User Name: Jeremy Bass
Date and Time: Friday, February 17, 2023 12:54:00 PM EST
Job Number: 190620263

Documents (10)

1. *Shepard's®:Countrywide Home Loans, Inc. v. Sheets 160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114, 2016 WL 1638202 (Idaho,April 26, 2016)*
   Client/Matter: -None-
   Requested Categories:
   History - Requested
   Citing Decisions - None applied
   Other Citing Sources - None applied
   Table of Authorities - Not Requested
2. *Hoffman v. Bd. of Local Improvement Dist. No. 1101, 163 Idaho 464*
   Client/Matter: -None-
3. *Wadsworth & Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364*
   Client/Matter: -None-
4. *Porcello v. Porcello, 167 Idaho 412*
   Client/Matter: -None-
5. *Jones v. Lynn, 169 Idaho 545*
   Client/Matter: -None-
6. *Jones v. Nosworthy, 2018 Ida. Dist. LEXIS 20*
   Client/Matter: -None-
7. *Self Storage Advisors v. SE Boise Boat & RV Storage, 2021 U.S. Dist. LEXIS 21971*
   Client/Matter: -None-
8. *Roost Project, LLC v. v. Andersen Contr. Co., 437 F. Supp. 3d 808*
   Client/Matter: -None-
9. *Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC, 331 F. Supp. 3d 1131*
   Client/Matter: -None-
10. Jones v. Nosworthy, 2018 Ida. Dist. LEXIS 20_Attachment1
    Client/Matter: -None-

LexisNexis

Shepard's®: Report Content

History: Requested

Citing Decisions: None Applied

Other Citing Sources: None Applied

Table Of Authorities: Not Requested

***Shepard's*®:** Countrywide Home Loans, Inc. v. Sheets 160 Idaho 268,371 P.3d 322,2016 Ida. LEXIS 114,2016 WL 1638202: (Idaho April 26, 2016)

No subsequent appellate history

History (1)

1. **Citation you *Shepardized*™**

Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114, 2016 WL 1638202

Court: Idaho | **Date:** April 26, 2016

Citing Decisions (8)

Analysis: Followed by (1), "Cited by" (7)

Headnotes:HN3 (2), HN4 (1), HN6 (1)

Idaho Supreme Court

1. Jones v. Lynn, 169 Idaho 545, 498 P.3d 1174, 2021 Ida. LEXIS 179, 2021 A.M.C. 205, 2021 WL 5441515

LB **Cited by:** 169 Idaho 545 p.560; 498 P.3d 1174 p.1189
... "The unclean hands doctrine 'stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327(2016)** (quoting Ada Cnty. Highway Dist. v. Total Success Investments, LLC , 145 Idaho 360 , 370 , 179 P.3d 323 , 333 (2008)). In determining if [the clean ...

Discussion: | **Court:** Idaho | **Date:** November 22, 2021 | **Headnotes:**: HN4

2. Porcello v. Porcello, 167 Idaho 412, 470 P.3d 1221, 2020 Ida. LEXIS 170, 102 U.C.C. Rep. Serv. 2d (CBC) 718, 2020 WL 4432813

LB **Cited by:** 167 Idaho 412 p.427; 470 P.3d 1221 p.1236
... credible evidence that the parties agreed that the Hayden [Lake] home would be used to secure subsequent refinanc[ing] of the Via Venito or Woodinville properties[,]" finding that there were no discussions of refinancing the Legacy loan until after the loan expired. The district court distinguished this case from Biersdorff v. Brumfield , 93 Idaho 569 , 468 P.2d 301 (1970) , and rejected the Estates' reliance on **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322(2016)** ...

Court: Idaho | **Date:** August 3, 2020

3. Wadsworth & Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364, 445 P.3d 1090, 2019 Ida. LEXIS 123, 2019 WL 3332904

G **Followed by:** 165 Idaho 364 p.372; 445 P.3d 1090 p.1098
This quasi-contract "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties." Continental Forest Prods. v. Chandler Supply Co., 95 Idaho 739, 518 P.2d 1201 (1974). Unjust enrichment occurs where (1) the plaintiff confers a benefit on the defendant; (2) the defendant appreciates the benefit; and (3) the defendant's acceptance of the benefit is inequitable without payment to the plaintiff for the benefit's value. ... Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 326 (2016). **(HN3)**

Discussion: | **Court:** Idaho | **Date:** July 25, 2019 | **Headnotes:**: HN3

4. Hoffman v. Bd. of Local Improvement Dist. No. 1101, 163 Idaho 464, 415 P.3d 332, 2016 Ida. LEXIS 420

LB **Cited by:** 163 Idaho 464 p.470; 415 P.3d 332 p.338
... Wandering Trails, LLC v. Big Bite Excavation, Inc. , 156 Idaho 586 , 592 , 329 P.3d 368 , 374 (2014) . "An enforceable contract must be complete, definite, and certain in all of the contract's material terms." Id. **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 274, 371 P.3d 322, 328(2016)** . The

district court considered extrinsic evidence to evaluate whether Appellants' execution of a release of claims against the Boards and their agents and employees related to the ...

Discussion: | **Court:** Idaho | **Date:** December 21, 2016 | **Headnotes:**: HN6

Idaho District Court

5. Jones v. Nosworthy, 2018 Ida. Dist. LEXIS 20, 2018 A.M.C. 2903

Cited by:
... Dram Shop Act applies to these facts, and it shields from liability "any person who sold or otherwise furnished alcohol" who did not receive notice "within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail." I.C. § 23-808 . Plaintiffs cite **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327(2016)** , and argue that Defendants cannot assert the 180-day deadline for giving notice in Idaho 's Dram Shop Act because ...

Court: Idaho Dist. Ct. | **Date:** August 9, 2018

9th Circuit - U.S. District Courts

6. Self Storage Advisors v. SE Boise Boat & RV Storage, 2021 U.S. Dist. LEXIS 21971, 2021 WL 372789

Cited by:
... law, the "unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322(2016)** (internal quotation marks, alterations, and citation omitted). Because the second cause of action relating to the revised agreement is no longer a controversy ...

Court: Dist. Idaho | **Date:** February 3, 2021

7. Roost Project, LLC v. v. Andersen Contr. Co., 437 F. Supp. 3d 808, 2020 U.S. Dist. LEXIS 21677, 2020 WL 560574

Cited by: 437 F. Supp. 3d 808 p.824
... law a plaintiff must prove: (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." Nelson-Ricks Cheese Company, Inc. v. Lakeview Cheese Company, LLC , 331 F.Supp.3d 1131 , 1145 (D. Idaho 2018) (citing **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 326(Idaho 2016)** (citing Teton Peaks Inv. Co. ...

Court: Dist. Idaho | **Date:** February 4, 2020

8. Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC, 331 F. Supp. 3d 1131, 2018 U.S. Dist. LEXIS 117345

Cited by: 331 F. Supp. 3d 1131 p.1145
... law a plaintiff must prove: (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit. **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 326(Idaho 2016)** (citing Teton Peaks Inv. Co. LLC v. Ohme , 146 Idaho 394 , 195 P.3d 1207 , 1211 (Idaho 2008)) . "The essence of the quasi-contractual theory of unjust ...

Court: Dist. Idaho | **Date:** July 12, 2018 | **Headnotes:**: HN3

Other Citing Sources: (11)

Annotated Statutes

1. **Idaho Code sec. 9-505**

   ... Where written documents, unsigned by mortgagee, did not match the loan amount and interest rate that mortgagee believed that bank had promised, there was no meeting of the minds and, thus, no contract to be enforced between the parties.**Countrywide Home Loans, Inc. v. Sheets,160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114(2016)**. Waiver of Defense. The defense of the statute of frauds is waived where it does not appear from the complaint that the contract sued on does not fall within it, ...

   Content: Statutes

Briefs

2. **Plaintiff-Appellee: GERSTEIN v. Attorney-Appellant: ROBINS KAPLAN, LLP**, 2021 CO App. Ct. Briefs LEXIS 460

   ... ("The doctrine of unclean hands applies only when the plaintiff's allegedly unclean conduct was willful or fraudulent. Mere negligence is not sufficient."); O'Neil v. Picillo , 682 F.Supp. 706 , 727 (D.R.I. 1988) (same), aff'd , 883 F.2d 176 (1st Cir.1989) ;**Countrywide Home Loans, Inc. v. Sheets, 371 P.3d 322, 327(Idaho 2016)**(for unclean hands doctrine to apply, "the conduct must be intentional or willful, rather than merely negligent"); Hoffman Constr. Co. v. U.S. Fabrication ...

   Content: Court Filings | **Date:** June 14, 2021

3. **380 PROPS. v. SORROW**, 2019 GA App. Ct. Briefs LEXIS 1677

   ... Any party seeking equitable relief is subject to the unclean hands doctrine. O.C.G.A. § 23-1-10 . Williams v. Williams , 255 Ga. 264 , 265 (1985) ("It is well established . . . that equity is not available to one who lacks clean hands as to the relief sought."); cf.**Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273(Sup. Ct. 2106)**("In determining if the clean hands doctrine applies, a court has discretion to evaluate the relative conduct of both parties and to determine ...

   Content: Court Filings | **Date:** July 19, 2019

4. **HERNDON v. CITY OF SANDPOINT**, 2022 ID S. Ct. Briefs LEXIS 643

   ... "The unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327(2016)** (internal citations omitted). On appeal, Herndon argues that the City chose to deal with the Festival through a defective lease which was executed in violation ...

   Content: Court Filings | **Date:** August 11, 2022

5. **PORCELLO v. The Estate of ANTHONY J. PORCELLO**, 2019 ID S. Ct. Briefs LEXIS 1699

   ... and Mark had made interest payment for many months. Tr., Vol. VIII, p. 1351, L. 6-25. The district court also observed that during trial and in written closing argument, Tony and Annie failed to develop the advancement argument, other than to make a conclusory statement that Mark and Jennifer failed to satisfy the terms of the Note and Deed of Trust. R., p. 476. The district court also distinguished **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 327(2016)** ...

   Content: Court Filings | **Date:** October 18, 2019

6. **WILSON v. WILSON**, 2019 ID S. Ct. Briefs LEXIS 1612

... B. The magistrate court did not error in finding the $ 35,000.00 gift from Mr. Wilson to Ms. Kinsey for the purchase of the property located 1110 8th Avenue, Lewiston, Idaho was not an asset of the party's marriage . In his Appellant brief, Mr. Wilson claims that the court errored in not awarding him in an equitable lien upon Ms. Kinsey's home at 1110 8th Avenue home. Mr. Wilson cites **Countrywide Loans v. Sheets and Bank of America, 160 Idaho 268, 371 P.3d 322(2016)** as authority that ...

Content: Court Filings | **Date:** October 15, 2019

7. **WILSON v. WILSON**, 2019 ID S. Ct. Briefs LEXIS 1444

... question in this case, which is what is to be done to recognize the equity of providing Appellant with equitable compensation for his separate property contribution to the real estate now classified as separate property? The answer is to impose an equitable lien on the home for all or part of the $ 35,000.00 down payment. An equitable lien is a court ordered tool for enforcing the doctrine of unjust enrichment. That doctrine was recently stated in **Countrywide Loans v. Sheets and Bank of America,** ...

Content: Court Filings | **Date:** September 15, 2019

8. **REESE v. SIDDOWAY & CO.**, 2019 ID S. Ct. Briefs LEXIS 103

... A party is only entitled to damages for unjust enrichment if he establishes three elements: "(1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." **Countrywide Home Loans, Inc. v. Sheets,160 Idaho 268, 272, 371 P.3d 322, 326(2016)** (quoting Teton Peaks Inv. Co. , LLC v. Ohme, 146 Idaho 394 , 398 , 195 P.3d 1207 , 1211 ...

Content: Court Filings | **Date:** January 22, 2019

9. **NORTH IDAHO BLDG. CONTRS. ASS'N v. CITY OF HAYDEN**, 2018 ID S. Ct. Briefs LEXIS 304

... a fee of $ 2,280. Id. But, such conduct does not rise to the level of "inequitable, unfair and dishonest, or fraudulent and deceitful," conduct which is necessary for the application of the doctrine of unclean hands. **Countrywide Home Loans, Inc. v. Sheets,160 Idaho 268, 271, 371 P.3d 322, 325(2016)** . As previously stated, nothing in Loomis mandates that the only methodology a city may follow to calculate a legal cap fee is that which was used by the City of Hailey or that the failure ...

Content: Court Filings | **Date:** February 21, 2018

10. **SELECT PORTFOLIO SERVICING v. DUNMIRE**, 2019 NV S. Ct. Briefs LEXIS 2783

... , 245 P.3d 535 (2010) (citing Houston v. Bank of Am. Fed. Sav. Bank , 119 Nev. 485 , 489 , 78 P.3d 71 , 74 (2003)) . See also **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322(2016)** (attorney's fees awarded to Bank of America where borrower "failed to pay on his loan for six years, apparently hoping to obtain a windfall due to Bank of America 's error[.]"); Oliverio , 109 Wash.App. at 73 , 33 P.3d at 1106 ...

Content: Court Filings | **Date:** April 17, 2019

Motions

11. **Oregon-Idaho Utils. Inc. v. Skitter Cable TV Inc.**, 2017 U.S. Dist. Ct. Motions LEXIS 133518

... The elements of unjust enrichment are that (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit. **Countrywide Home Loans, Inc. v. Sheets,371 P.3d 322, 329(Idaho 2016)** .deg Here, OIU alleged that it provided a benefit to the Skitter Defendants by paying $ 4500 to Kingdom Telephone; that Skitter "accepted the benefits"; ...

Content: Court Filings | **Date:** December 11, 2017

Legend

	Warning - Negative Treatment is Indicated	R	Red - Warning Level Phrase
Q	Questioned - Validity questioned by citing references	O	Orange - Questioned Level Phrase
	Caution - Possible negative treatment	Y	Yellow - Caution Level Phrase
	Positive - Positive treatment is indicated	G	Green - Positive Level Phrase
A	Analysis - Citing Refs. With Analysis Available	B	Blue - Neutral Level Phrase
I	Cited - Citation information available	LB	Light Blue - No Analysis Phrase
	Warning - Negative case treatment is indicated for statute		

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Neutral
As of: February 17, 2023 5:54 PM Z

Hoffman v. Bd. of Local Improvement Dist. No. 1101

Supreme Court of Idaho

December 21, 2016, Filed

Docket No. 43295/43628, 2016 Opinion No. 153A

Reporter
163 Idaho 464 *; 415 P.3d 332 **; 2016 Ida. LEXIS 420 ***

JEANETTE HOFFMAN, DON THOMAS, MARI THOMAS, BRIAN NELSON, LOUISE LUSTER, LYNDA SNODGRASS, LANCE HALE, MONIQUE HALE, ROXANNE METZ, AL THORNTON, TONI THORNTON, BLAIR HAGERMAN, DARRIN HENDRICKS, LESLIE CURFMAN, MIKE ZEHNER, JOSE FRANCA, KAREN CROSBY, CHUCK BOYER, and KIM BLOUGH, individuals, Plaintiffs-Appellants, v. THE BOARD OF THE LOCAL IMPROVEMENT DISTRICT NO. 1101, an Idaho Local Improvement District; and BOARD OF ADA COUNTY COMMISSIONERS, Defendants-Respondents.

Subsequent History: As Amended January 4, 2017.

Rehearing denied by *Hoffman v. Bd. of Local Improvement Dist. No. 1101, 2017 Ida. LEXIS 37 (Idaho, Feb. 3, 2017)*

Prior History: [*1]** Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Timothy Hansen, District Judge.

Disposition: The judgment of the district court is affirmed.

Core Terms

district court, summary judgment motion, attorney's fees, costs, Memorandum, summary judgment, Settlement, parties, award of attorney's fees, settlement agreement, reasonable basis, municipality, confirmed, mediation, Notice, material term, challenges, issue of material fact, exclusive remedy, subdivision, integrated, ordinance, genuine, reasons

Case Summary

Overview

HOLDINGS: [1]-Respondents boards of county commissioners and local improvement district (boards) were entitled to summary judgment in appellants landowners' assessment appeal because parol evidence was properly considered to find a settlement's enforceability and if the landowners' release included their claims, since the agreement was not integrated, the agreement released the claims, and the motion was unopposed; [2]-The boards were entitled to attorney fees under *Idaho Code Ann. § 12-117(1)* because *Idaho Code Ann. § 50-1718* was no basis for fees; [3]-The boards were entitled to attorney fees under *Idaho Code Ann. § 12-117(1)* because *Idaho Code Ann. § 50-1718* did not provide a low bar for assessment appeals, and no reasonable appeal basis was shown; [4]-The boards were entitled to appellate attorney fees under *Idaho Code Ann. § 12-117(1)* because the appeal had no reasonable basis.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN1[] Entitlement as Matter of Law, Appropriateness

When reviewing an order for summary judgment, the standard of review for the Idaho Supreme Court is the same standard as that used by a district court in ruling on the motion. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Idaho R. Civ. P. 56(c). Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact. If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which the Supreme Court exercises free review.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2[] Standards of Review, De Novo Review

The Idaho Supreme Court exercises free review over matters of statutory interpretation.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

HN3[] Appellate Review, Appealability

It is well settled in Idaho that an order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken. Idaho App. R. 11. An order denying a motion for summary judgment is not subject to review—even after the entry of an appealable final judgment.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > Contract Interpretation > Parol Evidence

HN4[] Contract Conditions & Provisions, Integration Clauses

Idaho's parol evidence rule only prevents a district court from considering extrinsic evidence relating to other terms of a contract when the contract is integrated.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > Contract Interpretation > Parol Evidence

Civil Procedure > Settlements > Settlement Agreements

HN5[] Contract Conditions & Provisions, Integration Clauses

A settlement agreement stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally. A contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty. Where a written agreement is integrated, questions of the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language. The mere existence of a written document, however, does not establish integration. A written contact containing a merger clause is integrated for purposes of the parol evidence rule. Under the parol evidence rule, if a written agreement is complete on its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contract.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > Meeting of Minds

HN6[] Contract Formation, Meeting of Minds

For a contract to exist, a distinct understanding that is common to both parties is necessary. An enforceable

contract must be complete, definite, and certain in all of the contract's material terms.

Contracts Law > Contract Interpretation > Intent

HN7 **Contract Interpretation, Intent**

A determination of the intent of parties to a contract is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN8 **Appeals, Appellate Briefs**

Regardless of whether an issue is explicitly set forth in a party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by the Idaho Supreme Court.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN9 **Basis of Recovery, Statutory Awards**

The plain language of *Idaho Code Ann. § 12-117(1)* provides that it applies in "any proceeding" involving a state agency or a political subdivision and a person. A contention that *Idaho Code Ann. § 12-117(1)* is superseded by *Idaho Code Ann. § 50-1718* as an "exclusive remedy" is unpersuasive.

Governments > Public Improvements > Assessments

HN10 **Public Improvements, Assessments**

A natural reading of *Idaho Code Ann. § 50-1718* is that it provides "any person who has filed objections" or "any other person who feels aggrieved by the decision of the council" with the "exclusive remedy" of appealing the decision first to a district court and then to the Idaho Supreme Court. Attorney fees are not mentioned anywhere in the statute.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Record on Appeal

HN11 **Appeals, Appellate Briefs**

The Idaho Supreme Court will not search an appellate record for error. It does not presume error on appeal; a party alleging error has the burden of showing it in the record.

Civil Procedure > Appeals > Standards of Review

HN12 **Appeals, Standards of Review**

When a district court's decision is based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.

Counsel: Runft & Steele Law Offices, PLLC, Boise, for appellants.

Hawley Troxell Ennis & Hawley LLP, Boise, for respondents.

Judges: HORTON, Justice. Chief Justice J. JONES and Justices EISMANN, BURDICK and W. JONES, CONCUR.

Opinion by: HORTON

Opinion

[*466] [334] AMENDED OPINION, THE COURT'S PRIOR OPINION DATED DECEMBER 21, 2016, IS HEREBY AMENDED**

ON THE BRIEFS

HORTON, Justice.

Jeanette Hoffman, Don Thomas, Mari Thomas, Brian Nelson, Louise Luster, Lynda Snodgrass, Lance Hale, Monique Hale, Roxanne Metz, Al Thornton, Toni Thornton, Blair Hagerman, Darrin Hendricks, Leslie Curfman, Mike Zehner, Jose Franca, Karen Crosby, Chuck Boyer, and Kim Blough (collectively "Appellants") appeal from the district court's denial of their motion for summary judgment and grant of summary judgment in favor of the Board of the Local Improvement District No. 1101 and the Ada County Board of Commissioners (the Boards) in a case regarding assessments levied on properties within the Sage Acres Local Improvement District. Appellants also appeal from the district court's award of attorney fees to the Boards. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ada County Ordinance **[***2]** No. 780 established the Ada County Local Improvement District No. 1101, commonly known as Sage Acres Local Improvement District (LID). The ordinance was adopted on May 10, 2011. The purpose of the LID was to construct a water delivery system for residential and irrigation use by properties within the Sage Acres Subdivision (Sage Acres), located off of Old Horseshoe Bend Road in Boise, Idaho. The water system was completed in 2014. Appellants challenged the creation of the LID and Ada County Ordinance No. 809, which confirmed the assessments levied on properties affected by the LID.

On September 18, 2013, Appellants filed a Notice of Appeal from Assessments in Ada County district court. The district court entered its Order Governing Proceedings and Setting Trial. The district court set the matter for trial on March 9, 2014, and ordered the parties to mediate no later than 90 days prior to trial. Prior to mediation, on December 11, 2014, the Boards filed a motion for summary judgment which asserted that Appellants' claims were not legally or factually supported. The district court scheduled the summary judgment motion for hearing on January 27, 2015.

On December 22, 2014, Appellants and **[***3]** the Boards engaged in mediation before Senior Judge D. Duff McKee. At the conclusion of the mediation, Judge McKee prepared a handwritten Memorandum of Settlement:

> County & LID will pay its own litigation costs & fees, and waive any claim against Appellants for costs & fees.
>
> All parties to stipulate to dismissal of all claims, with prejudice and without fees and costs.
>
> **[*467]** **[**335]** Appellant property owners to be responsible for LID assessment fees as originally billed, plus accrued interest.* Appellants to pay their own legal costs & fees including their 1/2 of mediation fee.
>
> *Property owner to be provided w/current statement of amounts due as of 10/1/14 including interest; Owner to have 30 days from date of close on this agreement to pay off the LID plus interest, or to pay the annual installment, plus annual interest, (plus security fund deposit if required.)

Counsel and representatives for Appellants and the Boards signed the Memorandum of Settlement.

Following the mediation, counsel for the parties exchanged drafts of proposed formal settlement agreements. No formal settlement agreement was signed because the Boards insisted that the agreement include a release of Appellants' claims against the **[***4]** Boards and their agents and employees and Appellants were unwilling to execute such a release.

On January 14, 2015, Appellants filed a Notice of Settlement of Appeal and Appellants' Motion to Dismiss Appeal with Prejudice. Appellants argued that the district court should enforce the terms of the Memorandum of Settlement. On January 26, 2015, the day before the hearing on the Boards' motion for summary judgment, Appellants filed a Motion for Order Shortening Time on Appellants' Motion to Dismiss Appeal. Appellants argued that the settlement rendered the Boards' motion for summary judgment moot and the district court should instead take up their motion to dismiss their appeal. The following day, the district court held a hearing on the various motions.

During the hearing, the district court determined that Appellants' Motion to Dismiss Appeal with Prejudice would be treated as a motion for summary judgment to enforce the settlement agreement. The district court set a new hearing date of March 12, 2015, and instructed the parties to provide briefing regarding Appellants' motion. The district court further instructed Appellants to submit arguments in response to the Boards' motion for summary **[***5]** judgment.

