a satisfaction of judgment although the Appellants had not received any money from the Respondent or anyone to satisfy any judgment?
- c. Whether the District Court erred when it denied Appellants' Motion for Prejudgment Interest?
- d. Whether the Appellants were entitled to recover their costs and attorney fees below?
- e. Whether the Appellants are entitled to recover their costs and attorney fees on appeal?

ARGUMENT

1. The Court erred when it ruled the Clarke's were not the prevailing party.

The Clarke's prevailed on their sole claim against Holly, and they were awarded every penny of the damages the Clarke's proved at trial. Conversely, Holly did not prevail on any aspect of her case and all affirmative defenses were denied or abandoned. Notwithstanding these results, Judge Hoagland ruled that the Clarke's were not the prevailing party. (R. p. 29.)

Since they both live off the same income and both are responsible (based on community property law) for both judgments, [Foot note 5: Haw. Rev. Stat. Ann. § 510-8.] there seems to be no net gain or loss by either party, except in attorney fees and costs to argue a rather esoteric legal issue. The net effect is like rearranging the deck chairs on the Titanic. To that extent, there is no prevailing party and no costs or fees will be awarded.

Judge Hoagland ignores the fact that while Holly may have already been liable to the Clarke's tangentially; through their ability to attach community property assets, until the Clarke's judgment in this case, Holly's separate property assets were untouchable. The Clarke's Judgment against Holly personally would entitle the Clarkes to pursue and attach any separate property that Holly now owned or should acquire in the future, such as an inheritance. (See Haw. Rev. Stat. Ann. 510-8.) Accordingly, Judge Hoagland's conclusion that the Clarke's gained nothing by this lawsuit is factually and legally incorrect. While Judge Hoagland suggests by his reference to a sinking ship that the lawsuit was baseless, it was not and the Clarke's may ultimately benefit significantly from a judgment against Holly personally, which they now have. There was method to the Clarke's madness, which apparently the Court did not understand or consider.

"In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties." *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009).

While a district court has discretion, that discretion is measured by certain criteria.

The district court's determination of who is a prevailing party will not be disturbed absent an abuse of discretion. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 847, 172 P.3d 1119, 1122 (2007). When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Id.* (affirming the trial court's decision that each party bear its own costs in a case

where a plaintiff successfully showed a breach of contract, but failed to provide adequate evidence to show damages that were not mere speculation).

Shore v. Peterson, 146 Idaho at 915.

Assuming that Judge Hoagland understood he had discretion, although he does not mention such understanding in his decision, Judge Hoagland failed to act consistently with the legal standards applicable to a decision to determine prevailing party status.

IRCP 54(d) (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court may determine that a party to an action prevailed in part and did not prevail in part, and on so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resulting judgment or judgments obtained.

Here the Clarke's won on their sole claim and obtained a judgment for over \$250,000.00 against Holly. However, there is no criterion in IRCP 54(d) (B) that even remotely suggests that a Court should consider any perceived "effect" of the judgment, or what "effect" such a judgment may potentially have on other non-parties like Zach, or any existing judgments. The effect that Holly's judgment may ultimately have on Zack's judgment is pure speculation and accordingly is not relevant to the Court's prevailing party determination.

Moreover, Judge Hoagland ignored basic community-separate property law. Contrary to his ruling, as a *result* of this action, the Clarke's obtained a substantial benefit in this litigation by now having another pocket into which they may reach—Holly's current or future separate property. Judge Hoagland therefore failed to act consistently with the legal standards applicable

to a prevailing party determination when he erroneously concluded that the Clarke's gained nothing by the lawsuit.

Judge Hoagland also failed to reach his decision by an exercise of reason.

On the other hand, to the extent that the Clarkes obtain a judgment against Holly Latimer voiding the unlawful transfers and awarding a money judgment against her, **then the new judgment against her would effectively partially satisfy the original judgment against him**, to the extent and in the amount of the judgment against her.

It is unclear just what basis Judge Hoagland references to conclude that a mere paper judgment somehow satisfies an existing judgment. IRCP 58.1. "Satisfaction of Judgment. (a) Required on Full Payment. **Upon full payment of a judgment**, the party in whose favor the judgment was rendered must: (1) file a satisfaction of judgment in the court in which the judgment was entered;" (Emphasis added) Perhaps if Holly *paid* the Clarke's judgment then Zach would be entitled to claim partial satisfaction or set-off against any recovery against him, but it is nonsensical to find that a mere paper judgment is the basis to satisfy an existing judgment, which was Judge Hoagland's ruling.