On March 11, 2015, Appellants filed a Notice of Non-Opposition to Respondent's [sic] Motion for Summary Judgment, stating:

> The Appellants hereby notify the Court and opposing counsel that, consistent with the Appellants' contention that this matter settled at mediation on December 22, 2014, and in

> furtherance of their desire to not incur the significant expenses associated with a trial on this matter, they do not oppose Respondent's [sic] request that this appeal be dismissed.
>
> Appellants' decision to decline to oppose the Respondent's [sic] request for dismissal does not, however, have any bearing on the reasonableness of the legal or factual grounds for the appeal itself, and Appellants will outline those grounds in the event that their own motion for summary judgment is not granted and/or if Respondent [sic] moves for an award of attorney's fee or costs beyond the costs specifically allowed by *I.C. § 50-1718*.

On March 12, 2015, the district court held a hearing on the parties' motions for summary judgment. During the hearing, the district court clarified the effect of Appellants' Notice of Non-Opposition with Appellants' counsel:

> THE COURT: Okay. Now, in this case, [Counsel], just so I am **[***6]** clear then, is what you are saying is that if I deny your motion for summary judgment, then your nonopposition to the respondents' motion would be in effect and I could still dismiss the appeal even though I had denied your motion for summary judgment; is that what you are saying?
> [COUNSEL]: Yes, Your Honor. That is consistent with what I had — how I had envisioned this playing out today.

On March 30, 2015, the district court entered its Memorandum Decision and Order denying Appellants' motion for summary judgment and granting the Boards' motion for summary judgment. The district court concluded that there were "genuine issues of material fact regarding whether there was a sufficient meeting of the minds to form an enforceable settlement agreement." On April 17, 2015, the Boards filed a motion for attorney fees and costs. The Boards requested **[**336]** **[*468]** fees pursuant to *Idaho Code sections 12-117(1)* and *12-121*. On August 14, 2015, the district court entered its Memorandum Decision and Order regarding attorney fees and concluded that the Boards were entitled to attorney fees under both statutes. Appellants filed two separate appeals which this Court consolidated.

II. STANDARD OF REVIEW

HN1[↑] "When reviewing an order for summary judgment, **[***7]** the standard of review for this Court is the same standard as that used by the district court in ruling on the motion." *Intermountain Real Props., LLC v. Draw, LLC, 155 Idaho 313, 316-17, 311 P.3d 734, 737-38 (2013)*. Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *I.R.C.P. 56(c)*.

"Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Fuller v. Callister, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011)* (quoting *Castorena v. General Elec., 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)*). "However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Co-op., Inc., 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012)*. "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review." *Conway v. Sonntag, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005)*. ***HN2***[↑] "We exercise free review over matters of statutory interpretation." *KGF Dev., LLC v. City of Ketchum, 149 Idaho 524, 527, 236 P.3d 1284, 1287 (2010)*.

III. ANALYSIS

Appellants challenge the district court's denial of their motion for summary judgment and grant of summary judgment to the Boards. Appellants contend that the district court erred by considering parol evidence without first determining that **[***8]** the handwritten settlement agreement was ambiguous on its face. Appellants further contend the district court erred by considering immaterial hearsay testimony from the Boards' attorneys in reaching its decision. Finally, Appellants claim the district court erred by awarding the Boards attorney fees under *Idaho Code sections 12-117(1)* and *12-121*. We address these issues in turn.

A. The district court did not err when it denied Appellants' motion for summary judgment and granted the Boards' unopposed motion for summary judgment.

In reaching its decision, the district court explained that settlement agreements are governed by the same rules

and principles applicable to contracts generally. After noting that the Memorandum of Settlement did not contain a merger clause, the district court considered the Affidavit of Theodore E. Argyle in Opposition to Appellants' Motion for Summary Judgment to Enforce Settlement Agreement, the Declaration of Lynnette M. Davis in Opposition to Appellants' Motion for Summary Judgment to Enforce Settlement Agreement, and other evidence in the record. The district court agreed with the Boards' contention that the Memorandum of Settlement set forth only some of the material terms of the parties' **[***9]** agreement and there were "genuine issues of material fact regarding whether there was a sufficient meeting of the minds to form an enforceable settlement agreement." Thus, the district court denied Appellants' motion for summary judgment and granted the Boards' unopposed motion for summary judgment.

Ordinarily, this Court would not address a district court's denial of a motion for summary judgment.

> ***HN3***[↑] "It is well settled in Idaho that '[a]n order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken.'" *Garcia v. Windley, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007)* (alteration in original) (quoting *Dominguez v. Evergreen Res., Inc., 142 Idaho 7, 13, 121 P.3d 938, 944 (2005)*); *see* **[**337]** **[*469]** *I.A.R. 11*. "[A]n order denying a motion for summary judgment is not subject to review—even after the entry of an appealable final judgment." *Dominguez, 142 Idaho at 13, 121 P.3d at 944*; *see also Lewiston Indep. Sch. Dist. No. 1 v. City of Lewiston, 151 Idaho 800, 808, 264 P.3d 907, 915 (2011)* (explaining that this Court does not review denials of summary judgment after judgment is rendered on the merits); *Hunter v. State, Dep't of Corr., 138 Idaho 44, 46, 57 P.3d 755, 757 (2002)* ("An order denying a motion for summary judgment is not an appealable order itself, nor is it reviewable on appeal from a final judgment.").

Am. Bank v. BRN Dev., Inc., 159 Idaho 201, 205-06, 358 P.3d 762, 766-67 (2015). However, we will make an exception in this case because Appellants' non-opposition to the Boards' summary judgment was conditioned upon the denial of their motion for summary judgment.

Appellants argue that the district **[***10]** court erred when it considered evidence of the parties' intent without first making a determination that the Memorandum of Settlement was ambiguous as a matter of law. Appellants contend this Court's holdings in *J.R. Simplot Co. v. Bosen, 144 Idaho 611, 167 P.3d 748 (2006)*, and *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC, 156 Idaho 709, 330 P.3d 1067 (2014)*, stand for the proposition that:

> [A]ny inquiry into the intent of the parties to a contract, or as to whether there was a "meeting of the minds" concerning the terms of the contract, is inappropriate until and unless a determination has been made that the contract between the parties is ambiguous or unambiguous as a matter of law.

The Boards respond that Appellants fundamentally misconstrue ***HN4***[↑] Idaho's parol evidence rule, which only prevents the district court from considering extrinsic evidence relating to other terms of a contract when the contract is integrated. The Boards are correct.

HN5[↑] A settlement agreement "stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally." *Vanderford Co. v. Knudson, 150 Idaho 664, 672, 249 P.3d 857, 865 (2011)* (quoting *Wilson v. Bogert, 81 Idaho 535, 542, 347 P.2d 341, 345 (1959)*). "A contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty." *Giacobbi Square v. PEK Corp., 105 Idaho 346, 348, 670 P.2d 51, 53 (1983)*. "Where a written agreement is integrated, questions of **[***11]** the parties' intent regarding the subject matter of the agreement may only be resolved by reference to the agreement's language." *Steel Farms, Inc. v. Croft & Reed, Inc., 154 Idaho 259, 267, 297 P.3d 222, 230 (2012)*. "The mere existence of a written document, however, does not establish integration." *Valley Bank v. Christensen, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991)*. "A written contact containing a merger clause is integrated for purposes of the parol evidence rule." *Steel Farms, Inc., 154 Idaho at 267, 297 P.3d at 230*.

> Under the parol evidence rule, if the written agreement is complete on its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the written contract.

Lindberg v. Roseth, 137 Idaho 222, 228, 46 P.3d 518, 524 (2002) (internal citations omitted).

Appellants' argument and authority deal with the interpretation of terms of a contract. The district court

did not look to extrinsic evidence in order to interpret the terms of the handwritten Memorandum of Settlement. Instead, it was attempting to determine whether an enforceable contract between the parties had been formed at all. This involved evaluating whether there was a meeting of the minds as to a material term of the parties' contract which was not addressed in the Memorandum of Settlement.

> HN6[] "For a contract to exist, a distinct **[***12]** understanding that is common to both parties is necessary." Wandering Trails, LLC v. Big Bite Excavation, Inc., 156 Idaho 586, 592, 329 P.3d 368, 374 (2014). "An enforceable contract must be complete, definite, and **[**338]** **[*470]** certain in all of the contract's material terms." *Id.*

Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 274, 371 P.3d 322, 328 (2016). The district court considered extrinsic evidence to evaluate whether Appellants' execution of a release of claims against the Boards and their agents and employees related to the allegations contained in the Notice of Appeal of Assessment was a material term of the contract. The district court did not err by doing so.

> HN7[] The determination of the parties' intent is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings.

J.R. Simplot Co., 144 Idaho at 614, 167 P.3d at 751.

Appellants have not advanced any argument that the district court erred when it determined the Memorandum of Settlement was not integrated. Appellants have not demonstrated that the district court erred by determining that execution of a release of Appellants' claims was a material term of the parties' agreement. Appellants have not demonstrated a genuine issue of material **[***13]** fact as to whether the parties reached an agreement regarding Appellants' execution of a release of claims.

Appellants advance other claims in their briefing in support of their contention that the district court erred: (1) the district court improperly considered affidavit testimony from Davis and Argyle; (2) the testimony amounted to bare allegations and denials; (3) the testimony was not material and should have been disregarded; and (4) the testimony was inadmissible hearsay. However, Appellants have not supported these claims with cogent argument or authority.

> HN8[] "Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).

Appellants' contentions that the district court improperly considered the testimony of Davis and Argyle and that the testimony was immaterial are simply without merit. Appellants make no attempt to explain how or why the testimony amounted to bare allegations. Indeed, Appellants fail to identify the testimony at issue. Appellants' hearsay argument is not supported by any citation **[***14]** to authority. Thus, we do not consider those claims on appeal.

For these reasons, we hold that the district court did not err when it denied Appellants' motion for summary judgment and granted the Boards' unopposed motion for summary judgment.

B. The district court did not err when it awarded the Boards attorney fees pursuant to Idaho Code section 12-117(1).

The district court awarded the Boards attorney fees pursuant to Idaho Code section 12-117(1) after it determined that Appellants had acted without a reasonable basis in fact or law by continuing to maintain the appeal. The district court reasoned:

> Appellants have not challenged the amount of attorney fees requested by Respondents. Rather, Appellants oppose an award of any attorney fees in this matter, asserting that an award of such fees is not provided for in I.C. § 50-1718. Idaho Code section 50-1718 sets forth the manner in which a person may appeal the confirmation of an assessment roll. The statute provides that where an assessment is confirmed by the district court on appeal, "the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs." I.C. § 50-1718. Appellants assert that because the statute is designated as the "exclusive remedy" for such an appeal, and because the statute **[***15]** contains a provision regarding costs but not attorney fees, an award of attorney fees is not available in connection with an appeal brought pursuant to I.C. § 50-1718.

> The Court disagrees. Although I.C. § 50-1718 itself contains no provision regarding attorney fees, the statute does not specifically exclude an award of attorney **[**339]** **[*471]** fees. Idaho Code sections 12-117(1) and 12-121 both provide a basis for an award of attorney fees in matters where a political subdivision is a party, and the Court finds no conflict between these statutes and I.C. § 50-1718.

Appellants contend that Idaho Code section 12-117(1) does not authorize the award of attorney fees because it contains the explicit condition "unless otherwise provided by statute." Appellants argue that Idaho Code section 50-1718 provides the "exclusive remedy" in this case and only "the fees of the clerk of the municipality for copies of the record . . . with other costs" may be assessed.

Idaho Code section 12-117(1) provides:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing **[***16]** party acted without a reasonable basis in fact or law.

I.C. § 12-117(1). **HN9**[↑] The plain language of section 12-117(1) provides that it applies in "any proceeding" involving a "state agency or a political subdivision and a person." Appellants' contention that section 12-117(1) is superseded by section 50-1718 as an "exclusive remedy" is unpersuasive. Section 50-1718 is titled: "Appeal procedure — Exclusive remedy." It provides:

> Any person who has filed objections to the assessment roll or any other person who feels aggrieved by the decision of the council in confirming the same shall have the right to appeal to the district court of the county in which the municipality may be situated. Such appeal shall be made within thirty (30) days from the date of publication of the ordinance confirming the assessment roll by filing a written notice of appeal with the clerk of the municipality and with the clerk of the district court aforesaid describing the property and objections of the appellant. The appellant shall also provide a bond to the municipality in a sum to be fixed by the court, but not less than two hundred dollars ($200) with sureties to be approved by the court, conditioned to pay all costs to be awarded to the respondent upon such an appeal. After said thirty (30) **[***17]** day appeal period has run, no one shall have any cause or right of action to contest the legality, formality or regularity of said assessments for any reason whatsoever and, thereafter, said assessments and the liens thereon shall be considered valid and incontestable without limitation.
>
> If an appeal is filed within said period, the case shall be docketed by the clerk of said court in the name of the person taking the appeal against the municipality as "an appeal from assessments." . . . The judgment of the court shall be either to confirm, modify or annul the assessment insofar as the same affects the property of the appellant, from which judgment an appeal may be taken to the Supreme Court as provided by law. In case the assessment is confirmed, the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs.

I.C. § 50-1718. **HN10**[↑] A natural reading of the statute is that it provides "any person who has filed objections" or "any other person who feels aggrieved by the decision of the council" with the "exclusive remedy" of appealing the decision first to the district court and then to this Court. Attorney fees are not mentioned anywhere in the statute. **[***18]** Appellants' contention that section 50-1718 somehow limits the Boards' ability to recover attorney fees provided for by other statutes is not supported by its text.

C. The district court did not err by awarding the Boards attorney fees pursuant to Idaho Code section 12-117(1).

In its memorandum decision and order, the district court provided a list of reasons why it concluded Appellants acted without a reasonable basis in fact or law:

> For the following reasons, the Court concludes that an award of attorney fees to Respondents is warranted under both I.C. § 12-117(1) **[*472]** and I.C. § 12-121. The court notes that in its Memorandum Decision and Order entered on March 7, 2014, the court considered the issue of the amount of the bond to be provided by Appellants and indicated that it could not conclude that the filing of the appeal in this matter was clearly frivolous. However, the Court finds that Appellants have acted without a reasonable basis in fact or law

by continuing to maintain the appeal, thereby causing Respondents to incur significant expenses in defending the matter. The Court is also left with the abiding belief that the matter was pursued unreasonably and without foundation. As Respondents have noted, after the filing of their appeal in September of 2013, **[***19]** Appellants never propounded any requests for discovery upon Respondents. Further, although Respondents served interrogatories, requests for production, and requests for admission upon Appellants on December 2, 2014, Appellants never provided any responses to those discovery requests. Appellants did provide an expert witness disclosure to Respondents on September 11, 2014. The disclosure consisted of two letters written by Jerry T. Elliott, P.E. However, while Mr. Elliott raised certain questions about the water delivery system in his letters, he provided no affirmative opinions and indicated he had not performed an inspection of the system. Nevertheless, Appellants' expert witness disclosure required Respondents to retain an expert, Cathy Cooper, P.E.

Finally, Appellants failed to respond substantively to Respondents' motion for summary judgment or provide any evidence to demonstrate the validity of their challenges to the assessments, despite being provided multiple opportunities to do so. As Respondents have noted, in their Notice of Appeal from Assessments, Appellants raised certain challenges to the establishment of the Sage Acres LID. However, Appellants offered no evidence or **[***20]** argument demonstrating that such challenges were not time-barred under *I.C. § 50-1727*, which requires legal challenges to the formation of an LID to be brought within 30 days after publication of the ordinance. Further, Appellants have failed to provide any evidence to support the validity of their challenges to the assessment roll. Although Appellants have made reference to certain items in the agency record, those documents were not admitted as exhibits for the Court's consideration, and Appellants provided no further evidence, by affidavit or otherwise, to support their claims. For these reasons, the Court is left with the abiding belief that the matter was pursued unreasonably and without foundation. The Court also finds that Appellants acted without a reasonable basis in fact or law by continuing to maintain the appeal while substantially failing to engage in discovery or to provide any evidence to support the validity of their challenges.

Appellants contend that because *Idaho Code section 50-1718* permits a wide category of people (objectors and the aggrieved) to appeal to the district court and "[w]ith the authority of the courts to fashion appropriate equitable remedies being so broadly defined, the Appellants were thus **[***21]** acting with a reasonable basis in law when they asked the District Court to consider all possible remedies in equity..." Appellants argue their "objections and grievances were made abundantly clear in a four-inch thick volume of objections that were presented to the LID Board and which are also on file with this Court." Appellants conclude that "[b]ased on all of those objections and issues, the Appellants acted within the scope of the statute by asking the Court to change the assessment in some way more favorable to them. . . ."

Appellants do not attempt to address the district court's reasons for awarding attorney fees. Instead, they contend that the broad scope of *Idaho Code section 50-1718* creates a low bar for the reasonableness of an appeal. However, Appellants have made no effort to identify the "objections and grievances" which prompted their appeal, much less to demonstrate that there was a reasonable basis for those objections and grievances.

HN11[↑] "This Court will not search the record for error. We do not presume error **[**340]** **[*473]** on appeal; the party alleging error has the burden of showing it in the record." *PHH Mortg. v. Nickerson, 160 Idaho 388, 399, 374 P.3d 551, 562 (2016)* (internal quotations and citations omitted). Because Appellants have failed to identify a basis for concluding that **[***22]** the action was pursued reasonably before the district court, we affirm the district court's decision to award attorney fees to the Boards pursuant to *Idaho Code section 12-117(1)*.

Based upon this holding, we will not address the district court's alternate basis for the award of attorney fees under *Idaho Code section 12-121*. ***HN12***[↑] "When a decision is based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds." *Andersen v. Prof'l Escrow Servs., Inc., 141 Idaho 743, 746, 118 P.3d 75, 78 (2005)* (internal quotations omitted).

D. The Boards are entitled to attorney fees and costs on appeal.

The Boards request attorney fees on appeal pursuant to *Idaho Code section 12-117(1)*. Appellants also request attorney fees on appeal. Appellants are not entitled to attorney fees because they have not prevailed.[2] The Boards are the prevailing party in this appeal. We find that the present appeal was pursued without a reasonable basis in law. Thus, the Boards are entitled to attorney fees on appeal pursuant to *Idaho Code section 12-117(1)*.

IV. CONCLUSION

We affirm the judgment of the district court and its award of attorney fees to the Boards. Attorney fees and costs on appeal to the Boards.

Chief Justice J. JONES and Justices EISMANN, BURDICK and W. JONES, **CONCUR**.

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[2] Appellants did not cite to authority in support of their fee request. Therefore, even if Appellants had prevailed, they would not be entitled to an award of attorney fees. *Mulford v. Union Pac. R.R., 156 Idaho 134, 142, 321 P.3d 684, 692 (2014)*.

Cited
As of: February 17, 2023 5:54 PM Z

Wadsworth & Reese, PLLC v. Siddoway & Co., PC

Supreme Court of Idaho

July 25, 2019, Filed

Docket No. 46126

Reporter
165 Idaho 364 *; 445 P.3d 1090 **; 2019 Ida. LEXIS 123 ***; 2019 WL 3332904

WADSWORTH REESE, PLLC, an Idaho professional corporation; CLARK A. REESE CPA P.C., an Idaho professional corporation; and WADSWORTH ACCOUNTING CPA, an Idaho professional corporation, Plaintiffs-Counterdefendants-Respondents, v. SIDDOWAY & COMPANY, PC, an Idaho professional corporation; RANDY SIDDOWAY, an individual, Defendants--Counterclaimants-Appellants.SIDDOWAY & COMPANY, PC, an Idaho professional corporation; RANDY SIDDOWAY, an individual, Counterclaimants-Appellants, v. FREDERICK WADSWORTH, an individual; and CLARK A. REESE, an individual, Counterdefendants-Respondents.

Prior History: [*1]** Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Jason D. Scott, District Judge.

Disposition: The district court's judgment is affirmed.

Core Terms

district court, arbitration, parties, prevailing party, attorney's fees, operating agreement, client base, unjust enrichment, void, membership, purchase agreement, costs, terms, legitimate business purpose, one-third, one-half, entitled to an attorney, compelling arbitration, competent evidence, motion to stay, distributions

Case Summary

Overview

HOLDINGS: [1]-There was no abuse of discretion in concluding that a seller was not the "prevailing party" entitled to attorney fees where they successfully compelled arbitration for claims under its agreement with a purchaser because the district court correctly focused on the final judgment and result of the action, specifically in the arbitration proceedings, as required by *Idaho R. Civ. P. 54(d)(1)(B)*; [2]-The seller was not entitled to an equal distribution because the legal counsel was not a member under *Idaho Code Ann. § 30-25-409(c)*; [3]-Leaving the parties to their pre-litigation position was reasonable, not unjust, or an abuse of discretion because the purchaser was not unjustly enriched. With both parties failing to perform their end of the agreement, depriving both sides of the full benefits of the bargain, neither the purchaser nor the seller was unjustly enriched.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

HN1 **Standards of Review, Abuse of Discretion**

The determination of whether a party prevailed for purposes of an attorney fee award is a discretionary decision of the trial court. Accordingly, an appellate court reviews the district court's determination to deny attorney fees for an abuse of discretion. As long as the district court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion, acted consistently with the legal standards applicable to the specific choices available to it, and reached its decision by the exercise of reason, the appellate court will not disturb the decision on appeal.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Contracts Law > Defenses > Illegal Bargains

HN2[] Basis of Recovery, Statutory Awards

Void contracts are deemed never to have existed in the eyes of the law. Thus, parties generally cannot benefit from a contractual attorney fees provision or statute where the contract is illegal or void. The limited exception to this rule lies is where that a party may be entitled to attorney's fees under a contract even if it is established that no contract between the parties ever existed.

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

HN3[] Justiciability, Mootness

An issue is moot if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief or if a favorable judicial decision would not result in any relief or the party lacks a legally cognizable interest in the outcome.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN4[] Substantial Evidence, Sufficiency of Evidence

Because determining whether a fiduciary breached his or her duty is a question of fact, an appellate court will not disturb the district court's findings as long as there was substantial and competent evidence supporting them.

Business & Corporate Law > Limited Liability Companies > Member Duties & Liabilities

HN5[] Limited Liability Companies, Member Duties & Liabilities

A derivative action occurs where a member of a limited liability company (LLC) brings a claim to enforce the company's rights, while a direct action is brought by a member to assert the member's rights. *Idaho Code Ann. §§ 30-25-801 to 30-25-802*. Both of these actions are brought by a member of the LLC, rather than the LLC itself.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

HN6[] Limited Liability Companies, Management Duties & Liabilities

Under *Idaho Code Ann. § 30-25-409*, managing members of a limited liability company owe specific duties of loyalty and care to their company, including refraining from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law. *Idaho Code Ann. § 30-25-409(c)*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN7[] Types of Contracts, Quasi Contracts

Unjust enrichment is the measure of recovery under a contract implied in law. This quasi-contract is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties. Unjust enrichment occurs where (1) the plaintiff confers a benefit on the defendant, (2) the defendant appreciates the benefit, and (3) the defendant's acceptance of the benefit is inequitable without payment to the plaintiff for the benefit's value.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Preliminary Considerations > Equity > Relief

HN8[] Standards of Review, Abuse of Discretion

Because an appellate court reviews rulings on equitable remedies for an abuse of discretion, the four-part abuse of discretion analysis applies: Whether the trial court: (1)

correctly perceived the issue as one of discretion, (2) acted within the outer boundaries of its discretion, (3) acted consistently with the legal standards applicable to the specific choices available to it, and (4) reached its decision by the exercise of reason.

Counsel: Hastings Law Group, LLC, Salt Lake City, for appellants. Brett W. Hastings argued.

Fisher & Hudson, Boise, for respondents. Vaughn Fisher argued.

Judges: BRODY, Justice. Chief Justice BURDICK, and Justices BEVAN, STEGNER, and MOELLER CONCUR.

Opinion by: BRODY

Opinion

[*366] [1092]** BRODY, Justice.

This appeal arises from the division of a three-member accounting firm, Siddoway, Wadsworth & Reese, PLLC. The three members of the firm were the personal professional corporations solely owned by each accountant. In early 2015, Reese PC signed a purchase agreement to buy a one-half interest in the client base of Siddoway PC for $200,000. This purchase agreement included an arbitration clause.

In August of 2015, Siddoway left the accounting firm, taking several employees and the clients' information with him. Following Siddoway's departure, the firm (now named Wadsworth Reese, PLLC), along with its remaining members, filed a complaint in the district court against Siddoway and his personal professional corporation and two of the employees who followed him. Siddoway counterclaimed. **[*367] [**1093] [***2]** The parties brought a range of claims.

Reese PC and Siddoway PC also went to arbitration for claims related to their purchase agreement, but the arbitrator determined the purchase agreement was void for failure of a condition subsequent.

The remaining claims between the parties were tried by the district court. The district court entered findings of fact and conclusions of law, ultimately deciding to "leave the parties where it found them." This included the following final determinations pertinent to this appeal: the district court ordered dissociation of Siddoway's personal professional corporation as a firm member; Siddoway and Siddoway PC were not entitled to attorney fees for compelling arbitration; Siddoway PC failed to show unjust enrichment from the void purchase agreement; and the firm could fund Reese's personal professional corporation's litigation and arbitration costs because resolving the purchase-agreement dispute served a legitimate business purpose. Siddoway and Siddoway PC timely appealed.

We affirm the district court's judgment. Siddoway and Siddoway PC were not entitled to attorney fees for compelling arbitration, nor did they show unjust enrichment or breach of membership **[***3]** duties.

I. FACTUAL AND PROCEDURAL BACKGROUND

Clark Reese, Frederick Wadsworth, and Randy Siddoway are each certified public accountants with their own professional corporation (respectively, Reese PC, Wadsworth PC, and Siddoway PC). In 2012, Reese became an employee of Siddoway PC. Following the death of Steve Harding, one of Siddoway's former accounting partners, Siddoway and Reese began discussing becoming partners on terms that Reese would purchase a one-half interest in Siddoway's practice. This term was to balance out the client base each accountant would bring to the new firm—Siddoway brought about 450 clients while Reese brought less than ten clients from his previous positions.

On December 20, 2013, Reese and Siddoway formed CRS Services, PLLC. A month later, they changed the accounting firm's name to Siddoway, Wadsworth & Reese to reflect the addition of a third accountant, Frederick Wadsworth. About that same time, Siddoway, Wadsworth & Reese (hereinafter Wadsworth Reese PLLC to reflect its current title) obtained the Harding client base. That purchase agreement between Wadsworth Reese PLLC (then named CRS) and Harding & Co., P.A., contained a five-year non-competition provision. **[***4]**

Siddoway PC, Reese PC, and Wadsworth PC signed the Siddoway Wadsworth Reese operating agreement on January 6, 2014, which gave each member a one-third membership interest in the firm. The operating agreement did not include a non-competition clause. However, the operating agreement appears to have been intended as a temporary document because the three members had yet to decide all the terms under which they would do business together.

A year later, on January 28, 2015, Siddoway PC and Reese PC signed "the Reese Agreement" in which

Reese PC promised to pay Siddoway PC $200,000 for a one-half interest in Siddoway's client base. Reese PC signed an associated promissory note for $200,000, while Reese signed guaranties to both the Reese Agreement and promissory note. Reese PC agreed to pay the $200,000 in monthly payments over the next four years. The Reese Agreement contained a non-competition clause, an agreement to arbitrate, and a provision that awarded "the prevailing party" attorney fees following legal action.

Right on the heels of Siddoway PC and Reese PC signing the Reese Agreement, the three individual accountants all signed a modification of the Reese Agreement that required the **[***5]** three members of Wadsworth Reese PLLC to agree to amend the operating agreement to finally settle the terms under which they would do business together by February 15, 2015, or else the Reese Agreement would be void. Despite the three members' failure to reach an agreement by the February 15 deadline, Reese PC continued to make payments to Siddoway PC under the Reese Agreement. Ultimately, Reese PC paid approximately $28,000 to Siddoway PC. Siddoway PC had transferred numerous **[*368] [**1094]** clients to Wadsworth Reese PLLC, and Reese became the accountant for hundreds of those clients, based both on his capacity to take on the work as well as Siddoway's referrals to Reese.

In 2015, Siddoway's relationship with both Reese and Wadsworth broke down, causing the parties to discuss buyout options and begin negotiations on how Siddoway PC would exit Wadsworth Reese PLLC. The parties never agreed upon terms. On August 21, 2015, Siddoway announced he was leaving the firm. As Siddoway left Wadsworth Reese PLLC he took several employees with him, including his nephew Dustin Siddoway and administrative employee Jeanine Barkan. On the day he announced his departure, Siddoway also downloaded Wadsworth Reese PLLC's **[***6]** UltraTax files, which contained the firm's clients' names, addresses, tax information, and any work in progress. Siddoway then sent a list of Wadsworth Reese PLLC's clients to Dustin Siddoway.

Immediately after leaving Wadsworth Reese PLLC, Dustin Siddoway formed the accounting firm AnchorPoint, PLLC, while Barkan formed an LLC now called PoleStar Entrepreneurial Group. Their goal was to create complementary businesses with an overlapping clientele. Siddoway's departure ultimately resulted in a "mass migration" of over 200 clients to AnchorPoint. About 60 percent of the Harding client base remained at Wadsworth Reese PLLC. During this time, Dustin Siddoway also met twice with Reese and Wadsworth "to resolve difficulties arising from the company's breakup" and to obtain tax data for certain clients. Siddoway PC and AnchorPoint seem to have remained separated due to concerns over a non-competition provision in the agreement Wadsworth Reese PLLC used to purchase the Harding client base. AnchorPoint and Siddoway PC remain separate entities.

On December 14, 2015, Wadsworth Reese PLLC, Reese PC, and Wadsworth PC, collectively sued Siddoway and Siddoway PC, alleging trade secrets violations, **[***7]** breach of the operating agreement, breach of fiduciary duties, and interference with prospective business advantage, amongst other claims. In addition, the plaintiffs requested a judicial order to dissociate Siddoway from Wadsworth Reese PLLC. Reese PC also sought $28,000 in damages, plus interest, for the amount paid to Siddoway PC under the Reese Agreement. Siddoway and Siddoway PC counterclaimed, alleging breach of the operating agreement, violations of Idaho Code section 30-6-404 for failing to make distributions in equal shares, and misappropriated funds, as well as other business-related claims. Siddoway also requested a judicial dissolution of Wadsworth Reese PLLC.

On February 12, 2016, Siddoway and Siddoway PC filed a motion to compel arbitration on claims relating to the Reese Agreement, and the district court granted the motion. Reese and Reese PC asked the district court to stay the arbitration, but the district court denied and granted the stay in part: it found that the claims against Reese were not arbitrable while the claims against Reese PC were. At arbitration, the arbitrator ruled that the Reese Agreement was void for failure of a condition subsequent. Following both of the court rulings to **[***8]** compel arbitration and stay the proceedings, Siddoway and Siddoway PC requested attorney fees incurred in compelling the arbitration. The district court denied those motions, finding them premature because the prevailing party could not yet be determined. The court then dismissed Siddoway's claim for breach of the Reese Agreement, with prejudice, and deferred ruling on fees and costs consequent to this ruling until after judgment was rendered on the remaining claims.

After arbitration, Reese PC and Wadsworth PC voted in October 2015 for Wadsworth Reese PLLC to pay for Reese's separate legal representation in the litigation and arbitration over the Reese Agreement. Both Reese

and Wadsworth later testified that their respective PCs voted this way because they were concerned about settling ownership of the firm. They were especially concerned about Siddoway claiming a majority interest if the Reese Agreement failed. Both Reese and Wadsworth were also concerned about the firm's potential liability for debts and the obligations to creditors as the firm struggled to maintain revenue. Siddoway and **[*369] [**1095]** Siddoway PC opposed this expenditure, arguing it was inappropriate.

The district court held a **[***9]** five-day bench trial. Following the trial, the district court dissociated Siddoway PC as a member of Wadsworth Reese PLLC and did not award further relief to any party. The district court also determined that Siddoway PC failed to show unjust enrichment from the void purchase agreement. In summary, the district court decided to "leave the parties where it found them." Two weeks later, Siddoway and Siddoway PC filed a motion to alter or amend the judgment, arguing that Wadsworth Reese PLLC did not have a legitimate business purpose to pay for Reese PC's litigation and arbitration expenses against Siddoway. Siddoway also revived its previous requests for attorney fees incurred in compelling arbitration under the Reese Agreement. The district court denied all requested relief, finding Siddoway's arguments lacked merit and that it was not the prevailing party. Siddoway and Siddoway PC timely appealed.

II. ANALYSIS

Siddoway and Siddoway PC challenge several of the district court's conclusions of law. We will address each issue and its applicable standard of review in turn.

A. The district court did not abuse its discretion by declining to award Siddoway fees and costs related to the arbitration [***10] litigation.

Siddoway and Siddoway PC contend that the district court committed reversible error in deciding that Siddoway was not the "prevailing party" entitled to attorney fees where they successfully compelled arbitration for claims under the Reese Agreement. The Siddoway parties' contention breaks into two distinct arguments: (1) that they were the prevailing parties and are entitled attorney fees under the contractual language; and (2) that the district court lacked jurisdiction to consider the Reese parties' motion to stay arbitration. We reject these arguments.

1. Attorney fees

HN1[] The determination of whether a party prevailed for purposes of an attorney fee award is a discretionary decision of the trial court. *See* Israel v. Leachman, 139 Idaho 24, 26, 72 P.3d 864, 866 (2003). Accordingly, this Court reviews the district court's determination to deny attorney fees for an abuse of discretion. *Id.* As long as the court correctly perceived the issue as one of discretion, acted within the outer boundaries of its discretion, acted consistently with the legal standards applicable to the specific choices available to it, and reached its decision by the exercise of reason, we will not disturb the decision on appeal. Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

The arbitrator ruled that the Reese **[***11]** Agreement was void. HN2[] Void contracts "are deemed never to have existed in the eyes of the law." Syringa Networks, LLC v. Idaho Dep't of Admin., 159 Idaho 813, 367 P.3d 208, 222 (2016). Thus, parties generally cannot benefit from a contractual attorney fees provision or statute where the contract is illegal or void. Kosmann v. Gilbride, 161 Idaho 363, 367, 386 P.3d 504, 508 (2016); Trees v. Kersey, 138 Idaho 3, 12, 56 P.3d 765, 774 (2002). The limited exception to this rule lies in *O'Connor v. Harger Construction, Inc.*, where we stated that "[a] party may be entitled to attorney's fees under a contract even if it is established that no contract between the parties ever existed." 145 Idaho 904, 912, 188 P.3d 846, 854 (2008). *O'Connor*, however, made that determination when examining a contract containing a severability clause that allowed the unenforceable provisions to be severed from the remainder of the contract which contained an attorney fee provision. *Id.*

Nevertheless, the Siddoway parties maintain that they are the prevailing parties for attorney fee purposes because they compelled arbitration and the Reese Agreement provides a fee award for enforcing its terms even though the arbitrator determined the contract was void. We disagree. The exact language of the attorney fee provision in the Reese Agreement reads: "Should either party be required to commence legal action to **[*370] [**1096]** enforce any of the terms of this Agreement, the prevailing **[***12]** party in such litigation shall be entitled to an award of reasonable attorneys fees and costs from the other party." Idaho Rule of Civil Procedure 54(d)(1)(B) guides our "prevailing party" analysis. It states: "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." I.R.C.P. 54(d)(1)(B).

Siddoway's argument that it is a prevailing party because it compelled arbitration rests almost entirely on our decision in Grease Spot, Inc. v. Harnes, 148 Idaho 582, 226 P.3d 524 (2010). In that case, Grease Spot filed a complaint against the defendants, alleging violations of a purchase agreement. Id. at 583, 226 P.3d at 526. After the defendants won a motion to compel arbitration, the arbitrator dismissed all of Grease Spot's claims against the defendants and they obtained an order confirming the arbitration award and judgment on the arbitration was entered in their favor. Id. at 583-84, 226 P.3d at 525-26.

This Court affirmed the district court's decision to award attorney fees for successfully compelling arbitration, noting the defendants were "the 'prevailing party' for purposes of receiving attorney fees once they prevailed in compelling arbitration, thereby terminating consideration of **[***13]** the merits of the action." Id. at 586, 226 P.3d at 528. However, Siddoway's circumstances differ greatly from the defendants in *Grease Spot*. The *Grease Spot* defendants were prevailing parties not simply because they compelled arbitration, but because they compelled arbitration on *all* claims and subsequently won at arbitration. This is an important distinction. Our decision in *Grease Spot* did not solely recognize the defendants' victory of a motion to compel arbitration, but the defendants' victory at "terminating consideration of the merits of the action." *Id.* That is the opposite of Siddoway's position.

While the district court granted the Siddoway parties' motion to compel, the arbitrator ultimately determined that the entire Reese Agreement was void for failure of a condition subsequent. The Siddoway parties subsequently lost their claims in arbitration as well as every counterclaim before the district court. Their only success concerning the Reese Agreement was in arguing the arbitrability of claims against Reese PC. The district court determined that one successful motion was "nowhere near enough success to make them prevailing parties." We agree. The district court correctly focused on the final judgment **[***14]** and result of the action—specifically in the arbitration proceedings—as required by Idaho Rule of Civil Procedure 54(d)(1)(B). There was no abuse of discretion.

2. Jurisdiction

Next, Siddoway and Siddoway PC contend that the district court lacked jurisdiction to consider Reese PC's motion to stay arbitration. There are two main arguments Siddoway raises within this procedural context: (a) the district court erred in considering Reese PC's motion to stay arbitration because the court lacked jurisdiction at that time; and (b) the district court erred in granting Reese's motion to stay arbitration because Reese, in his personal capacity, was bound to the arbitration agreement. Even if we were inclined to overlook the fact that these arguments were not raised in the district court and that Siddoway cites to no case law, statutes, or rules for the basis of his contentions (with the sole exception of a quick recap on the importance of res judicata), we will not take up the jurisdictional issues because they are moot.

HN3[] "An issue is moot if it 'does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief' or if 'a favorable judicial decision would not result in any **[***15]** relief or the party lacks a legally cognizable interest in the outcome.'" State v. Abdullah, 158 Idaho 386, 462, 348 P.3d 1, 77 (2015) (quoting Arambarri v. Armstrong, 152 Idaho 734, 739, 274 P.3d 1249, 1254 (2012) (citations omitted)). Analyzing now whether the district court had jurisdiction to take up the motions to stay arbitration is an academic exercise that fails to address a real controversy and cannot afford relief to either side. The arbitrator concluded that the Reese Agreement was void. This Court's determination of either **[*371]** **[**1097]** the lack of, or presence of, jurisdiction to stay the proceeding will not alter that conclusion, nor would it change the outcome on whether Siddoway and Siddoway PC were prevailing parties for an award of attorney fees.

B. There was substantial and competent evidence that Wadsworth Reese PLLC had a legitimate business purpose to pay legal fees to dissociate Siddoway.

The Siddoway parties next contend that Wadsworth Reese PLLC lacked a legitimate business purpose to pay plaintiffs' legal fees, including Reese and Reese PC's separate litigation and arbitration costs. While unstated in these terms, the Siddoway parties seem to contest the competence of the evidence before the district court. In addition, the Siddoway parties argue that the district court failed to identify this case **[***16]** as a derivative action.

The district court's determination of a "legitimate business purpose" ties closely with questions of good faith, fiduciary duties, and members' duties under the operating agreement, including the finding of whether the attorney fees were distributions or transfers to a non-member third party. HN4[↑] Because determining whether a fiduciary breached his duty is a question of fact, this Court will not disturb the district court's findings as long as there was substantial and competent evidence supporting them. Prehn v. Hodge, 161 Idaho 321, 328, 385 P.3d 876, 883 (2016). We conclude that there was substantial and competent evidence to support the district court's findings.

1. This litigation was not a derivative or a direct action.

HN5[↑] A derivative action occurs where a member of a limited liability company brings a claim to enforce the company's rights, while a direct action is brought by a member to assert the member's rights. I.C. §§ 30-25-801 to 802. Both of these actions are brought by a member of the LLC, rather than the LLC itself. *See id.* However, this action was brought by the firm, not a member asserting the member's or the firm's rights. As noted by the district court, the presence of Reese PC and Wadsworth PC on the plaintiff's side was simply **[***17]** superfluous; the clear basis of the litigation has been Wadsworth Reese PLLC's pursuit of its rights. Thus, this action does not fall into the definition of either a derivative or direct action as Siddoway contends.

2. Payments to Wadsworth Reese PLLC's legal counsel were not distributions.

Siddoway and Siddoway PC contend that the payment of legal fees for this litigation and appeal constitute "disproportionate distributions to Reese and Wadsworth and a breach of the utmost fiduciary duties owed by Reese and Wadsworth to Siddoway." The district court found that the payments were not a distribution under the operating agreement and that Siddoway was not entitled to a proportionate payment. Instead, paying the legal fees was a legitimate business purpose to solve the ownership disputes. We agree.

The operating agreement defined "distribution" as "a transfer of property to a Member on account of a Membership Interest as described in Article IX herein." In addition, HN6[↑] under Idaho Code section 30-25-409, managing members of a limited liability company owe specific duties of loyalty and care to their company, including "refrain[ing] from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, **[***18]** or knowing violation of law." I.C. § 30-25-409(c). Under the earlier version of the act, each member owed a duty of care to the firm "to act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company." Law of January 6, 2014, I.C. § 30-6-409(3), repealed by S.L. 2015, ch. 243, § 2, as amended by S.L. 2015, ch. 337, §4.

First, the district court determined that the payments to Wadsworth Reese PLLC's legal counsel were not "distributions" under the operating agreement because the legal counsel was not a member of Wadsworth Reese PLLC and the payments were not made because of Wadsworth PC and Reese **[*372]** **[**1098]** PC owning a membership interest. Instead, the payments were transfers of property to a non-member third party to resolve disputes amongst the firm's members. The operating agreement plainly defines distribution as a payment "to a Member on account of a Membership Interest." As the district court correctly concluded, the legal counsel was not a member nor did they receive payments on account of a membership interest. As such, Siddoway is not entitled to an equal distribution.

Second, the district court concluded **[***19]** that the firm decided to pay Wadsworth Reese PLLC's counsel because of the company's perceived need to address and resolve disputes between the parties. While Siddoway argues that the district court relied only on Reese's testimony at trial, the district court based its conclusion on a range of substantial and competent evidence, including testimony from Reese, Wadsworth, and Siddoway that Siddoway PC might assert a two-thirds interest in the firm if the Reese Agreement failed, as well as additional testimony that the firm was struggling with cash inflow and had growing concerns about obligations to creditors. In addition, the district court concluded that the plaintiffs' vindicated claims demonstrate good faith. Wadsworth Reese PLLC won its claim in proving that Reese owned a one-third interest in the firm under the operating agreement and that the Reese Agreement was void overall. Altogether, the district court's determination was based on relevant evidence that a reasonable mind would accept to support its conclusion.

Undoubtedly, Reese PC's vote for the firm to pay its

attorney fees was laced with self-interest. However, "[a] member does not violate a duty or obligation under this **[***20]** chapter or under the operating agreement solely because the member's conduct furthers the member's own interest." *I.C. § 30-25-409(e)*. Likewise, the district court concluded that the evidence did not indicate bad faith from Reese PC or Wadsworth PC in wanting to settle the questions of ownership. These were important issues for the firm to resolve for the owning members, clients, and creditors. The firm's vote to pay the litigation expenses—even for Reese and Reese PC in their separate arbitration and litigation proceedings—was an apposite decision in these circumstances and the district court reached that conclusion based on substantial and competent evidence.

C. The district court did not abuse its discretion in determining that neither Siddoway PC nor Reese PC were unjustly enriched.

The Siddoway parties' final contention is that the district court erred in denying them recovery for unjust enrichment in the Reese Agreement, because Reese PC obtained the benefits of a one-third membership interest in Wadsworth Reese PLLC. The district court determined that neither Reese PC nor Siddoway PC were unjustly enriched. We agree.

HN7[↑] Unjust enrichment "is the measure of recovery under a contract implied in law." **[***21]** *Barry v. Pac. West Constr., Inc., 140 Idaho 827, 834, 103 P.3d 440, 447 (2004)*. This quasi-contract "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties." *Continental Forest Prods. v. Chandler Supply Co., 95 Idaho 739, 518 P.2d 1201 (1974)*. Unjust enrichment occurs where (1) the plaintiff confers a benefit on the defendant; (2) the defendant appreciates the benefit; and (3) the defendant's acceptance of the benefit is inequitable without payment to the plaintiff for the benefit's value. ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 326 (2016)***. ***HN8***[↑] Because this Court reviews rulings on equitable remedies for an abuse of discretion, the four-part abuse of discretion analysis applies here:

> Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg, 163 Idaho at 863, 421 P.3d at 194. While Siddoway and Siddoway PC argue that the district court's conclusion was arbitrary **[*373]** **[**1099]** and unsupported, we conclude that the district court properly reached its decision by an exercise of reason.

Both sides conferred a benefit on the other: Reese **[***22]** PC conferred a benefit of $28,000 to Siddoway PC, which conferred a benefit of one-half of Siddoway PC's client base to Reese PC. Reese PC's benefit also appreciated as he served the client base. Consequently, the key inquiry is whether the Siddoway parties proved that Reese PC's acceptance of the client base was inequitable with the $28,000 benefit Reese PC paid to Siddoway PC. This they failed to do. Once again, Siddoway failed to state the correct standard of review but it appears to be arguing against the reasonableness of the district court's decision in leaving the parties where it found them.

First, Siddoway PC fails in its old argument that it bestowed a benefit of a one-third interest in the firm through the Reese Agreement rather than just an interest in the Siddoway PC client base. Reese PC obtained its one-third interest in Wadsworth Reese PLLC from the firm's operating agreement, which was signed prior to the Reese Agreement and expressly gave Reese PC an equal membership interest alongside Siddoway PC and Wadsworth PC. Thus, Reese PC could not be unjustly enriched by its one-third membership interest.

Second, the Siddoway parties' main evidence of unjust enrichment stems **[***23]** from the assertion that Reese is enjoying the benefit of many clients that previously belonged to Siddoway PC. As for exact monetary calculations on the value of the client base, the district court calculated that Reese PC retained an excess benefit of about $21,358.50 in the following factual analysis:

> The total amount Wadsworth Reese collected from former Siddoway PC clients in 2016 was $123,397 (rounded to the nearest dollar). This total includes payments for services rendered by Wadsworth Reese not only in 2016 but also in 2014 and 2015, but the record doesn't show the degree to which it is attributable to services rendered before the Siddoway Parties cut ties with Wadsworth Reese in August 2015, or instead to services rendered after

> the cutting of ties. In any event, Siddoway PC contends Reese PC derived a benefit equal to 80% of $123,397, or $98,717.60, from this revenue. It isn't clear what the 80% factor deducts for, but it is clear that it comes from the formula to which Reese PC and Siddoway PC agreed in setting the $200,000 price under the Reese Agreement for Reese PC to purchase a one-half interest in Siddoway PC's established client base. That formula also contained a second **[***24]** adjustment, by which the result after application of the 80% factor was reduced by another 50%, given that Reese PC was buying only a one-half interest in Siddoway PC's established client base. For reasons they don't explain, the Siddoway Parties don't apply this 50% factor here. Perhaps that's because, by 2016, they had cut ties with Wadsworth Reese and were no longer benefiting from the revenue Wadsworth Reese generated by serving the Siddoway PC client base, to whatever extent those clients remained with Wadsworth Reese. But Reese PC undeniably shared the benefit of that revenue equally with Wadsworth PC—both received identical monthly management fees, and neither received any profit distributions—so Reese PC garnered no more than half the benefit. Consequently, the Siddoway Parties' $98,717.60 figure would have to be reduced by 50% to account for Wadsworth PC's share of the benefit. This leaves $49,358.80—only $21,358.50 more than the $28,000 Reese PC paid to Siddoway PC under the Reese Agreement.