Ultimately, the Clarke's filed a Motion for Prejudgment interest which Judge Hoagland denied in an oral decision. (Discussed below) The Transcript of that decision is in the record. When discussing his basis for denying the Clarke's claim for prejudgment interest Judge Hoagland kept stating his reasoning for denying prevailing party status; that the judgments (Holly's and Zach's) refer to "the same money." (Tr. pp. 13, L. 2-p. 17, L. 4) Judge Hoagland believes that "Fundamentally, it is all the same money." (Tr. p. 14, L. 4.)

First; obviously, a Judgment is not “money.” A judgment is a debt that is accruing interest, and that interest will cease when the debt is paid. However Judge Hoagland considered the judgment as it were money sitting in a bank. In reality, the Clarke’s obtained separate judgments against both parties and those judgments are separate and distinct. Holly could have joined Zach as a party and asserted a claim for contribution, but she did not. While eventually, either party may seek an offset for payment made to satisfy the other’s particular judgment. However, the fact remains that there are two separate and distinct judgments against separate parties; both of which the Clarke’s are entitled to pursue and collect, subject to a claim for setoff or contribution by the other party.

By way of illustration, suppose that the Clarke’s judgment against Zach was for \$250,000, and the Clarke’s obtained a judgment against Holly for \$250,000. Judge Hoagland orders the Clarke’s to file a satisfaction of judgment in the case against Zach, so he owes nothing, yet the Clarke’s have not received a dime from anyone. That simply is nonsensical. Accordingly, Judge Hoagland failed to reach his decision to deny the Clarke’s “prevailing party” status based on any rational thought or logical reasoning. The judgments at issue simply do not address the “same money” as Judge Hoagland erroneously concludes.

2. The District Court erred when it ordered the Plaintiffs to file a satisfaction of judgment in another case although the Plaintiffs had not received any money from the Defendant to satisfy any judgment.

In his Findings of Fact and Conclusions of Law, Judge Hoagland stated: “Upon entry of the Judgment in this case, Plaintiffs should file a partial satisfaction of the judgment in the underlying case for the same amount.” (R. p. 29) The Clarke’s incorporate their argument on

this issue as previously stated in this brief. There is simply no legal or factual basis to order a party to ever file a satisfaction of judgment unless they have received payment for that judgment.

The Clarke's, in deference to the Court's authority, filed PLAINTIFFS' NOTICE OF FILING PARTIAL SATISFACTION OF JUDGMENT AND NOTICE OF OBJECTION AND PROTEST. (R. pp. 52–56) Although filed, the Clarke's have the authority to revoke that filing upon a ruling by this Court that Judge Hoagland order is reversed. As Judge Hoagland had no legal or factual basis to Order the Clarke's to file any satisfaction of judgment in any case, this Court should find that Judge Hoagland's order was illegal.

3. The District Court erred when it denied Plaintiffs' Motion for Prejudgment Interest.

On March 28, 2017, the Clarke's timely filed their Motion for Prejudgment Interest, and a declaration in support, to which they attached an itemized list of Zach's unlawful transfers to Holly by date and amount and calculated interest due and accruing from the date of the transfer, (R. p. 37–41), and determined that prejudgment interest had accrued as of March 17, 2017 in the amount of \$81,619.32.

On April 16, 2017 Judge Hoagland ruled from the bench and denied the Clarke's Motion. Judge Hoagland did not issue any subsequent written decision. Notwithstanding that the Court ruled each transfer Zach made to Holly violated the Fraudulent Transfers Act, Judge Hoagland refused to award pre-judgment interest because it was all "the same money."

The Clarke's conceded that while the *Uniform Voidable Transactions Act*, I.C. § 55-901, *et. sec.*, does not specifically address prejudgment interest, it does identify broad authority to grant relief; "...(c) Subject to applicable principles of equity and in accordance with applicable

rules of civil procedure: ...3. any other relief the circumstances may require.” I.C. § 55-916(1)(c)(3). Accordingly, a Court has discretion to award pre-judgment interest according to the UVTA.

Additionally, Idaho’s UVTA is remedial litigation designed to provide broad relief to creditors otherwise deprived of money or property to which they are lawfully entitled. “It is a well-known canon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature.” *State By and Through Alan G. Lance v. Hobby Horse Ranch Tractor and Equip. Co.*, 129 Idaho 565, 567, 929 P.2d 741, 743 (1996) (citing NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60.01 at 147 (5th ed. 1992)).

The Clarke’s also presented an accounting showing that the Clarke’s damages were “readily ascertainable by mathematical process.” *Ross v. Ross*, 145 Idaho 274, 279-80, 178 P.3d 639,642-42 (Ct. App., 2007).