Despite this excess amount, the district court found several factors significant to support its conclusion that Reese PC was not unjustly enriched. First, the evidence from trial suggested **[***25]** that while "Siddoway PC brought more clients into the venture, Reese PC likely performed much more of the work necessary to service them." Second, the district court also found ample evidence that Reese PC's contributions to the firm ensured the equal compensation of monthly management fees to each member—a contribution of efforts that Siddoway PC likely did not provide to the firm. Third, Siddoway PC's early departure and efforts to send many clients to **[*374]** **[**1100]** AnchorPoint deprived Reese PC of the full benefit of the bargain and made assessment of the clients' value difficult. Ultimately, these factors combined to suggest Reese PC was not unjustly enriched. With both parties failing to perform their end of the Reese Agreement, depriving both sides of the full benefits of the bargain, neither Reese PC nor Siddoway PC was unjustly enriched. Leaving the parties to their pre-litigation position was reasonable, not unjust or an abuse of discretion.

D. Wadsworth Reese PLLC is entitled to attorney fees on appeal.

Both appellants and respondents request attorney fees on appeal under *Idaho Code section 12-120(3)*. It states:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, **[***26]** or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

I.C. § 12-120(3). The gravamen of the underlying transaction was commercial in nature. Thus, because Wadsworth Reese PLLC is the prevailing party on this appeal, it is entitled to attorney fees.

III. CONCLUSION

We affirm the district court's judgment and award attorney fees and costs on appeal to respondents.

Chief Justice BURDICK, and Justices BEVAN, STEGNER, and MOELLER CONCUR.

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Porcello v. Porcello

Supreme Court of Idaho

August 3, 2020, Opinion Filed

Docket No. 46443

Reporter
167 Idaho 412 *; 470 P.3d 1221 **; 2020 Ida. LEXIS 170 ***; 102 U.C.C. Rep. Serv. 2d (Callaghan) 718; 2020 WL 4432813

JENNIFER PORCELLO, Plaintiff-Counterdefendant-Respondent, v. The Estate of ANTHONY J. PORCELLO, the Estate of ANNIE C. PORCELLO, and KALYN M. PORCELLO, as Personal Representative, Defendants-Counterclaimants-Appellants.The Estate of ANTHONY J. PORCELLO, the Estate of ANNIE C. PORCELLO, and KALYN M. PORCELLO, as Personal Representative, Third Party Plaintiffs-Appellants, v. MARK PORCELLO, Third Party Defendant-Respondent.

Prior History: [*1]** Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Cynthia K.C. Meyer, District Judge.

Disposition: The judgment of the district court is vacated and the case is remanded for further proceedings.

Core Terms

district court, trust deed, latent ambiguity, parties, parol evidence, extrinsic evidence, ambiguity, mortgage, terms, summary judgment, renovation, parol evidence rule, loans, attorney's fees, incomplete, proceeds, vacate, competent evidence, proceedings, future advances, contributed, handwritten, properties, costs, intent of a party, purchase price, fact finding, conversation, foreclosure, collateral

Case Summary

Overview
HOLDINGS: [1]-Substantial and competent evidence did not support the district court's interpretation of a promissory note and a deed of trust with respect to ownership of the lake property as the district court's findings of fact were at best internally inconsistent because, if respondents were to own the lake home "free and clear" upon sale of the Woodinville property, there would be no need for a credit toward purchase of the lake home; and, conversely, if respondents were to receive a credit of $150,000 toward the purchase of the lake home, it followed that there was a recognized debt against which the credit was to be applied; thus, the district court clearly erred in interpreting the note and deed to contain a term that the entire obligation to pay would be satisfied once the Woodinville property sold.

Outcome
Judgment vacated; case remanded.

LexisNexis® Headnotes

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Appeals > Standards of Review > Substantial Evidence

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Trials, Bench Trials**

Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, the supreme court will liberally construe the trial court's findings of fact in favor of the judgment entered. The supreme court will not set aside a trial court's findings of

fact unless the findings are clearly erroneous. If the trial court based its findings on substantial evidence, even if the evidence is conflicting, the supreme court will not overturn those findings on appeal. Additionally, the supreme court will not substitute its view of the facts for that of the trial court. The supreme court exercises free review over matters of law. Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN2 **Contract Interpretation, Ambiguities & Contra Proferentem**

Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN3 **Reviewability of Lower Court Decisions, Preservation for Review**

An issue presented on appeal must have been properly framed and preserved in the court below.

Contracts Law > Contract Interpretation > Parol Evidence

HN4 **Contract Interpretation, Parol Evidence**

The parol evidence rule, as applied to contracts, is a rule, not of evidence or of evidence merely, but of substantive law, it being considered that parol evidence is excluded because the law requires the terms of the agreement to be found in the writing itself and not because of any reasons which ordinarily require the exclusion of evidence, such as some policy against its admission, or its untrustworthiness or lack of probative value.

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Patent Ambiguities

HN5 **Contract Ambiguities, Latent Ambiguities**

If an instrument's terms are clear and unambiguous, its meaning and legal effects are questions of law to be determined from the plain meaning of its own words. There are two types of ambiguity, patent and latent. A patent ambiguity exists when the document is ambiguous on its face. A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist. That includes an ambiguity that does not appear upon the face of the agreement, but lies hidden in the subject to which it has reference. The supreme court has described the process in explaining latent ambiguity as being divided into two parts: first, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.

Contracts Law > Contract Interpretation > Parol Evidence

HN6 **Contract Interpretation, Parol Evidence**

While a discussion of the parol evidence rule begins with a document, the supreme court has never clearly held that a latent ambiguity must be tethered to a specific provision in that document. Most cases regarding a latent ambiguity involve interpretation of a particular provision in a document.

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

HN7 **Contract Ambiguities, Latent Ambiguities**

A latent ambiguity in a contract must ultimately be tied to the language of the instrument itself. Latent ambiguities by nature only emerge when the instrument is applied to the facts as they exist. Interpretation of a contract requires an inquiry into its legal meaning and effect. In determining ambiguity, the court hears the proffer of the parties and determines if there are objective indicia that, from the parties' linguistic reference point, the contract's terms are susceptible of

different meanings.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation > Parol Evidence

Contracts Law > Contract Interpretation > Intent

HN8 **Contract Interpretation, Ambiguities & Contra Proferentem**

In analyzing ambiguity, the court must consider the words of the agreement, including writings made a part of the contract by annexation or incorporation by reference, the alternative meanings suggested by the parties, and any extrinsic evidence offered in support of those meanings. Extrinsic evidence properly considered in deciding whether the contract is ambiguous may include the structure of the contract; the parties' relative positions and bargaining power; the bargaining history; whether one of the parties prepared the instrument, so that the language should be construed most strongly against it; and any conduct of the parties which reflects their understanding of the contract's meaning. Only after a careful and painstaking search of all the factors shedding light on the intent of the parties will the court conclude that the language in any given case is clear and unambiguous.

Contracts Law > Contract Interpretation > Parol Evidence

HN9 **Contract Interpretation, Parol Evidence**

In order for an agreement to express the understanding of the parties it must be complete or integrated. Parol evidence may be elicited to expand or clarify an incomplete agreement.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Contracts Law > Contract Interpretation > Intent

HN10 **Contract Conditions & Provisions, Integration Clauses**

Whether a contract is ambiguous is a question of law the supreme court reviews de novo. Whether a particular subject of negotiations is embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances. A written contract that contains a merger clause is complete upon its face.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN11 **Standards of Review, De Novo Review**

Whether an agreement is complete or integrated is a question of law over which the supreme court exercises de novo review.

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

HN12 **Mortgages & Other Security Instruments, Definitions & Interpretation**

Where it is plainly apparent from the terms of a mortgage that it was intended to secure future advances, the terms will control a contrary understanding of the mortgagor. Future advance clauses are enforceable according to their tenor. Where the intention of the parties is expressed in unambiguous

terms, a court does not construe a future advances clause but enforces it as written.

Civil Procedure > Appeals > Costs & Attorney Fees

Contracts Law > Remedies > Damages > Types of Damages

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN13[] **Appeals, Costs & Attorney Fees**

Idaho Code Ann. § 12-120(3) allows for attorney fees to be awarded to the prevailing party in a civil action to recover on a note or negotiable instrument. The supreme court awards costs on appeal to the prevailing party. *Idaho App. R. 40(a)*. However, the supreme court has declined to award attorney fees or costs when both parties have prevailed on appeal.

Counsel: Stoel Rives LLP, Boise, for appellants Estates of Anthony J. Porcello and Annie & Kalyn Porcello, as personal representative. W. Christopher Pooser argued.

Ramsden Marfice Ealy & DeSmet, Coeur d'Alene, for respondent Jennifer Porcello. Michael Ramsden argued.

Smith + Malek, PLLC, Coeur d'Alene, for respondent Mark Porcello. Peter J. Smith IV argued.

Judges: STEGNER, Justice. Chief Justice BURDICK, Justices BRODY, BEVAN and MOELLER CONCUR.

Opinion by: STEGNER

Opinion

[1224]** **[*415]** STEGNER, Justice.

This case involves interpretation of a promissory note and a deed of trust involving a home and real property located in Hayden Lake, Idaho. In the summer of 2014, Mark and Jennifer Porcello, who were married at the time, sought to purchase this property. After making various pre-payments, the amount the couple needed to purchase the property was roughly $312,000. While Mark and Jennifer could not qualify for a conventional loan themselves, they hoped that another property in Woodinville, Washington, which was owned **[***2]** by Mark's parents, and in which Mark and Jennifer claimed an interest, could be sold to assist in the purchase of the Hayden Lake property. In an effort to help Mark and Jennifer purchase the property, Mark's parents, Annie and Tony Porcello, obtained financing through a non-conventional lender. In the end, the transaction became quite complicated. Annie and Tony ultimately took out a short-term, "hard money" loan[1] from Legacy Group Capital (LGC), with two properties (including the Woodinville property) serving as collateral. Due to the lender's requirements, and the ownership of other property by Mark and his parents, the amount borrowed by Annie and Tony ballooned to $648,500 and greatly exceeded the amount needed by Mark and Jennifer to close on the Hayden Lake property. Nevertheless, Annie and Tony's lawyer drafted a promissory note for Mark and Jennifer to sign which equaled the amount borrowed by Annie and Tony. In turn, Mark signed a promissory note and deed of trust for the Hayden Lake house, in the same amount and with the same repayment terms as the loan undertaken by his parents. Jennifer initially resisted signing the Note and Deed of Trust, but ultimately, after speaking **[***3]** to the lawyer who drafted the documents, signed them. With the funding provided, Mark and Jennifer purchased the Hayden Lake property.

In mid-2016, Annie and Tony sought non-judicial foreclosure on the Hayden Lake property, claiming that the entire balance of the note was due and owing. By this time Mark and Jennifer had divorced, although Jennifer still occupied the Hayden Lake home. In response to the foreclosure proceeding, Jennifer filed suit against her former in-laws seeking a declaratory judgment and an injunction, arguing that any obligation under the note had been satisfied in full when the Woodinville property sold, notwithstanding the language of the note encumbering the Hayden Lake property. Annie and Tony answered Jennifer's complaint by filing a counter-claim against her and a third-party complaint against Mark.

After a trial extending over eight days in April and May 2018, the district court granted Jennifer's request for a declaratory judgment. By this time, Annie and Tony had died and were substituted for as parties in the litigation

[1] "Hard money" loans are a form of short-term financing, usually with higher interest rates than those of the traditional alternatives. "Hard money lenders tend to focus on the value of the collateral relative to the loan amount. These lenders are able to move quickly and require less in the way of due diligence and underwriting than traditional lenders." Erik North, *The Language of Loans*, ***41 L.A. LAW 32, 34 (Jan. 2019)***.

by their respective estates. The district court also denied the estates' request for judicial foreclosure, and dismissed **[***4]** their third-party claims against Mark. The district court held that the Note and Deed of Trust were latently ambiguous because the amount of the Note was more than twice the amount Mark and Jennifer needed in order to purchase **[**1225] [*416]** the Hayden Lake property. Because the district court concluded the note and deed of trust were ambiguous, it considered parol evidence to interpret them. Ultimately, the district court found the Note and Deed of Trust conveyed the Hayden Lake property to Jennifer and Mark "free and clear" upon the sale of the Woodinville property.

Annie's and Tony's estates timely appealed the district court's decisions. For the reasons set out below, we vacate the judgment of the district court and remand for further proceedings.

I. Factual and Procedural Background

A. Factual Background.

This case involves three generations of the Porcello family, multiple properties in three different states, and several real estate transactions between a married couple Ann Porcello (Annie) and Anthony Porcello (Tony), their son, Mark Porcello (Mark), and his now ex-wife Jennifer Porcello[2] (Jennifer). As noted, both Annie and Tony died during the pendency of this dispute. Their estates have since **[***5]** been substituted for each of them. The personal representative of both estates is Kalyn Porcello (Kalyn), who is Mark's daughter from a previous marriage. The estates of Annie and Tony will be collectively referred to as "the Estates" in this opinion. The first names of the parties are being used to refer to them to avoid confusion with other family members who share the common surname.

The various parties' finances, assets, and relationships are confusingly intertwined. Although the real property which is the subject of the Note and Deed of Trust in this case is the Hayden Lake property, several other properties are relevant to the underlying dispute. The first is a property located in Woodinville, Washington. Annie and Mark purchased this property jointly in 2012, with partial financing provided by Wells Fargo from a loan obtained by Annie and Tony.[3] This property will be referred to as the Woodinville property. The second is a home located in Indian Wells, California, which was originally owned by Annie as her separate property. This home is situated on Via Venito, a street in Indian Wells. This property has been and will continue to be referred to as the Via Venito property. The **[***6]** third property is a home in Bellevue, Washington. Mark leased this property with an option to purchase it. This property will be referred to as the Bellevue property.

This case also involves three loans undertaken by Annie and Tony. The first loan—the one most closely associated with the Note and Deed of Trust in this case—was a short-term "hard money" loan provided by Legacy Group Capital (the Legacy loan) in the amount of $648,500. The Legacy loan was secured by both the Woodinville property and the Via Venito property. The second and third loans were both conventional loans provided by Evergreen Mortgage Company (Evergreen) to Annie and Tony which in many respects replaced the Legacy loan. The first Evergreen loan was collateralized by the Woodinville property. The second Evergreen loan was collateralized by the Via Venito property.

Further complicating matters is the fact that multiple generations of the Porcello family have also been involved in two jewelry businesses that were owned and operated by various family members. While the two businesses evidently used to work closely together, several conflicts arose between them that left the parties "entrenched in their respective positions[,]" **[***7]** as the district court put it. Litigation relating to those entities has also ensued. This ongoing litigation and the parties' commingling of finances have also made it difficult to parse out contributions to the various real estate transactions conducted by Mark and his parents.

Finally, Mark and Jennifer themselves have been married twice and have had a **[**1226] [*417]** turbulent relationship. Mark and Jennifer were first married from 2003 to 2007. Following their reconciliation

[2] Jennifer has since returned to using her maiden name, Maggard.

[3] Although Annie and Tony jointly took out several loans relevant to this case, Tony's testimony and the district court's findings reflect that Annie "was more involved in the dealings with Mark than [Tony] was, [and] that [Tony] signed documents when [Annie] told him to[.]" One of the reasons the loans were undertaken by Annie and Tony, without Mark's participation, was Mark's inability to obtain conventional financing. The explanation for this inability was Mark's divorces, bankruptcy, poor credit rating, and struggle with addiction.

and second marriage, which began in 2013 and ended in 2015, the Woodinville property was purchased.[4] The transaction that is the subject of this case—purchase of the Hayden Lake property—was entered into during Mark and Jennifer's second marriage. Mark and Jennifer divorced for the second time in 2017, and Jennifer was awarded ownership of the Hayden Lake home in the divorce proceedings. Jennifer continues to live there with her daughters. Notably, the district court found that, despite their "long, often acrimonious relationship[,]" Mark and Jennifer's testimony was consistent with each other's and made logical sense.

With this background, the specific facts of the case are as follows.

1. 2012 purchase of the Woodinville property **[***8]** .

Mark and Annie decided to purchase a home together in Woodinville, Washington, in 2011. The purchase price was $401,000. Annie paid $93,000 as a down payment.[5] Annie and Tony took out a loan from Wells Fargo for the balance and titled the Woodinville property in their names only. The district court found that "[t]he agreement between Mark and Annie was that Annie would pay the down payment [of $93,000] on the Woodinville home, and Mark and Jennifer would live in the home. Mark would then make the monthly payments to Wells Fargo." Renovations were needed on the Woodinville home, to which Mark, Annie, and Jennifer each contributed, although the amounts contributed by each continue to be disputed. The district court found that Jennifer contributed sweat equity and that Mark had been reimbursed by Annie for some of the renovation costs.

In 2013, Mark and Jennifer's relationship again deteriorated; Mark moved out of the Woodinville home briefly, during which time he stopped making monthly payments on the Wells Fargo mortgage. During this period of time, Mark and Jennifer were involved in several family law issues in Washington state courts, and Annie sought to evict Jennifer from the Woodinville **[***9]** home. Jennifer asserted she had an equitable interest in the home; however, this interest was not recognized in an arbitration proceeding in August 2013. Jennifer was required to vacate the house as a result of the arbitration proceeding. However, Mark and Jennifer reconciled in November 2013, and Mark resumed making payments on the mortgage. Mark and Jennifer then remarried. It was at this point that Mark and Jennifer decided to move to Idaho.

2. 2014 purchase of the Hayden Lake property.

Mark and Jennifer located a home in Hayden Lake, Idaho, they sought to purchase. The purchase price was $360,000; they put down $20,000 in earnest money and moved in before closing. However, they were unable to secure conventional financing to complete the purchase. Closing was extended from July 31, 2014, to September 4, 2014, and the two were required to pay an additional $20,000 in earnest money and $5,000 in rent, which was later credited against the purchase price. Mark and Jennifer still needed approximately $312,000 to close on the property by September 4, 2014. Proceeds from the Woodinville property would have assisted them in the purchase, but the renovations on that property were not yet **[***10]** complete and a sale could not be achieved without the house being renovated. Because Mark was unable to obtain a conventional loan, he asked Annie for help to complete the purchase of the Hayden Lake property.

On August 27, 2014, Annie and Tony took out the Legacy loan in the amount of $648,500. The Legacy loan had a term of ninety days and an interest rate of 12%. The Legacy loan was secured by the Woodinville property and the Via Venito property, but not the Hayden Lake home.[6] In addition, **[**1227]** **[*418]** LGC would only lend money to Annie and Tony if it were in a first position, which meant the outstanding Wells Fargo mortgage had to be paid off; however, there was insufficient equity in the Woodinville property itself to both pay off Wells Fargo's first position in the property and fund the purchase of the Hayden Lake property. As a result, Annie had to put up her Via Venito property, in addition to the Woodinville property, as collateral. As found by the district court, the parties expected the Woodinville property to sell within the loan's term of ninety days, and that the proceeds from the sale of the Woodinville property would go toward paying off the

[4] The parties have heavily disputed their respective contributions to the purchase and renovations of the Woodinville property.

[5] The district court found there was no evidence supporting Mark's contention that he repaid Annie about half of this down payment.

[6] LGC did not conduct business in Idaho. LGC required that the property used as collateral for any loan issued by it needed to be in a state in which LGC conducted business. LGC was licensed in both California and Washington. Hence, the loan was collateralized by the Via Venito and Woodinville properties.

balance of the Legacy loan.

The Legacy loan **[***11]** funds were disbursed to Annie and Tony on September 2, 2014, and were distributed as follows:

- $17,315.50 in settlement charges on the loan;
- $270,462.00 to pay off the Wells Fargo mortgage on the Woodinville home;
- $312,044.32 toward the purchase of the Hayden Lake property[7];
- $48,677.62 as cash.[8]

Joe Mijich (Mijich) was Annie and Tony's attorney. Mijich drafted the Note and Deed of Trust for the closing of the Hayden Lake property. According to Mijich, this Note and Deed of Trust were drafted to mirror the Legacy loan terms, including the total loan amount of $648,500. Mijich testified that the Note and Deed of Trust were in the same amount as the Legacy loan because Annie and Tony "wanted to make sure . . . they had some security back, so they wanted a note, a similar note to be signed by - by Mark and Jennifer ... - under the same conditions of the note that they were borrowing on." Mijich also stated that he expected the obligations of the Note to be adjusted after the Legacy loan was paid off.

On September 3, 2014, Mark and Jennifer went to Pioneer Title Company to sign the closing paperwork for the Hayden Lake property. When they were presented with the Note and Deed of Trust, Jennifer **[***12]** became upset when she noticed that the principal amount of the Note was $648,500, despite the HUD-1 settlement statement for closing on the Hayden Lake property showing that the purchase price was only $360,000. Even with this disparity, Mark signed the Note and Deed of Trust. Jennifer, however, refused to sign. Mark and Jennifer left Pioneer Title Company between 5:00 and 5:15 p.m. Shortly thereafter, Mark and Jennifer pulled over to the side of the road to make a series of phone calls. Mark initially called Tony to ask about the Note and Deed of Trust. According to both Mark and Jennifer, Tony told Mark to call Mijich.

Although Mijich denied speaking with Mark and Jennifer on the day in question, in part because he had no billing record corroborating the conversation, phone records admitted at trial show that Mark placed a call to Mijich's cell phone at 5:24 p.m., which lasted for approximately ten minutes. According to Mark and Jennifer, Mijich told them that the Note and Deed of Trust needed to match the amount of the Legacy loan because a portion of the Legacy loan was being used to purchase the Hayden Lake property and both the Woodinville and Via Venito properties were being **[***13]** used as collateral. Mijich purportedly told them that once the Woodinville property sold and the Legacy loan was paid in full, the Hayden Lake home would belong to Mark and Jennifer "free and clear."

The next day, Jennifer returned to Pioneer Title Company and signed the Note and Deed of Trust. Pioneer Title Company received the $312,044.32 on behalf of Mark and **[**1228]** **[*419]** Jennifer, and the purchase of the Hayden Lake property closed.

3. Renovation and sale of the Woodinville property.

Between the summers of 2014 and 2015, several projects were planned for the Woodinville property, including replacing the driveway, repainting certain rooms, repairing the swimming pool, installing new cabinets and counters in the kitchen, and landscaping the yard. The amounts contributed by the parties to this remodel were hotly disputed by the parties, but the district court found that the amounts Mark and Annie invested in the property were roughly equal, and that Jennifer's contribution was in sweat equity.

At some point during this renovation in the summer of 2014, Annie drafted a note. This note read:

> To Whom It May Concern:
>
> I, Ann Porcello agree to the following: When the house in Woodinville sells .... I will **[***14]** have $150,000.00 transferred for the purchase of the home at 1663 Northwest Dr., Hayden, [sic] Idaho 83835. Please advise me if there is any specific way that this needs to be handled.

The note is dated July 1, 2014. The note was later signed by Tony, but he testified he did not know why Annie asked him to sign it. Tony contended that the note was not meant to be a gift or repayment for renovations on the Woodinville property.

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[7] This amount was disbursed directly to Pioneer Title Company, which handled the escrow for the purchase of the Hayden Lake property.

[8] The district court concluded that the cash was paid to Annie and Tony. However, the Estates argue that this money was actually paid to Mark. The evidence from trial suggests the Estates' attribution of the payments is correct. At trial, Mark was asked if the $48,677.62 had been paid to him. His response was that he assumed that was correct. Kayln also testified that the money was paid to Mark. It does not appear that the district court's conclusion that this cash was paid to Annie and Tony is ultimately supported by the evidence at trial.

According to Jennifer, this note was her "security" so that her contribution to the Woodinville renovations would be recognized. (Her contribution to the earlier work on the Woodinville property had not been recognized during the 2013 arbitration proceedings.) According to Mark, Annie intended the note to recognize Mark's investment in the Woodinville property. Regarding the note, the district court found "that Annie wrote the note intending to repay Mark and Jennifer for their equity in the Woodinville home and designating that the $150,000 go toward payment of the Hayden [Lake] home."

4. The Evergreen loans.

The Woodinville property was not ready to sell as quickly as anticipated. While the Woodinville property was being renovated, the Legacy loan came due. The **[***15]** Legacy loan term was extended, but Mark, who had the obligation to make monthly interest payments on the Legacy loan, was experiencing financial strain. To reduce the amount of the monthly payments, and to avoid extreme penalties for nonpayment, Annie and Tony took out two conventional loans from Evergreen. Evergreen disbursed the proceeds from the first loan on May 14, 2015. This loan was secured by the Woodinville property and was in the amount of $480,000. Annie and Tony used the proceeds to pay down the Legacy loan by about $470,000. This left an outstanding obligation on the Legacy loan of roughly $193,400.

Evergreen disbursed the proceeds from the second loan on July 21, 2015; this loan was secured by the Via Venito property and was in the amount of $417,000. According to Mark, this loan was originally obtained so that he could exercise his option to purchase the Bellevue property. Mark stated that he and Annie had planned for the Woodinville property to sell two or three days before the second Evergreen loan paid out, so that the Woodinville property proceeds would be used to pay the balance of the outstanding Legacy loan. However, the second Evergreen loan was disbursed before **[***16]** the Woodinville property sold. As a result, the second Evergreen loan was used to pay the balance of the Legacy loan, in addition to several unrelated expenses.

The Woodinville property finally sold in July 2015. The proceeds from the sale of the property were paid out on July 30, 2015, and were used to pay off the first Evergreen loan. Of the Woodinville proceeds, Mark received a check from Tony for $157,157.40, which he put toward the purchase of the Bellevue property. At that time, the Legacy loan and the first Evergreen loan had been paid in full.

5. Events leading to non-judicial foreclosure proceedings on the Hayden Lake property.

Mark and Jennifer's relationship deteriorated yet again. The two separated in 2015. Jennifer filed for divorce a second time in April 2015, although the divorce was not finalized until 2017. Jennifer contends that she was not privy to Mark and Annie's actions **[**1229]** **[*420]** regarding the Evergreen loans, and did not learn about the various refinancings until much later. However, Jennifer continued to live in the Hayden Lake home with her five daughters.

In June 2016, Annie and Tony commenced a non-judicial foreclosure proceeding against the Hayden Lake property.

B. Procedural [*17] Background**.

Jennifer filed this action on October 5, 2016, against Annie and Tony, seeking a preliminary injunction to stop the trustee's sale, and to obtain a declaratory judgment resolving her ownership of the property. On February 13, 2017, Annie and Tony counterclaimed against Jennifer and brought a third-party complaint against Mark.[9] Annie and Tony claimed that Mark and Jennifer had not paid interest as required on the Note, and that the total amount of the Note was due and owing.

Annie and Tony moved for summary judgment against Jennifer in December 2017. After briefing and argument, the district court denied their motion. The district court denied summary judgment on the basis that genuine issues of material fact remained as to whether Jennifer had some equitable interest in the Woodinville house and whether some amount was owed Jennifer toward the purchase cost of the Hayden Lake home. However, in denying summary judgment, the district court addressed specific arguments made by Annie and Tony "[b]ecause it may aid the parties in resolving this declaratory judgment action[.]" First, the district court addressed the applicability of the parol evidence rule, observing that there **[***18]** was no merger clause in the Note and Deed of Trust. The district court also pointed out that parol evidence would always be

[9] Annie died in February 2017. Her granddaughter, Kalyn, was appointed as personal representative of her estate. Tony died after the trial. Kalyn was also appointed personal representative of his estate.

admissible to show fraud in the inducement, which, according to the district court, Jennifer had alleged.[10] Second, the district court observed that there "may also be latent ambiguities in the contract, to the extent there is a contract, which would allow the use of parol evidence in interpreting the contract." The case went to trial before the district court, and was conducted over a period of eight days in April and May 2018.

Following the submission of written closing arguments by the parties, the district court entered its memorandum decision and order. The district court first evaluated the testimony presented by the parties, finding that Annie's and Tony's witnesses were on the whole less credible than the witnesses provided by Mark and Jennifer. The district court made findings of fact as to the parties' relative contributions to the Woodinville renovations, the intent behind the handwritten note signed by Annie and Tony, and two checks issued by Annie to Mark in September 2014. Further, the district court concluded that the evidence established that a **[***19]** phone conversation had occurred between Mijich, Mark, and Jennifer, on September 3, 2014, and that Mark and Jennifer's account of this conversation was internally consistent and made the most sense to the district judge.

The district court concluded that the Note and Deed of Trust were latently ambiguous "because the principal amount due under the Note is more than double the amount Mark and Jennifer needed to purchase the subject property." The district court stated that "the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense." The district court also observed that the Note was a negotiable instrument, and applied *Idaho Code section 28-3-117* and its official comment. Accordingly, the district court relied on this statute to allow the introduction of extrinsic evidence to determine the intent of the parties at the time the Note and Deed of Trust were signed.[11]

[1230]** **[*421]** The district court concluded that the extrinsic evidence presented at trial established that the parties' intent was for Mark and Jennifer's obligation under the Note and Deed of Trust to terminate once the Woodinville home sold and the Legacy loan was paid off in full. Noting that Mijich was speaking on behalf of Annie and Tony during the cell phone conversation, the district court concluded it was reasonable for Mark and Jennifer to rely on Mijich's representations. The district court also concluded that the purported future advances—the two Evergreen loans—were not intended to be covered by the Note. The district court determined that it was "unnecessary . . . to determine a precise amount" that the parties owed each other "based on investments, amounts borrowed, closing expenses, renovation expenses, sweat equity, and other considerations." "Based on the [c]ourt's **[***21]** finding of the parties' intent, the Legacy [l]oan was repaid in full, which in turn satisfied the Note on the Hayden [Lake] home." The district court granted Jennifer's request for a declaratory judgment, denied Annie and Tony's request for judicial foreclosure, and granted Mark's request for dismissal of the claims against him.

The Estates of Annie and Tony timely appealed.

II. Standard of Review

HN1[] Review of a trial court's conclusions following a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. Since it is the province of the

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[10] The law in Idaho is well-settled with regard to the pleading specificity required to assert a claim for fraud. A claim of fraud must be set out with particularity. *See I.R.C.P. 9(b)*. Jennifer's complaint did not assert a claim of fraud with the requisite particularity. To the extent the district court allowed parol evidence to be admitted on the basis Jennifer claimed she was the victim of fraud, the district court erred.

[11] *Idaho Code section 28-3-117* is entitled "Other Agreements Affecting Instrument," and states:

> Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, *the obligation of a party to an instrument to pay the instrument may be modified, supplemented or nullified by a separate agreement of the obligor and a person entitled* ***[***20]*** *to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement*. To the extent an obligation is modified, supplemented or nullified by an agreement under this section, the agreement is a defense to the obligation.

I.C. § 28-3-117 (italics added). Because we find that the "applicable law regarding exclusion of proof of contemporaneous or previous agreements . . ." supersedes this provision, we find reliance on *Idaho Code section 28-3-117* in this particular case to be error.

> trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous. If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. Additionally, this Court will not substitute its view of the facts for that of the trial court. This **[***22]** Court exercises free review over matters of law.

Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S., 159 Idaho 679, 686, 365 P.3d 1033, 1040 (2016) (quoting *Big Wood Ranch, LLC v. Water Users' Ass'n of Broadford Slough & Rockwell Bypass Lateral Ditches, Inc., 158 Idaho 225, 230, 345 P.3d 1015, 1020 (2015)*). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Nw. Farm Credit Servs., FLCA v. Lake Cascade Airpark, LLC, 156 Idaho 758, 763, 331 P.3d 500, 505 (2014)* (quoting *Jarvis v. Rexburg Nursing Ctr., 136 Idaho 579, 583, 38 P.3d 617, 621 (2001)*).

HN2[↑] "Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact." *Thurston Enters., Inc. v. Safeguard Bus. Sys., Inc., 164 Idaho 709, 717, 435 P.3d 489, 497 (2019)* (quoting *Phillips v. Gomez, 162 Idaho 803, 807, 405 P.3d 588, 592 (2017)*).

III. Analysis

A. The Estates have not waived their objection to the admission of parol evidence. The issue was argued below and has been preserved.

The Estates moved for summary judgment below arguing that the Note and Deed of Trust were unambiguous and therefore parol evidence would be inadmissible to interpret them. The district court denied summary judgment on the basis that genuine issues of material fact remained as to whether Jennifer had some equitable interest in the Woodinville house and, if so, what amount was **[**1231]** **[*422]** owed Jennifer toward the purchase of the Hayden Lake property. After providing its analysis, the district court went on to address several arguments that the Estates had made, cautioning the parties that they "should recognize that the following does not constitute the [c]ourt's analysis in denying summary judgment." In particular, the district court addressed **[***23]** the Estates' argument that the parol evidence rule applied to bar extrinsic evidence regarding the parties' intent. The district court also analyzed the Estates' argument that the statute of frauds applied. At trial, each of the parties offered extrinsic evidence of the parties' agreement leading up to the signing of the Note and Deed of Trust. Throughout the trial, the Estates never objected to this evidence on the basis it was barred by the parol evidence rule. Nevertheless, Jennifer's counsel argued in written closing that the district court should again reject the Estates' argument seeking to preclude parol evidence.

On appeal, Jennifer argues that this issue has been waived by the Estates. Jennifer points out that after summary judgment, the Estates "made no mention of the parol evidence rule as a bar to any of the evidence[,]" and also presented extrinsic evidence of their own. This was a "tactical decision" by the Estates, Jennifer contends, which resulted in a "waiver of their objection based on the parol evidence rule."

The Estates cite *Reynolds Irrigation District v. Sproat, 69 Idaho 315, 327, 206 P.2d 774, 781 (1948)*, for the proposition that the parol evidence rule is a rule of substantive law, not a rule of evidence. Based on this authority, the Estates **[***24]** contend that "failure to object to the admission of parol evidence [at trial] is not a waiver." Further, the Estates argue that they framed and raised the issue properly before the district court, and that Jennifer renewed her argument on this issue in her closing reply argument.

There can be little doubt the Estates argued at summary judgment that the rule against parol evidence applied to bar extrinsic evidence to interpret the Note and Deed of Trust. Accordingly, the question is whether the Estates' failure to object to admission of the parol evidence *at trial* constitutes a waiver of this issue on appeal.

Although the Estates' briefing on summary judgment has not been included in the record on appeal, it is clear from the district court's decision denying summary judgment that the argument was made. ***HN3***[↑] "[A]n issue presented on appeal must have been properly framed and preserved in the court below." *Fed. Home Loan Mortg. Corp. v. Butcher, 157 Idaho 577, 581, 338 P.3d 556, 560 (2014)* (quotation omitted). In *Reynolds Irrigation District*, this Court noted that

> ***HN4***[↑] the parol evidence rule, as applied to

> contracts, is a rule, not of evidence or of evidence merely, but of substantive law, it being considered that parol evidence is excluded because the law requires the terms of **[***25]** the agreement to be found in the writing itself and not because of any reasons which ordinarily require the exclusion of evidence, such as some policy against its admission, or its untrustworthiness or lack of probative value.

Reynolds Irrigation Dist, 69 Idaho at 327, 206 P.2d at 781 (quotation omitted).

The Estates' lack of objection to the admission of parol evidence at trial does not constitute a waiver of their ability to argue this matter on appeal. The district court was clearly aware of the issue at summary judgment. The Estates argued that the rule against parol evidence barred the district court's consideration of extrinsic evidence. It is obvious from this record that the district court specifically considered whether extrinsic evidence would be barred by the parol evidence rule when it denied summary judgment to the Estates. In rejecting the Estates' motion for summary judgement, the district court was rejecting the Estates' argument that parol evidence should be excluded. Otherwise, the district court would have granted summary judgment to the Estates. Jennifer's counsel also argued in written closing, after the conclusion of the trial, that the district court should reject the Estates' effort to preclude parol evidence. And the **[***26]** district court addressed the applicability of the parol evidence rule in its final memorandum decision. Accordingly, the Estates' failure to object to the admission of extrinsic evidence at **[**1232]** **[*423]** trial does not constitute a waiver of their right to question the legal sufficiency of that evidence to vary or alter the terms of the Note and Deed of Trust. *See* *Evans v. Cavanagh, 58 Idaho 324, 73 P.2d 83, 86 (1937)*.

B. The district court erred in finding a latent ambiguity in the Note and Deed of Trust.

The district court concluded that the Note and Deed of Trust contained a latent ambiguity and that it was, therefore, appropriate to consider parol evidence to interpret them. The district court's reasoning consisted of the following:

> The [c]ourt determines the Note and Deed of Trust on the Hayden [Lake] home contain a latent ambiguity because the principal amount due under the Note is more than double the amount Mark and Jennifer needed to purchase the subject property. The purchase price for the Hayden [Lake] home was $360,000, and $312,044 was needed to close on the home. The principal amount on the Note is $648,500. It is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, **[***27]** on their face, do not make sense. Thus, it is appropriate for the [c]ourt to consider the extrinsic evidence to determine the parties' intent at the time the Note and Deed of Trust were signed. All of the parties in this litigation presented extrinsic evidence of the parties' intent.

On appeal, the Estates contend that the district court erred because a latent ambiguity must be tied to a specific term in the agreement that objectively holds more than one meaning. The Estates argue that there is no case law allowing a court "to find a latent ambiguity untethered to the contract's actual language and its application to the existing facts." The Estates argue that the district court erred in finding a latent ambiguity because "[t]here is nothing uncertain about Mark and Jennifer's promise to pay $648,500."

Jennifer and Mark argue that the Estates' argument would limit latent ambiguities to those situations where a term is susceptible of more than one reasonable meaning. Jennifer contends that a latent ambiguity can also be found where the language of the contract, as applied to the known facts, is nonsensical. (Citing *Canyon Highway Dist. No. 4 v. Canyon Cty., 107 Idaho 995, 997, 695 P.2d 380, 383 (1985)*.)

HN5[↑] "If [an instrument's] terms are clear and unambiguous, [its] meaning **[***28]** and legal effect[s] are questions of law to be determined from the plain meaning of its own words." *Sky Canyon Props., LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013)* (quotation omitted). "There are two types of ambiguity, patent and latent." *E. Side Highway Dist. v. Delavan, No. 45553, 2019 Ida. LEXIS 222, 2019 WL 6724484, at *15 (Idaho Dec. 11, 2019)* (quoting *Knipe Land Co., 151 Idaho at 455, 259 P.3d at 601*). "A patent ambiguity exists when the document is ambiguous on its face." *Id.* (quotation omitted). "A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist." *Id.* (citation omitted). This includes an ambiguity that does not "appear upon the face of the [agreement], but lies hidden in the subject to which it has reference[.]" *Williams v. Idaho Potato Starch Co., 73*

Idaho 13, 20, 245 P.2d 1045, 1049 (1952). This Court has described "the process in explaining latent ambiguity" as being "divided into two parts: First, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement." *Snoderly, 30 Idaho at 487, 166 P. at 265*.

There are two issues for this Court to determine. First, we must decide whether an ambiguity must be tethered to a specific provision in an instrument. Second, we must determine whether the district court erred in finding a latent ambiguity.

1. Analysis of ambiguity in a contract must be tied to **[***29]** the language of the contract itself.

HN6[↑] While a discussion of the parol evidence rule begins with a *document*, this Court has never clearly held that a latent ambiguity must be "tethered" to a *specific provision* in that document. Most cases regarding a latent **[**1233]** **[*424]** ambiguity involve interpretation of a particular provision in a document. *See, e.g.,* *Rangen, Inc. v. Idaho Dep't of Water Res., 159 Idaho 798, 808, 367 P.3d 193, 203 (2016)* (language in water law decree referring to specific tunnel); *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool, 139 Idaho 770, 771, 86 P.3d 484, 485 (2004)* (language in easement referring to "swimming"); *Carl H. Christensen Family Tr. v. Christensen, 133 Idaho 866, 873, 993 P.2d 1197, 1204 (1999)* (language in trust instrument regarding trustees' capacity); *Williams, 73 Idaho at 20, 245 P.2d at 1049* (language in contract referring to "pump").

This Court has also found latent ambiguities with respect to the legal effect of an instrument where certain terms were not actually contained in the instrument being interpreted. See *Kessler v. Tortoise Dev., Inc. (Kessler I), 130 Idaho 105, 108, 937 P.2d 417, 420 (1997)*; and *In re Estate of Kirk, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995)*. In *Kessler I*, for example, this Court found that an ambiguity existed where three provisions in a purchase and sale agreement were potentially controlling on the issue of whether specific performance was available to the purchaser. *Kessler I, 130 Idaho at 108, 937 P.2d at 420*. Although this Court did not clearly specify whether this was a patent or latent ambiguity, after remand and a second appeal, this Court affirmed the district court's determination that a latent ambiguity existed under **[***30]** these circumstances. *See* *Kessler v. Tortoise Dev., Inc. (Kessler II), 134 Idaho 264, 269, 1 P.3d 292, 297 (2000)*. Similarly, in *Estate of Kirk*, a testator stapled a handwritten document containing language of a conditional gift to an amendment to a trust. *See* *Estate of Kirk, 127 Idaho at 820, 907 P.2d at 797*. This Court affirmed the district court's finding that there was a latent ambiguity as to the conditional or permanent nature of the handwritten document, notwithstanding the conditional language that had been used. *Id. at 824, 907 P.2d at 801*.

However, in these cases, the heart of the ambiguity was rooted in provisions of the instruments, hi *Kessler II*, the ambiguity was tethered to whether the purchaser's remedy was controlled by one (or none) of three provisions. *134 Idaho at 269, 1 P.3d at 297*. Likewise, in *Estate of Kirk*, the latent ambiguity was ultimately tethered to the conditional language in the handwritten document, created by its physical attachment to the permanent trust amendment. *Estate of Kirk, 127 Idaho at 820, 907 P.2d at 797*.

HN7[↑] Accordingly, it is clear that a latent ambiguity in a contract must ultimately be tied to the language of the instrument itself. Latent ambiguities by nature only emerge when the *instrument* is "applied to the facts as they exist." *Knipe Land Co., 151 Idaho at 455, 259 P.3d at 601*. Interpretation of a contract requires an inquiry into its "legal meaning and effect[.]" *Taylor v. Browning, 129 Idaho 483, 488, 927 P.2d 873, 878 (1996)*. In determining ambiguity, as articulated by Professor Williston, **[***31]** "the court hears the proffer of the parties and determines if there are objective indicia that, from the parties' linguistic reference point, *the contract's terms are susceptible of different meanings*." 11 Williston on Contracts § 30:5 (4th ed.) (italics added).

2. The district court erred in determining that a latent ambiguity existed.

Even acknowledging that the district court tied its finding of latent ambiguity to the instrument's price term by pointing to the difference in terms between the Note and Deed of Trust and the amount needed to close on the Hayden Lake property, we do not agree with the district court's conclusion that a latent ambiguity existed.

HN8[↑] Professor Williston describes several factors to be taken into account in an analysis of ambiguity:

> The court must consider the words of the agreement, including writings made a part of the contract by annexation or incorporation by reference, the alternative meanings suggested by the parties, and any extrinsic evidence offered in

> support of those meanings. Extrinsic evidence properly considered in deciding whether the contract is ambiguous may include the structure of the contract; the parties' relative positions and bargaining power; **[***32]** the bargaining history; whether one of the parties prepared the instrument, so that the language should be construed most strongly against it; and any conduct of the parties **[**1234]** **[*425]** which reflects their understanding of the contract's meaning.
>
> Only after a careful and painstaking search of all the factors shedding light on the intent of the parties will the court conclude that the language in any given case is clear and unambiguous.

11 Williston on Contracts § 30:5 (4th ed.) (footnotes omitted).

In reading the Note and Deed of Trust, we are unable to find a latent ambiguity. The evidence reveals that the Note's principal amount is not out of proportion with the total amount of indebtedness on the Woodinville and the Hayden Lake properties. (Or, as Jennifer has argued, we do not find the agreement "nonsensical.") The Legacy loan was used in significant part to pay off the outstanding Wells Fargo mortgage on the Woodinville property. It is not clear who was ultimately obligated to pay the Wells Fargo mortgage, but it is clear that Mark was paying the monthly principal and interest on the mortgage when he and Jennifer lived on the property. It is also clear that Mark was obliged to make the payments on **[***33]** the Legacy loan once it supplanted the Wells Fargo mortgage. Adding the Wells Fargo mortgage payoff, $270,000, together with the amount required to purchase the Hayden Lake property, $312,044, yields $582,044. Comparing this figure, $582,044, with the total amount of the Note, $648,000, we are unpersuaded that a latent ambiguity is evident in the documents. Accordingly, the district court erred in finding that a latent ambiguity allowed it to use extrinsic evidence to interpret the Note and Deed of Trust.

C. Parol evidence was admissible to interpret the Note and Deed of Trust because the agreement was not integrated.

In its memorandum decision, the district court concluded that it was proper to consider extrinsic evidence to interpret the Note and Deed of Trust, reasoning that a latent ambiguity existed stating: "It is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense. Thus, it is appropriate for the [c]ourt to consider the extrinsic evidence to determine the parties' intent at the time the Note and Deed of Trust were signed."

On appeal, the Estates argue that the district court **[***34]** relied entirely on the latent ambiguity of the Note and Deed of Trust, rather than concluding it was incomplete. ***HN9***[⬆] In order for an agreement to express the understanding of the parties it must be complete or integrated. Parol evidence may be elicited to expand or clarify an incomplete agreement. Jennifer argues that the district court correctly allowed parol evidence because the Note and Deed of Trust were incomplete and parol evidence was therefore necessary to explain the agreements. The Estates respond, contending that the district court did not make a finding that the agreement was incomplete. The Estates argue that, absent this finding by the district court below, the "right-result, wrong-theory" rule of appellate review does not allow this Court to address the completeness of the agreement because this Court would be "engaging in appellate fact-finding upon conflicting evidence."

HN10[⬆] Whether a contract is ambiguous is a question of law this Court reviews *de novo.* *Thurston Enters., Inc., 164 Idaho at 717, 435 P.3d at 497* (quotation omitted). "Whether a particular subject of negotiations is embodied in the writing depends on the intent of the parties, revealed by their conduct and language, and by the surrounding circumstances." *Valley Bank v. Christensen, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991)* (citing *Nysingh v. Warren, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971)*). **[***35]** "A written contract that contains a merger clause is complete upon its face." *Howard v. Perry, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005)* (quotation omitted).