According to the UVTA, “‘Claim’ means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” I.C. § 55-910(3). The Clarke’s “right to payment” accrued in 2008 when Zach obtained the Clarke’s money by fraud. Accordingly, the case involves a claim for money after that money became due. See, I.C. § 28-22-104(1)(2). As the Uniform Voidable Transactions Act must be construed broadly and affords the trial court authority to fashion equitable remedies and prejudgment interest was “readily ascertainable” as

each fraudulent transfer was a specific amount proven at trial, the Clarke's were entitled to an award of prejudgment interest and Judge Hoagland erred when denying the Clarke's motion.

4. The Clarke's were entitled to recover their costs and attorney fees below.

Below the Clarke's pled they were entitled to Attorney fees according to "Idaho Code §§ 12-120, 12-121, and the Idaho Rules of Civil Procedure, if they prevail in this action." (R. p. 12.) In response, Holly claimed attorney fees "as provided by Idaho Code §§ 12-120(3) and 12-121 and Rule 54 of the Idaho Rules of Civil Procedure." (R. p. 15.)

In *Ross v. Hansen*, 148 Idaho 283, 221 P.3d 81 (2009) the Supreme Court ruled the Plaintiffs were entitled to recover attorney fees according to I.C. § 12-120(3) despite there was no direct contractual relationship between the Plaintiffs and the Defendant. "Although Hansen characterized the investment as a personal loan to him, Meyers and her late husband invested nearly \$300,000 in Ideal Consultants, what they believed was a legitimate attempt to build a revenue-generating program known as the Congressional Accountability Project. This was a fraudulent commercial transaction and Meyers is entitled to attorney fees under I.C. § 12-120(3) in recouping her losses." *Meyers v. Hansen*, 148 Idaho at 293-94. The Meyers had invested in Hansen's company, but had not had a contractual relationship directly with Hansen. Notwithstanding the Court found that the case involved a "fraudulent commercial transaction" and I.C. § 12-120(3) nonetheless applied. Although the *Hansen* facts mirror the facts in the Clarke's case against Zach, the rationale in *Hansen* applies equally to the facts here. The Court reasoned that although Hansen was not a direct contractual party, he was a party to the fraud. Accordingly, the case involved a "fraudulent commercial transaction," and anyone implicated in

that fraud was subject to an award of attorney fees against them. In the underlying case, the Clarke's invested in one of Zach's sham Limited Liability Companies and received promissory notes for their investments. Those investments constituted fraudulent commercial transactions.

Although *Hansen* did not involve a claim under the UVTA, the Clarke's proved that Holly was a party to the fraudulent commercial transactions, and the funds were not paid by her husband, but from fictitious companies created for the sole purpose of impeding collection efforts of Zach's creditors, including the Clarke's. If a defendant is liable for attorney fees according to I.C. § 12-120(3) for his involvement in the initial fraudulent commercial transaction, then it logically follows that parties involved in subsequent fraudulent transactions are equally liable. Accordingly, if the Court reverses the District Court, the Clarke's request that this Court order the District Court to award attorney fees according to I.C. § 12-120(3), as requested in the Complaint.

5. The Clarke's are entitled to recover their costs and attorney on appeal.

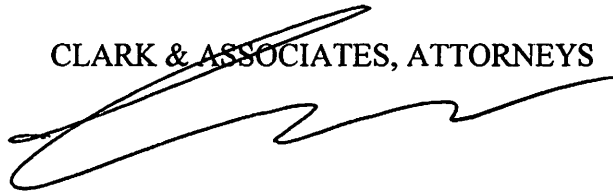
If this Court finds that the Clarke's prevailed on this appeal, they also seek costs and attorney fees on appeal according to I.C. § 12-120(3) and IAR 41. The Clarke's incorporate the same argument for attorney fees on appeal as they made for attorney fees below. The Clarke's also reserve argument pending review of Respondent's Brief as to whether the Appeal was defended frivolously and without foundation.

CONCLUSION

Based on the foregoing argument and facts, the Clarke's respectfully request this Court reverse the District Court's decision that the Clarke's were not the prevailing party in this lawsuit. They also ask this Court to overrule the District Court's order directing the Clarke's to file a satisfaction of judgment in another case, without having received any money to satisfy any judgment. They also request that this Court reverse the District Court's decision to deny the Clarke's request for pre-judgment interest. Additionally, the Clarke's request this Court, on remand, Order the District Court to award the Clarke's attorney fees according to I.C. § 12-120(3). Finally, the Clarke's request that this Court award attorney fees on appeal to the Clarke's according to I.C. § 12-120(3).

DATED THIS 28th day of July, 2017.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark, for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of July, 2017, I served the foregoing document (two copies) via U.S. Mail, postage prepaid to:

Holly Latimer
91-1183 Wiapuhia St.
Ewa Beach, HI 96706



Eric R. Clark