Although this Court has not stated whether an agreement's completeness or integration is a finding of fact or a conclusion of law, this Court has historically reviewed this issue *de novo. See, e.g., Howard, 141 Idaho at 142, 106 P.3d at 468* (giving no deference to a trial court's determination that an agreement was not integrated). We are not alone in this approach; other courts view the broad question of whether the parol evidence rule applies (encompassing the issues of completeness and ambiguity) as a question of law **[**1235]** **[*426]** subject to free review. *See, e.g., Poeppel v. Lester, 2013 SD 17, 827 N.W.2d 580, 584 (S.D. 2013)*; *Alstom Power, Inc. v. Balcke-Durr, Inc., 269 Conn. 599, 849 A.2d 804, 811 (Conn. 2004)*.

We hold that the Note and Deed of Trust are incomplete

with respect to the parties' intentions. HN11[↑] We also conclude that whether an agreement is complete or integrated is a question of law over which we exercise *de novo* review. While we owe no deference to the district court on this question, the district court correctly concluded the agreement was incomplete. As noted by the district court: "It is clear that the Note and Deed of Trust *do not reflect a complete agreement of the parties* because the Note and Deed of Trust, on their face, do not make sense. Thus, it is appropriate **[***36]** for the [c]ourt to consider the extrinsic evidence to determine the parties' intent at the time the Note and Deed of Trust were signed." (Italics added.) We agree. The Note and Deed of Trust do not reflect a complete agreement of the parties. Reading the documents, it is not possible to divine the parties' intentions about the terms of the Note and Deed of Trust once the Woodinville property was sold and the Legacy loan was paid off. There are a number of facts that support this conclusion. First, although the Woodinville property and the Wells Fargo mortgage encumbering it were in Annie and Tony's name, Mark was the one who made mortgage payments directly to Wells Fargo while he and Jennifer lived in the Woodinville house. Second, Annie's handwritten note of July 2014, indicated that the proceeds from the sale of the Woodinville property would provide Mark and Jennifer a $150,000 credit toward the Hayden Lake purchase once the property was sold, even though this intention was nowhere spelled out in the Note and Deed of Trust. Third, during Mijich's deposition, he stated *he* expected additional adjustments to be made to the Note once the Woodinville property sold. Mijich, it should **[***37]** be remembered, was the drafter of the documents. Finally, the evidence reveals that the terms of the Note and Deed of Trust were tied to another agreement, i.e., the Legacy loan. The record demonstrates that the principal and interest of the Legacy loan were mirrored in the Hayden Lake document apparently because Annie and Tony were concerned about Mark's ability to pay off that loan on its accelerated terms. Although it is clear that the Note and Deed of Trust were tied to the Legacy loan, the instruments themselves are silent about this connection, and are incomplete as to the intentions of the parties with regard to the various properties involved and what effect the payoff of the Legacy loan would have.

Ultimately, while the district court incorrectly determined the agreement contained a latent ambiguity, it correctly determined the agreement was not integrated and on this basis appropriately considered extrinsic evidence to interpret the Note and Deed of Trust. In sum, the district court came to the "right result." Whether it was under the "wrong theory" is immaterial. *See* *Idaho Sch. for Equal Educ. Opportunity v. Evans, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993)*. The district court considered parol evidence, not solely because of an incorrect finding of a latent ambiguity, **[***38]** but because it properly found that the agreement was incomplete. Thus, the district court ultimately did not err in its decision to consider parol evidence.

D. The district court's interpretation of the Note and Deed of Trust is not supported by substantial and competent evidence.

Having determined that it was proper to consider extrinsic evidence, the district court proceeded to interpret the Note and Deed of Trust to contain the condition that once the Woodinville property sold, Mark and Jennifer would own the Hayden Lake property "free and clear" and owe nothing on the Note. The district court relied on its finding of fact that the conversation between Mijich, Mark, and Jennifer had occurred. The district court reasoned that, given Mijich's role as Annie and Tony's attorney, it was reasonable for Mark and Jennifer to rely on his statement as part of the larger agreement regarding the ownership of the Hayden Lake property.

On appeal, the Estates argue that parol evidence can only be used to resolve the identified ambiguity, not to add new and material terms in the form of conditions. The Estates also contend that the district court's **[**1236]** **[*427]** interpretation of the parties' intent is not supported **[***39]** by substantial and competent evidence because (1) the parties could not have intended for the Woodinville property to satisfy the debt owed on the LGC Loan; and (2) the district court did not understand Annie and Tony's financial outlay. In particular, the Estates contend that the district court's findings cannot be reconciled with its other finding that Mark and Jennifer should receive $150,000 from the equity in the Woodinville property.

Substantial and competent evidence does not support the district court's interpretation of the Note and Deed of Trust with respect to ownership of the Hayden Lake property. The district court's findings of fact are at best internally inconsistent. As found by the district court, the handwritten note signed by Annie and Tony—dated July 1, 2014—was intended to recognize Mark and Jennifer's equity in the Woodinville house by crediting them with $150,000 toward purchase of the Hayden Lake home. Later in its opinion, the district court held that the intent

of the parties regarding the Note and Deed of Trust was when the Woodinville property sold, Mark and Jennifer would own the Hayden Lake home "free and clear." These two factual findings are mutually **[***40]** contradictory. If Mark and Jennifer were to own the Hayden Lake home "free and clear" upon sale of the Woodinville property, there would be no need for a credit toward purchase of the Hayden Lake home. Conversely, if Mark and Jennifer were to receive a credit of $150,000 toward the purchase of the Hayden Lake home, it follows that there was a recognized debt against which the credit was to be applied. These internally inconsistent findings lead us to conclude that the district court clearly erred in interpreting the Note and Deed of Trust to contain a term that the entire obligation to pay would be satisfied once the Woodinville property sold. In addition, the district court concluded that Mark was entitled to rely on Mijich's statement even though there was no reliance on the statement by Mark. Prior to Jennifer balking at signing the agreement, Mark had already signed the agreement, yet the district court concluded both Jennifer and Mark could reasonably rely on Mijich's statement. It was error to also credit *Mark* with the benefit of Mijich's statement. For these reasons, we vacate the judgment of the district court and remand for further proceedings.

E. The district court correctly [*41] determined that the Evergreen loans were not future advances on the Deed of Trust**.

In its interpretation of the Note and Deed of Trust, the district court concluded that the advancement clause of the Deed did not include the two Evergreen loans, interest payments, and unrelated expenses. The district court concluded that it found "no credible evidence that the parties agreed that the Hayden [Lake] home would be used to secure subsequent refinanc[ing] of the Via Venito or Woodinville properties[,]" finding that there were no discussions of refinancing the Legacy loan until after the loan expired. The district court distinguished this case from *Biersdorff v. Brumfield, 93 Idaho 569, 468 P.2d 301 (1970)*, and rejected the Estates' reliance on ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322 (2016)***.

In analyzing future advances provisions in mortgages, appellate courts in Idaho have begun with the text of the security agreement at issue. *See, e.g.,* *Idaho Bank & Tr. Co. v. Cargill, Inc., 105 Idaho 83, 88, 665 P.2d 1093, 1098 (Ct. App. 1983)* (discussing after-acquired collateral) ("[T]o protect the interests of debtors, creditors, purchasers and other interested persons, some definiteness and clarity must be imparted by the security agreement itself."); *Goss v. Iverson, 72 Idaho 240, 244, 238 P.2d 1151, 1154 (1951)* (examining lease and mortgage as to whether future advances were anticipated).

> ***HN12***[↑] Where it is plainly apparent from the terms of the mortgage that **[***42]** it was intended to secure future advances, the terms will control a contrary understanding of the mortgagor.
> Future advance clauses are enforceable according to their tenor. Where the intention of the parties is expressed in unambiguous terms, a court does not construe a future advances clause but enforces it as written.

59 C.J.S. *Mortgages* § 214 (footnote omitted).

The operative clause in the Deed of Trust requires that, for a future advance to be **[**1237]** **[*428]** covered by the advancement clause, it must be "the express intention of the parties to this Deed of Trust that it shall stand as continuing security until paid for all such advances together with interest thereon." There is no evidence that the parties intended that the Deed of Trust would stand as continuing security for the Evergreen loans. Accordingly, the district court correctly determined that the Evergreen loans were not future advances on the Deed of Trust.

F. Mark and Jennifer are entitled to a credit of $150,000 toward the purchase price of the Hayden Lake property.

The district court below made a factual finding that Annie's handwritten note was intended "to repay Mark and Jennifer for their equity in the Woodinville home and designating **[***43]** that the $150,000 go toward the payment of the Hayden [Lake] home." However, the district court later concluded that, given its interpretation of the Note and Deed of Trust, it was "unnecessary for the [c]ourt to determine a precise amount that Mark or Mark and Jennifer 'owe' Tony and Annie based on investments, amounts borrowed, closing expenses, renovation expenses, sweat equity, and other considerations."

Jennifer has asserted an additional issue on appeal, i.e., whether she is entitled to a credit against any sums determined by this Court to be owing on the Note and Deed of Trust in the amount of $150,000. The Estates respond, pointing out that they have not appealed the

district court's factual finding. The Estates further concede that there is substantial and competent evidence supporting the district court's findings that the parties' contributions to the Woodinville property were roughly equal, and reflect that $150,000 was Mark and Jennifer's equity in the Woodinville property. The district court's finding that Annie intended to recognize Mark and Jennifer's contribution to the Woodinville property is supported by substantial and competent evidence. Consequently, as to Jennifer's **[***44]** cross-appeal, the district court's decision will be affirmed and this credit should be reflected in any future judgment entered by the district court.

G. None of the parties are entitled to attorney fees or costs on appeal as each of the parties has partially prevailed.

The Estates seek attorney fees under the terms of the Note and Deed of Trust and costs under *I.A.R. 40*. They further seek attorney fees under *Idaho Code section 12-120(3)* as the prevailing party in a civil action to recover on a note or negotiable instrument. Both Jennifer and Mark also seek attorney fees under the same section.

HN13[↑] *Idaho Code section 12-120(3)* allows for attorney fees to be awarded to the prevailing party in a civil action to recover on a note or negotiable instrument. *I.C. § 12-120(3)*. This Court awards costs on appeal to the prevailing party. *I.A.R. 40(a)*. However, this Court has declined to award attorney fees or costs when both parties have prevailed on appeal. *See Watkins Co., LLC v. Storms, 152 Idaho 531, 540, 272 P.3d 503, 512 (2012)*; *Caldwell v. Cometto, 151 Idaho 34, 41, 253 P.3d 708, 715 (2011)*. The Estates have partially prevailed because we are vacating the judgment of the district court because its interpretation of the Note and Deed of Trust was not supported by substantial and competent evidence. Jennifer and Mark have partially prevailed because we are affirming the district court's use of parol evidence to interpret **[***45]** the Note and Deed of Trust. Accordingly, under *Idaho Code section 12-120(3)*, there is no prevailing party on appeal, and no party is entitled to attorney fees. For the same reason, no party is awarded costs on appeal.

Further, because we are vacating the district court's judgment and remanding the matter for further proceedings, there is not yet a prevailing party. *See Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 148 Idaho 479, 501, 224 P.3d 1068, 1090 (2009)*. For this reason, we vacate the award of attorney fees below. On remand, once the district court enters a final judgment, it may again consider whether attorney fees are warranted. *See id.*

IV. Conclusion

The district court's use of parol evidence to interpret the Note and Deed of Trust was **[**1238]** **[*429]** proper because the agreement is incomplete. However, the district court's interpretation of the Note and Deed of Trust is not supported by substantial and competent evidence. The district court correctly determined that the Evergreen loans were not future advancements on the Deed of Trust. This Court vacates the judgment of the district court and remands the case for further proceedings as set out in this opinion.

Each of the parties has partially prevailed on appeal. Consequently, we decline to award costs or attorney fees in this appeal. Because we are vacating **[***46]** the district court's judgment, we also vacate the district court's award of attorney fees.

Chief Justice BURDICK, Justices BRODY, BEVAN and MOELLER CONCUR.

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Jones v. Lynn

Supreme Court of Idaho

November 22, 2021, Filed

Docket No. 46735

Reporter
169 Idaho 545 *; 498 P.3d 1174 **; 2021 Ida. LEXIS 179 ***; 2021 AMC 205; 2021 WL 5441515

BRANDI JONES, natural parent of R.N., and DASHA DRAHOS (a/k/a DASHA HUNTER), biological sister of R.N., Decedent, Plaintiffs-Appellants, v. TRACEY LYNN, Defendant-Respondent, and C.N., B.L., and CHRISTOPHER NOSWORTHY, DALE ATKISSON, DOES I-X, Defendants.

Prior History: [*1]** Appeal from the District Court of the First Judicial District of State of Idaho, Kootenai County. Cynthia K. C. Meyer, District Judge.

Jones v. Nosworthy, 2018 Ida. Dist. LEXIS 20, 2018 A.M.C. 2903 (Idaho Dist. Ct., Aug. 9, 2018)

Disposition: The decision of the district court is affirmed.

Core Terms

dramshop, district court, alcohol, intoxicated person, alcoholic beverage, maritime, cause of action, spoliation, notice, federal maritime law, minors, requirement of notice, social host, cases, furnishing, admiralty, summary judgment, attorney's fees, dramshop law, maritime law, state law, intoxicated, equitable estoppel, appellant's claim, parties, Lake, classification, asserting, violates, preempt

Case Summary

Overview

HOLDINGS: [1]-Idaho's Dram Shop Act, *Idaho Code Ann. § 23-808*, applies to any person who sold or otherwise furnished alcoholic beverages; in this case, the district court correctly concluded that the Act encompassed respondent's conduct because she knowingly furnished alcohol to the minor at a dock; [2]-Appellants did not provide timely notice to respondent under *§ 23-808(8)*, and thus the district court properly dismissed appellants' claims; [2]-The Dram Shop Act is neither a local nor a special law because it applies generally to all members of the class it creates, and it is not arbitrary, capricious, or unreasonable; the Act does not violate *Idaho Const. art. III, § 19*.

Outcome

The decision of the district court is affirmed.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN1[] **Summary Judgment, Entitlement as Matter of Law**

The appellate court employs the same standard as the district court when reviewing rulings on summary judgment motions. Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(a). A moving party must support its assertion by citing particular materials

in the record or by showing the materials cited do not establish the presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the facts. Idaho R. Civ. P. 56(c)(1)(B). Summary judgment is improper if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. Even so, a mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment.

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN2[] Summary Judgment, Entitlement as Matter of Law

When reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, the appellate court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN3[] Reviewability of Lower Court Decisions, Timing of Appeals

The appellate court may levy sanctions when a party violates the time limits prescribed by the Idaho Appellate Rules. Idaho App. R. 21.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN4[] Reviewability of Lower Court Decisions, Preservation for Review

When a party does not file a cross-appeal from the district court judgment, she may raise an additional issue on appeal so long as she is not seeking reversal, vacation or modification of the judgment. Idaho App. R. 15(a); Idaho App. R. 35(b)(4).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Appeals > Record on Appeal

HN5[] Reviewability of Lower Court Decisions, Preservation for Review

A party must raise both the issue and its position on that issue before the trial court for the appellate court to review it. The appellant has the obligation to provide a sufficient record to substantiate his or her claims on appeal. The appellate court will not presume error below in the absence of a record that is adequate to review the appellant's claims.

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction > Statutory Sources

HN6[] Jurisdiction, Statutory Sources

In general, a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C.S. § 1333(1) over a tort claim must establish the water body's (1) location and of (2) connection with maritime activity.

Admiralty & Maritime Law > Practice & Procedure > Choice of Law

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Admiralty & Maritime Law > Practice & Procedure > Federal Preemption

HN7[] Practice & Procedure, Choice of Law

In general, state courts have concurrent jurisdiction with the federal courts to try cases at admiralty, but in doing so must apply federal maritime law rather than state law. That said, state law may supplement maritime law when maritime law is silent or where a local matter is at

issue, but state law may not be applied where it would conflict with maritime law. The test for determining when there is a conflict asks whether the state law contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Admiralty & Maritime Law > Practice & Procedure > Choice of Law

Admiralty & Maritime Law > Practice & Procedure > Federal Preemption

Admiralty & Maritime Law > Maritime Workers' Claims > Jones Act > Mariner & Seaman Status

HN8 **Practice & Procedure, Choice of Law**

Idaho law governs in the absence of a (1) well-settled body of admiralty case law or (2) federal legislation covering the specific issue. Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. State remedies remain applicable in such cases. Thus, admiralty jurisdiction does not result in automatic displacement of state law.

Admiralty & Maritime Law > Practice & Procedure > Choice of Law

Constitutional Law > Supremacy Clause > Federal Preemption

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Admiralty & Maritime Law > Practice & Procedure > Federal Preemption

HN9 **Practice & Procedure, Choice of Law**

Federal law will not preempt state law absent a clear statement of congressional intent to occupy an entire field or unless applying state law would conflict with or otherwise frustrate a federal regulatory scheme. Plainly there is no federal maritime statute comparable to Iowa Code § 123.92 governing the rights and liabilities of dram shops or third parties victimized by their patrons. And neither is there a consistent or uniform body of maritime common law imposing tort liability on sellers of alcohol for injuries resulting from their sales.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN10 **Alcohol Providers, Dram Shop Acts**

There is no well-settled body of admiralty case law regarding the applicability of state dram shop statutes.

Admiralty & Maritime Law > Practice & Procedure > Choice of Law

Admiralty & Maritime Law > Practice & Procedure > Federal Preemption

HN11 **Practice & Procedure, Choice of Law**

State remedies are available to supplant federal maritime law when there are no federal remedies available.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN12 **Alcohol Providers, Common Law Liability**

The Dram Shop Act addresses proximate cause, not duty or breach of duty. Idaho's dram shop law narrowed the application of general tort liability of a person furnishing alcohol to a tortfeasor by restricting the scope of the proximate cause inquiry and requiring parties to provide notice within 180 days after the cause of action arose. Idaho Code Ann. § 23-808(3)-(5).

Governments > Legislation > Interpretation

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN13 **Legislation, Interpretation**

The Dram Shop Act, Idaho Code Ann. § 23-808, is clear and unambiguous. The interpretation of a statute is a question of law over which we exercise free review. It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, the court does not construe it, but simply follows the law as written.

Governments > Legislation > Interpretation

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Torts > ... > Types of Negligence Actions > Alcohol Providers > Social Hosts

HN14 **Legislation, Interpretation**

The plain language of Idaho's Dram Shop Act specifies that it applies to a person who sold or otherwise furnished alcoholic beverages. Idaho Code Ann. § 23-808(5). If the legislature had intended to limit the Act's application to only social hosts, it could have repeated the words "dram shop or social host" rather than use the different, longer, and more expansive phrase "any person who sold or otherwise furnished alcoholic beverages." The court has been reluctant to second-guess the wisdom of a statute and has been unwilling to insert words into a statute that the court believes the Legislature left out, be it intentionally or inadvertently.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN15 **Alcohol Providers, Dram Shop Acts**

Ultimately, the plain language of Idaho Code Ann. § 23-808 provides that it applies to any person who sold or otherwise furnished alcoholic beverages.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN16 **Statute of Limitations, Time Limitations**

The Idaho Dram Shop Act requires that no claim may be brought against the furnisher of alcoholic beverages unless notice is provided within 180 days from the date the claim or cause of action arose. Idaho Code Ann. § 23-808(5).

Evidence > Inferences & Presumptions > Inferences

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN17 **Inferences & Presumptions, Inferences**

The spoliation doctrine is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position. The court has recognized the spoliation doctrine as a form of admission by conduct in that the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means.

Evidence > Inferences & Presumptions > Inferences

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN18 **Inferences & Presumptions, Inferences**

The Idaho Supreme Court has declined to adopt first-party spoliation as an independent tort. The Court has distinguished between first-party spoliation and third-party spoliation, recognizing that first-party spoliation of evidence is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence was adverse to the party's position. The remedy for such first-party misdeeds is not an independent cause of action. Rather, it prompts the remedy of instructing the jury that it may reasonably infer that evidence deliberately or negligently destroyed

by a party was unfavorable to that party's position. The Court has formally adopted the tort of intentional interference with a prospective civil action by spoliation of evidence by a third party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Contracts Law > Remedies > Equitable Relief > Unclean Hands

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN19 **Standards of Review, Abuse of Discretion**

The unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue. In determining if the clean hands doctrine applies a court has discretion to evaluate the relative conduct of both parties and to determine whether the conduct of the party seeking an equitable remedy should, in the light of all the circumstances, preclude such relief. A trial court's decision to afford relief based on the unclean hands doctrine, or to reject its application, will not be overturned on appeal absent a demonstration that the lower court abused its discretion.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN20 **Reviewability of Lower Court Decisions, Preservation for Review**

If the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by the appellate court.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Social Hosts

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN21 **Alcohol Providers, Common Law Liability**

Idaho Code Ann. § 23-808 does not carve out any exception for minors. To limit dram shop and social host liability, the legislature recognized minors in the statute, and prescribed that the furnishing of alcoholic beverages may constitute a proximate cause of injuries inflicted by intoxicated persons if the intoxicated person was younger than the legal age for the consumption of alcoholic beverages at the time the alcoholic beverages were sold or furnished and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known at the time the alcoholic beverages were sold or furnished that the intoxicated person was younger than the legal age for consumption of the alcoholic beverages. Idaho Code Ann. § 23-808(3)(a). This section refers to the "intoxicated person." Thus, § 23-808(5), which also refers to the "intoxicated person" applies to this section equally and Slade v. Smith Management Corp. merely holds that a cause of action is not curtailed—except as limited by the 180-day provision. Because the legislature did not carve out any exception specifying the notice requirement did not apply to minors, the Idaho Supreme Court will not write one into the statute.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

Evidence > Burdens of Proof > Allocation

HN22 **Constitutionality of Legislation, Inferences & Presumptions**

The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity. It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > State Constitutional Operation

HN23[] Equal Protection, Nature & Scope of Protection

Idaho Code Ann. § 23-808(4)(a) does not violate the equal protection guarantees of the Idaho and United States Constitutions even though it allows recovery by third parties but not intoxicated persons. Rational basis scrutiny applied and the disparate treatment of intoxicated persons under § 23-808 is rationally related to legitimate governmental purposes. The Idaho Dram Shop Act does not violate Idaho Const. art. I, § 7 because the claimed cause of action—alcohol provider liability for an injury suffered by the intoxicated person to whom the alcohol was provided—did not exist at common law at the time the Idaho Constitution was adopted.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN24[] Standards of Review, Arbitrary & Capricious Standard of Review

Idaho Const. art. III, § 19 prohibits local and special laws on several issues. The Idaho Supreme Court has outlined three characteristics of special laws: First, a special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. It is important to note that a law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable. Second, when the Legislature pursues a legitimate interest in protecting citizens of the state in enacting a law, then it is not special. Lastly, courts must determine whether the statute's classification is arbitrary, capricious, or unreasonable. If a law's classification is arbitrary, capricious, or unreasonable, it is a special law. In assessing the legitimacy of a particular law, as well as whether it is arbitrary, capricious, or unreasonable, the Court has on occasion examined not just the law itself, but its legislative history.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Governments > Legislation > Types of Statutes > Special Legislative Acts

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN25[] Standards of Review, Arbitrary & Capricious Standard of Review

Idaho's Dram Shop Act is neither a local nor a special law because it applies generally to all members of the class it creates, and it is not arbitrary, capricious, or unreasonable. The Act does not violate Idaho Const. art. III, § 19.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Torts > ... > Types of Negligence Actions > Alcohol Providers > Knowledge Requirements

HN26[] Equal Protection, Nature & Scope of Protection

The Idaho Supreme Court has evaluated whether the Idaho Dram Shop Act violates equal protection,

concluding that not every legislative classification which treats different classes of people differently can be said to be discriminatory, much less obviously invidiously discriminatory. For a classification to be obviously invidiously discriminatory, it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will. Idaho Code Ann. § 23-808 limits dram shop liability to those persons who are innocently injured as a result of the negligent provision of alcohol. Preventing intoxicated persons from recovering from the negligent providers of alcohol furthers this purpose and is not calculated to excite animosity or ill will. The classification of intoxicated persons is neither invidiously discriminatory nor does it involve a fundamental right. The disparate treatment of claimants who notify the negligent furnisher of alcohol and those who do not is not invidiously discriminatory, thus, rational basis test applies.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN27 **Equal Protection, Nature & Scope of Protection**

On rational-basis review, courts do not judge the wisdom or fairness of the legislation being challenged. The United States Supreme Court has held that on rational-basis review, a classification in a statute comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Under the rational basis test, a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

Torts > ... > Types of Negligence Actions > Alcohol Providers > Knowledge Requirements

HN28 **Judicial Review, Standards of Review**

Idaho had a legitimate and rational basis for enacting Idaho's Dram Shop Act: it wanted to limit liability upon purveyors of alcohol and implicitly leave liability for injuries caused by inebriated persons upon the person who allowed themselves to become inebriated: the inebriate himself. The exceptions to this rule are limited to those who lack capacity at the time they were served or who are otherwise not allowed to drink alcohol: obviously intoxicated persons and minors. These bases are enough to satisfy rational basis review.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

HN29 **Constitutionality of Legislation, Inferences & Presumptions**

Legislative acts are presumed to be constitutional.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN30 **Appeals, Appellate Briefs**

Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by the appellate court.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Common Law Liability

Torts > ... > Types of Negligence Actions > Alcohol Providers > Knowledge Requirements

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN31 **Alcohol Providers, Common Law Liability**

Idaho Code Ann. § 23-808(3)(b) provides that a person

may maintain a cause of action against the furnisher of alcohol where the intoxicated person was obviously intoxicated at the time the alcoholic beverages were sold or furnished, and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known that the intoxicated person was obviously intoxicated.

Governments > Legislation > Interpretation

HN32[] **Legislation, Interpretation**

A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. Thus, the more general statute should not be interpreted as encompassing an area already covered by one which is more specific.

Torts > ... > Types of Negligence Actions > Alcohol Providers > Dram Shop Acts

HN33[] **Alcohol Providers, Dram Shop Acts**

The stated purpose of the Idaho Dram Shop Act is to limit a person's ability to sue furnishers of alcohol. Thus, the 180-day notice requirement in Idaho Code Ann. § 23-808(5) aligns with the purpose of the statute and does not conflict with § 23-808(1) or (3). The Idaho Supreme Court rejects the argument that the statute is ambiguous or that § 23-808(5) contravenes the purpose of § 23-808.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > English Rule

Civil Procedure > Appeals > Frivolous Appeals

HN34[] **Basis of Recovery, Bad Faith Awards**

Idaho Code Ann. § 12-121 allows the award of attorney fees in a civil action if the appeal merely invites the court to second guess the findings of the lower court. Attorney fees may also be awarded under § 12-121 if the appeal was brought or defended frivolously, unreasonably, or without foundation. An award of fees under § 12-121 is within the court's discretion.

Civil Procedure > Appeals > Costs & Attorney Fees

HN35[] **Appeals, Costs & Attorney Fees**

A party seeking attorney fees on appeal must state the basis for such an award. In addition, the party seeking fees must provide argument on the issue. Idaho App. R. 35(a)(6), (b)(6). Absent any legal analysis or argument, the mere reference to a request for attorney fees is not adequate.

Counsel: James, Vernon & Weeks, P.A., Coeur d'Alene, attorneys for Appellants. Monica Brennan argued.

Law Offices of Mark Dietzler, Liberty Lake, attorneys for Respondents. Daniel Stowe argued.

Judges: BEVAN, Chief Justice. Justices BRODY, MOELLER and ZAHN, CONCUR. STEGNER, Justice, specially concurring.

Opinion by: BEVAN

Opinion

[1178]** **[*549]** BEVAN, Chief Justice.

This appeal concerns the applicability of the *Idaho Dram Shop Act* to a federal maritime wrongful death case. R.N.'s mother, Brandi Jones, and sister, Dasha Drahos[1]

[1] Dasha Drahos' status in the case requires more explanation. At some point, the district court dismissed Drahos from the case based on standing. On June 27, 2018, Drahos moved to reconsider. After hearings were held on July 11, 2018, and July 26, 2018, the district court granted Drahos' motion to reconsider. However, these documents are not included in the record on appeal. Although the district court apparently granted Drahos' motion to reconsider, in its subsequent memorandum decision granting Lynn's motion for summary judgment, it stated that Drahos' "wrongful death claim was dismissed pursuant to a motion for summary judgment." Along with the wrongful death claim, the Plaintiffs' first amended

(referred to hereafter as "Appellants" or "Plaintiffs"), filed a complaint against the Respondent, Tracy Lynn, alleging she recklessly and tortiously caused R.N.'s death (R.N. was sixteen years old at the time) by providing him with alcohol before he drowned in Lake Coeur d'Alene. Lynn filed a motion for summary judgment, asking the district court to dismiss the case because the Plaintiffs failed to comply with the notice requirements under Idaho's Dram Shop Act. The district court agreed and granted Lynn's motion for summary judgment after **[***2]** concluding there was no uniform body of federal maritime dram shop law that would preempt Idaho's Dram Shop Act. Thus, the Plaintiffs had to comply with the Dram Shop Act's notice requirements. The Plaintiffs timely appealed to this Court. We affirm.

I. Factual and Procedural Background

The parties do not dispute the facts relevant to this appeal. On July 21, 2015, R.N. went boating on Lake Coeur d'Alene with his friends C.N. and B.L. All three boys were sixteen years old at the time. The boat was owned by C.N.'s father. C.N., B.L., and R.N. obtained about 12 beers from an unknown source and consumed them while boating. Later, the boys stopped at Shooters, a restaurant and bar near the south end of the lake. Lynn allegedly provided C.N., B.L., and R.N. with an alcoholic drink[2] known as a "Shooter sinker" (also known as a "derailer" and "d tailer"). The boys left the restaurant and drank the derailer on the lake. At some point during the trip, R.N. jumped or fell off the boat into the water and drowned.

On May 2, 2017, the Plaintiffs filed a complaint against C.N. and B.L., as well as two adults who furnished alcohol to the boys, Lynn and her husband Dale Atkisson.[3] Relevant to this appeal **[***3]** are the Plaintiffs' claims against Lynn for "negligence, negligence per se, recklessness, and tortious conduct," and a claim for "wrongful death."[4] R.N.'s father, Andrew Nault, filed a similar complaint that was later consolidated.[5] On July 12, 2017, the Plaintiffs filed a first amended complaint, adding a cause of action for spoliation of **[**1179]** **[*550]** evidence against C.N. and B.L. The claims against Lynn remained the same at that time. On November 7, 2017, Lynn answered the first amended complaint, asserting the affirmative defense that "Plaintiffs' claims were barred because of, but not necessarily limited to, their failure to comply with pre-suit notice requirements of *I.C. § 23-808*."

On November 30, 2017, Lynn filed a motion for summary judgment, arguing that she did not receive proper notice of the Plaintiffs' intent to sue as required by Idaho's Dram Shop Act. The Plaintiffs opposed Lynn's motion, arguing that the Idaho Dram Shop Act does not apply to cases governed by federal maritime law.

While Lynn's motion for summary judgment was pending, on June 5, 2018, Jones moved to amend the complaint to add a claim of spoliation against Atkisson and Lynn. There is no ruling on this motion in the record.

On August **[***4]** 9, 2018, the district court entered a memorandum decision and order granting Lynn's motion for summary judgment. The district court concluded that Idaho's Dram Shop Act applies to these facts, which shields from liability "any person who sold or otherwise furnished" alcohol to the intoxicated person who did not receive notice by certified mail "within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail." *I.C. § 23-808 (2)*, *(5)*. Because the Plaintiffs did not provide timely notice, the district court granted Lynn's motion.

On August 15, 2018, the district court dismissed all claims against Lynn with prejudice. The district court did not execute a *Rule 54(b)* certificate at that time. The

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complaint alleged "[a]s a direct and proximate result of each Defendant's negligence, negligence per se, carelessness, recklessness, heedless conduct and tortious conduct, Plaintiffs have incurred emotional distress damages attended by physical manifestations, including but not limited to emotional distress resulting from the delay in discovering [R.N.'s] death and the delay in discovering [R.N.'s] body." Because the district court continued to reference Drahos as a plaintiff after her wrongful death claim had been dismissed, she was presumably permitted to proceed on her emotional distress claim following the district court's order granting her motion to reconsider. Thus, Drahos is still referenced as an Appellant herein.

[2] There are inconsistent descriptions of the amount of alcohol in the derailer. In the complaint and amended complaint, the Plaintiffs alleged the drink contained 12 shots of hard alcohol. However, at the motion for summary judgment hearing, Plaintiffs' counsel said, "it is uncontested [the derailer] has six shots."

[3] Dale Atkisson passed away during these proceedings, the status of his estate is unknown.

[4] Dasha Drahos' wrongful death claim was later dismissed.

[5] Andrew Nault did not join the current appeal.

Plaintiffs moved to reconsider, arguing that the elements of maritime tort law apply to their claims and the element of proximate cause cannot be narrowed by the application of Idaho's Dram Shop statute. Lynn opposed the motion to reconsider. On December 20, 2018, the district court denied the motion after concluding that the Plaintiffs had resubmitted the same line of cases that the district court had previously rejected.

On January 30, 2019, the Plaintiffs filed a notice of appeal. On **[***5]** March, 5, 2019, the district court issued its final judgment regarding all defendants. On March 21, 2019, the Plaintiffs filed an amended notice of appeal.

On December 3, 2019, nearly nine months after the district court entered final judgment, and almost a year after the court declined to reconsider Lynn's dismissal from the case, the Plaintiffs moved to amend the judgment under *Idaho Rules of Civil Procedure 59* and *60*. The Plaintiffs argued that while researching their brief for the appeal before this Court, they discovered a case that said, in dicta, that the notice provision of *Idaho Code section 23-808(5)* does not apply to the service of alcohol to minors. (Citing *Slade v. Smith Management Corp., 119 Idaho 482, 490, 808 P.2d 401, 409 (1991)*). The district court concluded that the motion was untimely under either rule, leaving the only possible avenue for relief to be under *Rule 60(b)(6)*, which requires "unique and compelling circumstances" to relieve a party from a final judgment. The district court found the Plaintiffs' arguments derived from *Slade* were not "unique and compelling circumstances" because the case was decided 29 years earlier. Even so, the district court went on to reject the merits of the Plaintiffs' claim, ultimately denying the motion to amend the judgment.

II. Issues on Appeal

1. Did the Appellants comply with the Idaho **[***6]** Appellate Rules?

2. Did the district court err in holding that federal maritime law applied?

3. Did the district court err in holding that Idaho's Dram Shop Act applied rather than federal maritime general negligence law?

4. Did the district court err in holding that Idaho's Dram Shop Act precluded the Appellants' claims?

5. Should Lynn be precluded from raising the Idaho Dram Shop Act as a defense when she lied to police, spoliated evidence, and had unclean hands?

[1180]** **[*551]** **6**. Does the time limitation in *Idaho Code section 23-808(5)* apply when the alcohol was furnished to minors?

7. Is *Idaho Code section 23-808* unconstitutional?

8. Is either party entitled to attorney fees on appeal?

III. Standard of Review

HN1[↑] This Court employs the same standard as the district court when reviewing rulings on summary judgment motions. *Owen v. Smith, 168 Idaho 633, 485 P.3d 129, 136-37 (2021)* (citing *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho, 166 Idaho 132, 140-41, 456 P.3d 201, 209-10 (2019)*). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *I.R.C.P. 56(a)*. A moving party must support its assertion by citing particular materials in the record or by showing the "materials cited do not establish the ... presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact[s]." *I.R.C.P. 56(c)(1)(B)* **[***7]** . Summary judgment is improper "if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *Owen, 168 Idaho at 633, 485 P.3d at 136-37* (quoting *Trumble, 166 Idaho at 141, 456 P.3d at 210*). Even so, a "mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.*

HN2[↑] "[W]hen reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment." *Tricore Invs., LLC v. Est. of Warren through Warren, 168 Idaho 596, 485 P.3d 92, 106 (2021)* (quoting *Drakos v. Sandow, 167 Idaho 159, 162, 468 P.3d 289, 292 (2020)*).

IV. Analysis

A. The Appellants complied with the Idaho Appellate Rules.

Lynn first asks this Court to impose sanctions based on her allegation that the Appellants failed to file a timely brief. HN3[] This Court may levy sanctions when a party violates the time limits prescribed by the Idaho Appellate Rules. I.A.R. 21. The Appellants' opening brief was originally due on April 30, 2020, and not filed until May 1, 2020. However, on April 21, 2020, this Court issued an emergency order due to the Covid-19 pandemic, which specified:

> In the event a deadline has been set by court order or rule and the last day for filing any document, holding any hearing, or doing any other thing or matter in any court falls on or between March 26, 2020 and April 30, 2020 when courts are reducing operations, the time for filing or doing any **[***8]** other thing in any court shall be extended until May 1, 2020.

The Appellants plainly complied with the extension granted by this emergency order.

Second, Lynn argues the Appellants violated the augmented record rules. This Court denied the Appellants' initial motion to augment the record on May 5, 2020. Appellants remedied the issue and filed an amended motion to augment the record, which this Court granted on June 4, 2020. On July 21, 2020, the Appellants filed an amended opening brief to reflect citations to the augmented record. Because the Appellants complied with the time restraints imposed by the Court in this case, we deny Lynn's request for sanctions.

B. Lynn is precluded from raising new arguments concerning the district court's application of federal maritime law.

Lynn raises an additional issue of whether the district court erred when it found that maritime law applied to these facts. In particular, Lynn attacks the district court's determination that Lake Coeur d'Alene is a navigable body of water. The Appellants counter that Lynn did not file a timely cross-appeal of the district court's application of federal maritime law, nor did she argue in opposition to that determination **[***9]** below. Thus, it was not properly preserved for appeal.

[1181]** **[*552]** HN4[] Although Lynn did not file a cross-appeal from the district court judgment, she may raise an additional issue on appeal so long as she is not seeking "reversal, vacation or modification of the judgment." I.A.R. 15(a); I.A.R. 35(b)(4). That said, Lynn did not directly challenge the district court's application of federal maritime law below. Lynn did attempt to incorporate co-defendant C.N's summary judgment argument against application of federal maritime law in her brief; however, Lynn specifically declined to take a formal position on whether federal maritime law applied during the proceedings below. Lynn admitted that she "need not take a formal position on whether maritime/admiralty law applies to the facts of this case but will concede it applies for the sake of argument." In addition, in Lynn's summary judgment reply brief, she stated that "irrespective of whether this [c]ourt decides the case falls under maritime/admiralty jurisdiction," the Idaho Dram Shop precluded the Plaintiffs' claims. Beyond that, even if we found review to be appropriate based on Lynn's separate statement that she was "incorporat[ing] Defendant [C.N.]'s argument against application **[***10]** of federal maritime/admiralty law," C.N.'s summary judgment motion and memorandum in support were not included in the record on appeal.

HN5[] A party must raise both the issue and its position on that issue before the trial court for this Court to review it. Eagle Springs Homeowners Assoc., Inc. v. Rodina, 165 Idaho 862, 869, 454 P.3d 504, 511 (2019) (citing State v. Gonzalez, 165 Idaho 95, 99, 439 P.3d 1267, 1271 (2019)). "The appellant has the obligation to provide a sufficient record to substantiate his or her claims on appeal." Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 751, 215 P.3d 457, 471 (2009) (quoting W. Cmty. Ins. Co. v. Kickers, Inc., 137 Idaho 305, 306, 48 P.3d 634, 635 (2002)). This Court will not presume error below in the absence of a record that is adequate to review the appellant's claims. *Id.* Even though Lynn is not an appellant, in this instance she is held to the same standard; we have an inadequate record to determine what C.N. argued below.

The record establishes that Lake Coeur d'Alene's characterization as a navigable body of water does not appear to have been challenged by the parties before the district court. HN6[] In general, "a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must establish the water body's [1] location and of [2] connection with maritime activity." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). Here, the district court's analysis focused almost exclusively on the second condition, connection to maritime activity, after finding that it was "*uncontroverted* that **[***11]** the alleged torts occurred on a navigable lake." (Emphasis added). Thus, we conclude that this issue has not been

adequately preserved for us to rule on given this record. Whether Lake Coeur d'Alene is a navigable body of water sufficient to invoke federal maritime law is a question of law that we leave for another day. Given the state of the record, we will apply federal maritime law, as did the district court.

C. The district court correctly applied the Idaho Dram Shop Act after concluding it did not conflict with any uniform federal common law.

The Appellants argue that federal maritime law preempts Idaho's Dram Shop Act. In particular, the Appellants allege that state law applies only if it adds remedies and does not diminish them. Because R.N.'s death is actionable under general maritime common law negligence, the Appellants contend that the Idaho Dram Shop Act does not apply, even though furnishing alcohol was Lynn's alleged negligent act.

HN7[⬆] In general, "[s]tate courts have concurrent jurisdiction with the federal courts to try cases at admiralty, but in doing so must apply federal maritime law rather than state law." *Fisk v. Royal Caribbean Cruises, Ltd., 141 Idaho 290, 292, 108 P.3d 990, 992 (2005)* (citing *Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959)*). That said, "state law may supplement maritime law when **[***12]** maritime law is silent or where a local matter is at issue, but state **[**1182]** **[*553]** law may not be applied where it would conflict with maritime law." *Id. at 294, 108 P.3d at 994* (quoting *Floyd v. Lykes Bros. S.S. Co., Inc., 844 F.2d 1044, 1047 (3rd Cir. 1988)*). The test for determining when there is a conflict asks whether the state law "contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* (quoting *Southern Pacific Co., v. Jensen, 244 U.S. 205, 216, 37 S. Ct. 524, 61 L. Ed. 1086 (1917)* (superseded on other grounds by statute)).

In *Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955)*, the United States Supreme Court faced the question whether the Court should create a judicial maritime rule or apply state law. Wilburn, the owner of a small houseboat used for commercial carriage, brought a fire loss claim against an insurance company after the houseboat was destroyed in a fire and the insurance company denied coverage. *Id. at 311*. The insurance company alleged Wilburn breached the policy because the policy precluded the boat from being sold, transferred, pledged, hired, chartered, or assigned "without written consent of the company" and required that the vessel "be used solely for private pleasure purposes." *Id.* The U.S. District **[***13]** Court entered judgment for the insurance company after holding "there is an established admiralty rule which requires literal fulfillment of every policy warranty so that any breach bars recovery." *Id. at 312*.

On appeal, the U.S. Supreme Court narrowed the issues presented as: "(1) is there a judicially established federal admiralty rule governing these warranties? [And] (2) [i]f not, should we fashion one?" *Id. at 314*. The Court ultimately found there was no established admiralty rule governing the insurance question presented:

> A mere cursory examination of the cases, state and federal, will disclose that through the years this common law doctrine, when accepted, has been treated not as an admiralty rule but as a general warranty rule applicable to many types of contracts including marine and other insurance.

Id. at 314-15.

The Court then answered the second issue, declining to fashion a new federal rule and concluding that because the United States Congress had failed to enact a national law, the problem was best left to the state legislatures. *Id. at 321*. We agree. ***HN8***[⬆] Put another way, and the test which we affirmatively adopt today, holds that Idaho law governs in the absence of a (1) well-settled body of admiralty case law or **[***14]** (2) federal legislation covering the specific issue.

Consistent with this rationale, the U.S. Supreme Court later recognized:

> Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold, in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases . . . .

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 202, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996). Thus, admiralty jurisdiction "does not result in automatic

displacement of state law." *Id. at 206* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995)*).

Despite *Wilburn Boat's* two-fold test, the Appellants argue that general maritime common law negligence should apply, not the Idaho Dram Shop Act, even though furnishing alcohol was involved in Lynn's alleged negligent act. Appellants rely on several Florida cases for their contention that when maritime claims are filed in state court under the concurrent jurisdiction afforded by the "savings to suitors" clause, *28 U.S.C. § 1333*, the state court generally applies federal maritime common law rather than state law. *See, e.g., Royal Caribbean Cruises, Ltd. v. Sinclair, 808 So.2d 233 (Fla. 3rd DCA 2002)* (plaintiff injured by ship's doctor not required **[***15] [**1183] [*554]** to comply with Florida pre-suit screening requirements); *Beckman v. Rick's Watercraft Rentals, 719 So.2d 1025 (Fla. 3rd DCA 1998)* (maritime claim not governed by Florida statute of limitations); *Flying Boat, Inc. v. Alberto, 723 So.2d 866 (Fla. 4th DCA 1998)* (federal maritime law preempts employer's immunity under Florida workers compensation law).

In addition, as they did below, Appellants continue to assert that federal courts have overwhelmingly ruled that maritime law supplants state dram shop statutes that deviate from federal law. For example, *Young v. Players Lake Charles LLC*, was a case in which Louisiana law limited dram shop liability for dram shops that provide alcohol to others. *47 F. Supp. 2d 832, 834 (S.D. Tex. 1999)*. The Youngs were the family of a decedent who was killed by a drunk driver who became intoxicated on a river boat casino. The Court in *Young* found that since federal admiralty jurisdiction governed the suit under *28 U.S.C. § 1333*, the dram shop law of Louisiana was inapplicable. *Id. at 835*. The Court went on to say that courts have held there has long existed a substantive federal dram shop cause of action under maritime law, and a defendant can be held liable at maritime law for providing alcohol without adequate supervision. *Id.* Ultimately, after discussing *Reyes v. Vantage Steamship Co., 558 F.2d 238 (5th Cir. 1977)*, *modified on reh'g*, *609 F.2d 140 (5th Cir. 1980)*, and *Thier v. Lykes Bros., Inc., 900 F. Supp. 864 (S.D. Tex. 1995)*, the *Young* Court held "there is an existing maritime rule governing **[***16]** the issue of dram shop liability." *Id. at 837*.

In *Reyes*, the Fifth Circuit addressed liability for the death of an intoxicated seaman who leaped from his vessel and drowned. The court held that the seaman's widow could maintain a cause of action for negligent rescue, then remanded the case for a determination on causation and comparative negligence. *558 F.2d at 239*. The court instructed the lower court on remand to consider the defendant's role in operating a "floating dram shop":

> It is the opinion of this Court that the practice revealed by this record of operating a floating dram shop makes a ship unseaworthy, and if not that, at least clearly negligent. Certainly the sea holds enough perils for a sailor, even a sober one. But for his employer to supply the beer without adequate control and then complain that Reyes was negligent for being drunk on board ship is indeed ironic.

Id. at 244-45. The court specifically instructed that the district court, in considering causation and the plaintiff's comparative negligence, weigh the "unseaworthiness or negligence [of defendants] with respect to the operation of a floating dram shop." *Id.*

In *Thier*, the plaintiff suffered severe injuries when a car driven by the defendants' chief officer of **[***17]** the vessel, while intoxicated, crashed on the way to a dinner. *900 F. Supp. at 866*. Evidence revealed that his intoxication stemmed from a shipboard atmosphere that the court characterized as a "floating dram shop." The court found that the owners of the vessel were negligent in "allowing a party atmosphere to prevail onboard wherein ship's officers frequently had girlfriends and guests onboard together with a regularly stocked store of party supplies including alcoholic beverages." *Id.* The court ultimately found that the defendants were directly liable for their negligence in "failing to monitor alcohol consumption onboard, fostering a party atmosphere, and failing to prohibit drunk [naval] officers from driving." *Id. at 879*.

We affirm the district court, which rejected the Appellants' reliance on these cases after concluding they were based on *Reyes*, which failed to follow the analysis outlined by the U.S. Supreme Court in *Wilburn Boat*. The district court suggested it believed *Reyes* was wrongly decided for that reason, noting that the Fifth Circuit appeared to fashion its own rule by judicial fiat without citing any authority. The district court also determined that this line of cases stands for no more than the proposition that the **[***18]** owner of a ship can be held liable under maritime rules when the owner allows his boat to become a "floating dram shop." The district court recognized that "[s]uch a duty would not extend to Lynn, who did not own the boat."

[1184]** **[*555]** In contrast to the authority relied on by the Appellants, the district court cited a series of cases that found that there is no uniform body of federal case law to preempt the state dram shop law. *See* Horak v. Argosy Gaming Co., 648 N.W.2d 137, 146-47 (Iowa 2002); Kludt v. Majestic Star Casino, LLC, 200 F. Supp. 2d 973, 979 (N.D. Ind. 2001); *Vollmar v. O.C. Seacrets, Inc., 831 F. Supp. 2d 862, 870 (D. Md. 2011)*. **HN9**[] In Horak, the Iowa Supreme Court determined:

> In wrestling with this decision, we are guided by the fundamental tenet of preemption doctrine that federal law will not preempt state law "absent a clear statement of congressional intent to occupy an entire field" or unless applying state law would conflict with or otherwise frustrate a federal regulatory scheme. Barske v. Rockwell Int'l Corp., 514 N.W.2d 917, 925 (Iowa 1994). Plainly there is no federal maritime statute comparable to Iowa Code section 123.92 governing the rights and liabilities of dram shops or third parties victimized by their patrons. And as the federal trial court in Meyer [v. Carnival Cruise Lines, Inc., 1994 U.S. Dist. LEXIS 21431, 1994 WL 832006,*1, 4 (N.D. Cal. Dec. 29, 1994)] observed, neither is there a consistent or uniform body of maritime common law imposing tort liability on sellers of alcohol for injuries resulting from their sales.

648 N.W.2d at 146-47. Likewise, in Kludt, the United States District Court for **[***19]** the Northern District of Indiana discussed the "unsettled nature of this area of federal law." 200 F. Supp. 2d at 979. In *Vollmar*, the United States District Court for the District of Maryland similarly recognized:

> It appears that federal trial courts have disagreed on whether there is a maritime dram shop law. *Compare* Bay Casino, LLC v. M/V Royal Empress, 199 F.R.D. 464, 467 (E.D.N.Y. 1999) (finding that federal maritime law may be applied to a dram shop liability cause of action), *Young v. Players Lake Charles, L.L.C., 47 F. Supp.2d 832, 837 (S.D. Tex. 1999)* ("there is an existing maritime rule governing the issue of dram shop liability"), *with* Meyer v. Carnival Cruise Lines, Inc., No. C-93-2383 MHP, 1994 U.S. Dist. LEXIS 21431, 1994 WL 832006, at *4 (N.D. Cal. Dec. 29, 1994) (finding no authority supporting federal maritime dram shop law and applying the state's dram shop law), Horak v. Argosy Gaming Co., 648 N.W.2d 137, 147 (Iowa 2002) (finding no federal maritime statute or maritime dram shop law preempting the state dram shop law), Kludt v. Majestic Star Casino, LLC, 200 F.Supp.2d 973 (N.D. Ind. 2001) (applying state dram shop law to supplement general maritime law).

831 F. Supp. 2d at 870.

The district court also identified a case from Alaska that addressed similar arguments to those raised in this case. In Christiansen v. Christiansen, 152 P.3d 1144 (Alaska 2007), the state dram shop act provided immunity for social hosts, but not for licensed alcohol sellers. The court determined that the same cases cited by the Appellants in this case—*Young, Reyes*, and Thier—failed to support the plaintiff's claim. The court concluded there was no general rule of maritime law that would abrogate the traditional **[***20]** social-host immunity rule as it existed at common law:

> Given the lack of analogous precedent in maritime law, the superior court found no "controlling federal rule" imposing liability on an unlicensed social host. We agree. In the absence of a controlling federal rule, we conclude that Almeria has not demonstrated that a characteristic feature of maritime law would be materially prejudiced by applying *AS 04.21.020* in this case.

152 P.3d at 1147.

The clear conflict among these authorities makes one thing eminently clear:**HN10**[] there is no well-settled body of admiralty case law regarding the applicability of state dram shop statutes. The district court recognized this, finding no uniform body of federal maritime dram shop law which would preempt Idaho's Dram Shop Act. At a hearing below, the Appellants' counsel admitted there is a split in authority whether there is a federal dram shop law, but urged the district court to follow what they argued is the majority approach among several states and federal circuits. We hold the district court did not err by declining to pick and choose from conflicting federal authority on the issue. In denying **[**1185]** **[*556]** the motion to reconsider, the district court reaffirmed its prior acknowledgment **[***21]** that it was not bound to accept the Fifth Circuit precedent on matters of federal law. The district court recognized there are two lines of cases that reflect there is no uniform body of federal case law that could preempt state law on point.

That said, Appellants contend that the district court erred by glossing over Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), in which the U.S. Supreme Court held that

no state court law would apply when it detracted from a remedy for plaintiffs. Because the Idaho Dram Shop Act does not provide its own remedy, Appellants allege that it detracts from the general negligence remedy allowable under federal maritime law. Lynn counters that the Appellants are misrepresenting *Yamaha*. We agree. *Yamaha* merely recognized that ***HN11***[⬆] state remedies are available to supplant federal maritime law when there are no federal remedies available. *516 U.S. at 215-16*. The district court reiterated this point:

> To the extent that Plaintiffs continue to argue that there is a conflict between the application of Idaho's Dram Shop Act and the principles of federal maritime law, Plaintiffs' argument is not well taken. The [c]ourt previously determined that under the facts of this case no conflict existed between Idaho's Dram Shop Act and general federal **[***22]** maritime law that would preclude the application of state law. . . . At the hearing on Plaintiffs' motion [to reconsider], Plaintiffs cited to *Yamaha Motor Corp., U.S.A. v. Calhoun* for the proposition that "state remedies remain applicable . . . and have not been displaced by the federal maritime wrongful death action." *Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 202, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996)*. The [c]ourt notes that the application of Idaho's Dram Shop Act does not automatically limit a plaintiff's recovery. However, in the present case, Plaintiffs' failure (inability) to comply with the deadlines in the Idaho Tort Claims [sic] Act ultimately barred Plaintiffs' claims against Defendant Lynn.

The district court did not err in applying Idaho law, even though that led to a statutory bar to the Appellants' ability to pursue a claim in this case. *See Wilburn Boat, 348 U.S. at 320-21*. We affirm the district court's application of the Idaho Dram Shop Act because there is no uniform federal law on the issue.

D. The district court did not err in holding that the Appellants' claims were barred because they failed to comply with the Idaho Dram Shop Act.

Next, Appellants argue they did not have to comply with the notice requirements of *Idaho Code section 23-808* because Lynn is not a "dram shop" nor is she a "social host." Appellants contend that Lynn knowingly **[***23]** sold alcohol to minors at the dock, and that to consider her either a "dram shop" or "social host" would provide her with protection not intended by the statute. Lynn argues that the Appellants wrongly focus on "dram shop" and "social host" labels instead of clear legislative intent as stated in the plain words of the statute.

In 1986, the legislature enacted *Idaho Code section 23-808*, also known as the Idaho Dram Shop Act, which outlines the civil liability imposed on a furnisher of alcoholic beverages for a plaintiff's injuries caused by an intoxicated person. *Section 23-808* reads:

> LEGISLATIVE FINDING AND INTENT — CAUSE OF ACTION. (1) The legislature finds that it is not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons and it is the intent of the legislature, therefore, to limit dram shop and social host liability; provided, that the legislature finds that the furnishing of alcoholic beverages may constitute a proximate cause of injuries inflicted by intoxicated persons under the circumstances set forth in *subsection (3)* of this section.
> . . . .
>
> (3) A person who has suffered injury, death or any other damage caused by an intoxicated person, may bring a claim or cause of action **[***24]** against any person who sold or otherwise furnished alcoholic beverages to the intoxicated person, only if:
>
> > **[**1186]** **[*557]** (a) The intoxicated person was younger than the legal age for the consumption of alcoholic beverages at the time the alcoholic beverages were sold or furnished and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known at the time the alcoholic beverages were sold or furnished that the intoxicated person was younger than the legal age for consumption of the alcoholic beverages; or
> > (b) The intoxicated person was obviously intoxicated at the time the alcoholic beverages were sold or furnished, and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known that the intoxicated person was obviously intoxicated.
>
> (4) (a) No claim or cause of action pursuant to *subsection (3)* of this section shall lie on behalf of the intoxicated person nor on behalf of the intoxicated person's estate or representatives.
> . . . .

> (5) No claim or cause of action may be brought under this section against a person who sold or otherwise furnished alcoholic beverages to an intoxicated person unless the person bringing the claim or cause of action notified **[***25]** the person who sold or otherwise furnished alcoholic beverages to the intoxicated person within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail that the claim or cause of action would be brought.
> . . . .

I.C. § 23-808.

"***HN12***[↑] The Dram Shop Act addresses proximate cause, not duty or breach of duty." *Idaho Dep't of Lab. v. Sunset Marts, Inc., 140 Idaho 207, 211, 91 P.3d 1111, 1115 (2004)*. Idaho's dram shop law narrowed the application of general tort liability of *a person* furnishing alcohol to a tortfeasor by restricting the scope of the proximate cause inquiry and requiring parties to provide notice within 180 days after the cause of action arose. *I.C. § 808(3)-(5)*.

In *Fell v. Fat Smitty's LLC*, a patron sued a bar owner, asserting a claim for negligence after he was stabbed by another bar patron. *167 Idaho 34, 467 P.3d 398 (2020)*. The bar moved for summary judgment, arguing among other things, that the patron failed to provide timely notice under *Idaho Code section 23-808(5)*. *Id. at 36, 467 P.3d at 400*. The patron countered that the notice provision was inapplicable because they did not plead a dram shop cause of action, rather, they were pursuing a common law negligence claim. *Id.* On appeal, this Court held the patron had to comply with the notice requirements of *section 23-808(5)* because the Idaho Dram Shop Act provides the exclusive remedy for a plaintiff injured **[***26]** by an intoxicated person against the vendor of the alcohol beverages. *Id. at 37, 467 P.3d at 401*.

HN13[↑] Here, both parties agree that *Idaho Code section 23-808* is clear and unambiguous.

> The interpretation of a statute is a question of law over which we exercise free review. *City of Sandpoint v. Sandpoint Indep. Highway Dist., 139 Idaho 65, 72 P.3d 905 (2003)*. It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *Id.* If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. *Id.* *Idaho Dep't of Lab. v. Sunset Marts, Inc., 140 Idaho 207, 211, 91 P.3d 1111, 1115 (2004)*.

The Appellants concentrate their argument on the stated purpose of *section 23-808*, which is to "limit dram shop and social host liability," and argue that Lynn is neither a "dram shop" nor a "social host." Appellants contend that an everyday understanding of the word "Dram Shop" would lead one to think of a commercial bar where alcohol is sold. Appellants also suggest that Lynn does not meet the definition of a "social host," which would presumably consist of a party at a residential home or an office party. Appellants argue there was no social gathering in this case, nor was R.N. a guest in Lynn's home.

The Appellants' focus on the definitions of "dram shop" or "social host," is misplaced. **[*558]** ***HN14***[↑] **[**1187]** As the district court **[***27]** recognized, the plain language of Idaho's Dram Shop Act specifies that it applies to "*a person* who sold *or otherwise furnished* alcoholic beverages . . . ." *I.C. § 23-808(5)* (emphasis added). If the legislature had intended to limit the Act's application to only social hosts, it could have repeated the words "dram shop or social host" rather than use the different, longer, and more expansive phrase "any person who sold or otherwise furnished alcoholic beverages." "[T]his Court has been reluctant to second-guess the wisdom of a statute and has been unwilling to insert words into a statute that the Court believes the [L]egislature left out, be it intentionally or inadvertently." *Stanley v. Indus. Special Indem. Fund, Idaho , , 168 Idaho 183, 481 P.3d 731, 735 (2021)* (quoting *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty., 159 Idaho 84, 89, 356 P.3d 377, 382 (2015)*).

The heart of the Appellants' negligence claim against Lynn stemmed from her furnishing alcohol to R.N., B.L., and C.N. Thus, the district court concluded the Idaho Dram Shop applied, including the notice provision of *subsection (5)*. The district court's analysis tracks this Court's recent decision in *Fat Smitty's*, which mandated application of Idaho's Dram Shop Act when a negligence cause of action was brought against the vendor of alcohol, even though that case involved a saloon instead of a person. *167 Idaho at 37, 467 P.3d at 401*. In arguing *Fat Smitty's* does **[***28]** not apply, the Appellants focus on the Court's use of the word "vendor" and argue that *Idaho Code section 23-808* is not intended to protect individuals like Lynn. Still, as pointed out by Lynn, "[h]ad the legislature intended to limit only *certain* dram shop and social host liability, it could have stated so within the text itself." (Quoting *Fat Smitty's,*

167 Idaho at 40, 467 P.3d at 404). ***HN15***[⬆] Ultimately, the statute's plain language provides that it applies to "any person who sold or otherwise furnished alcoholic beverages."

HN16[⬆] The district court correctly concluded the Idaho Dram Shop Act encompassed Lynn's conduct because she furnished alcohol to R.N. The Act requires that no claim may be brought against the furnisher of alcoholic beverages unless notice is provided "within one hundred eighty (180) days from the date the claim or cause of action arose." *I.C. § 23-808(5)*. The Appellants did not provide timely notice to Lynn under the statute, thus, we affirm the district court's dismissal of their claims against Lynn.

Alternatively, Lynn asserts that Idaho's Dram Shop Act bars the Appellants' claims because R.N. was intoxicated before his death. Having ruled that the Appellants' failure to provide notice under *Idaho Code section 23-808(5)* precludes their claims, we will not address this additional argument. **[***29]**

E. The record does not support Appellants' claims for spoliation and unclean hands.

The district court determined that Idaho's Dram Shop Act applies to these facts, and it shields from liability "any person who sold or otherwise furnished alcohol" who did not receive notice "within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail." (Citing *I.C. § 23-808*). On appeal, Appellants argue that even if the Dram Shop Act applies here, Lynn should not be permitted to avail herself of the defense because she intentionally lied to police and spoliated the evidence and has unclean hands.

a. Spoliation of evidence

On June 5, 2018, Jones moved to amend the complaint to add a claim of spoliation against Dale Atkisson and Tracy Lynn. In Lynn's summary judgment reply brief, she referenced that Jones had moved to amend the complaint requesting oral argument, but noted that she had not set her motion for hearing. Presuming that Jones would try to argue her motion at the upcoming summary judgment hearing, Lynn incorporated Defendant C.N.'s arguments and authorities on spoliation and asked the district court to dismiss the claim. There is no ruling on the motion to amend **[***30]** the complaint or a second amended complaint in the record. There is also no reference to either document being filed in the case summary. However, the judgment dismissing the claims against Lynn references a "[Second] Amended Complaint." In addition, at a July 11, **[**1188]** **[*559]** 2018, hearing on various motions, Lynn's counsel referenced the added claim, stating: "[t]he negligence claims, the spoliation claim have now been added."

Although it is unclear whether Jones was ultimately permitted to file a second amended complaint, the district court did discuss spoliation in its memorandum decision. After the district court held that the Appellants' claims were precluded based on their failure to comply with the notice requirements of Idaho's Dram Shop Act, the district court analyzed Jones' spoliation claims. That said, we do not know whether that analysis pertained to the claims lodged against C.N., or the later allegations against Lynn. To the extent the analysis includes Lynn, we will address the Appellants' arguments.

HN17[⬆] "The spoliation doctrine is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises **[***31]** that the missing evidence was adverse to the party's position." *Waters v. All Phase Const., 156 Idaho 259, 263, 322 P.3d 992, 996 (2014)* (quoting *Stuart v. State, 127 Idaho 806, 816, 907 P.2d 783, 793 (1995)*). "[W]e recognized the spoliation doctrine as a form of admission by conduct [in that] . . . the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means." *Id.* (quoting *Courtney v. Big O Tires, Inc., 139 Idaho 821, 824, 87 P.3d 930, 933 (2003)*).

The Appellants don't identify how much time passed before they were aware of Lynn's involvement, however, they claim that "[d]ue to Lynn's lies to the police in essence hiding and spoliating evidence, Jones and Drahos could not have discovered the name of the appropriate defendant prior to the 180-day time limit set forth in *I.C. § 23-808*." In support of their claim, the Appellants assert this Court should consider the amended declaration of Detective Terry Campbell, even though it was not admitted by the district court. The district court struck Detective Campbell's original declaration because it contained hearsay. The Appellants responded by filing an amended declaration after their motion to reconsider, however, the district court determined that the Appellants cited no authority or provided any argument on why the document should be admitted. In addition, the district court concluded

the **[***32]** amended declaration, "to the extent it would be admissible," had no bearing on the issues raised in the motion to reconsider. We decline to consider the amended declaration on appeal because it was properly not admitted below.

Ultimately, the district court rejected the Appellants' claim for spoliation after concluding that under federal maritime law, spoliation is an evidentiary remedy only available when a party destroys evidence, generally after a lawsuit has been filed. Because the court found that spoliation of evidence was an evidentiary sanction, not a tort, it determined that it did not apply, thus, the "Defendants [were] entitled to summary judgment on Plaintiff's spoliation claim as a matter of law."

The district court's decision tracks this Court's precedent declining to adopt first-party spoliation as an independent tort. ***HN18***[↑] In *Raymond v. Idaho State Police*, this Court distinguished between first-party spoliation and third-party spoliation, recognizing that first-party spoliation of evidence "is a general principle of civil litigation which provides that upon a showing of intentional destruction of evidence by an opposing party, an inference arises that the missing evidence **[***33]** was adverse to the party's position." *165 Idaho 682, 686, 451 P.3d 17, 21 (2019)* (quoting *Waters v. All Phase Constr., 156 Idaho 259, 263, 322 P.3d 992, 996 (2014)*). The Court held that the remedy for such first-party misdeeds is not an independent cause of action. Rather, it prompts the remedy of instructing the jury that it may "reasonably infer that evidence deliberately or negligently destroyed by a party was unfavorable to th[at] party's position. . . ." *Id.* The Court went on to formally adopt the tort of intentional interference with a prospective civil action by spoliation of evidence by a third party. *Id.*

Appellants claim their argument is much like the third-party spoliation tort remedy because even though Lynn lied to police and was sued within the statute of limitations, **[**1189]** **[*560]** she was dismissed from the case because of the alleged defects in prelitigation notice requirements. Thus, Appellants allege they cannot have an evidentiary remedy in the litigation and ask this Court to follow the reasoning in *Raymond*, which allows third-party tort spoliation to "provide a remedy for spoliation victims" who would "otherwise be unable to recover in their underlying lawsuits" and to "deter future spoliation." *Id.* (citing *Raymond, 165 at 687, 451 P.3d at 22*). Because the Appellants have not specified how long it took them to learn Lynn and **[***34]** Atkisson had provided alcohol to the boys, there is no way to determine the extent to which Lynn either made the 180-day notice requirements more difficult or impossible by lying to police. We decline to adopt a new remedy based on the record before us, particularly when it is unclear whether the district court's analysis even pertained to Lynn.

b. Unclean hands

The district court also held that the unclean hands doctrine is inapplicable to the facts here because the notice provision of *Idaho Code section 23-808(5)* is not an equitable remedy, it is a statutory bar to relief, and the doctrine of unclean hands only applies against a person pursuing an equitable remedy.

HN19[↑] "The unclean hands doctrine 'stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327 (2016)*** (quoting *Ada Cnty. Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 370, 179 P.3d 323, 333 (2008)*).

> In determining if [the clean hands] doctrine applies a court has discretion to evaluate the relative conduct of both parties and to determine *whether the conduct of the party seeking an equitable remedy* should, in the light of all the circumstances, preclude such relief. A trial court's decision **[***35]** to afford relief based on the unclean hands doctrine, or to reject its application, will not be overturned on appeal absent a demonstration that the lower court abused its discretion.

Ada Cnty. Highway Dist., 145 Idaho at 371, 179 P.3d at 334 (emphasis added) (quoting *Sword v. Sweet, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004)*).

On appeal, Appellants simply state, "[m]oreover, [Lynn] has unclean hands as set forth in *Sword v. Sweet, 140 Idaho 242, 92 P.3d 492 (2004)*, *Ada Highway District, 145 Idaho at 370, 179 P.3d at 333*; *Republic Molding Corp. V. B. W. Photo Utilities, 319 F.2d 347 (1963)*." The Appellants failed to adequately support their claim with cogent argument. ***HN20***[↑] "[I]f the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." *Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010)*; *see also Inama v. Boise Cnty. ex rel.*

Bd. of Comm'rs, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing). We conclude that Appellants' claim of unclean hands suffers from this failing. Even if we were to reach the merits of the Appellants' arguments, we hold the district court correctly concluded that the doctrine of unclean hands did not apply because the Appellants were not pursuing an equitable remedy.

F. The notice requirements under *Idaho Code section 23-808(5)* still apply when alcohol is furnished to minors.

Next, the Appellants argue that the 180-day limitation in Idaho Code section 23-808(5) does not apply to adults who knowingly provide alcohol to minors. In support, **[***36]** the Appellants cite the following dicta from Slade v. Smith Management Corp.:

> the legislature was equally specific that there was no curtailment of the right to file an action for furnishing alcoholic beverages to a person below the legal age for consuming alcoholic beverages where doing so caused injury, death or damage.

119 Idaho 482, 490, 808 P.2d 401, 409 (1991) (citing I.C. § 23-808(1), (3)(a)).

[1190]** **[*561]** Based on this statement, the Appellants ask this Court to conclude that the 180-day notice requirement of section 23-808 does not apply to limit a remedy to persons who knowingly provide alcohol to minors. Yet the statute does not carve out any exception for minors. ***HN21***[↑] To limit dram shop and social host liability, the legislature recognized minors in the statute, and prescribed that "the furnishing of alcoholic beverages may constitute a proximate cause of injuries inflicted by intoxicated persons" if:

> The intoxicated person was younger than the legal age for the consumption of alcoholic beverages at the time the alcoholic beverages were sold or furnished and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known at the time the alcoholic beverages were sold or furnished that the intoxicated person was younger than the legal age for consumption of the alcoholic **[***37]** beverages . . . .

I.C. § 23-808(3)(a).

This section refers to the "intoxicated person." Thus, subsection (5), which also refers to the "intoxicated person" applies to this section equally and Slade merely holds that a cause of action is not curtailed—except as limited by the 180-day provision. Because the legislature did not carve out any exception specifying the notice requirement did not apply to minors, we will not write one into the statute.

G. The Appellants have failed to prove that *Idaho Code section 23-808(5)* is unconstitutional.

Last, Appellants argue that Idaho Code section 23-808(5) is unconstitutional. ***HN22***[↑] "The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990) (citation omitted). "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Id.*

The constitutionality of Idaho's Dram Shop Act was previously addressed by this Court in *Coghlan v. Beta Theta Pi Fraternity*, where an eighteen-year-old student sued her sorority, other fraternities and sororities, and the school, **[***38]** after she became intoxicated at a party and fell down a fire escape. 133 Idaho 388, 392-93, 987 P.2d 300, 304-05 (1999). The district court held the unambiguous language of Idaho Code section 23-808 bars suits by intoxicated persons against the server of alcohol and granted summary judgment for the fraternities. Coghlan appealed, challenging the constitutionality of section 23-808 on various grounds: (1) the statute violates the equal protection clause because it permits recovery by third parties but not intoxicated persons; (2) the statute impermissibly revives the doctrine of contributory negligence; and (3) that the statute impermissibly infringes on the right to a trial by jury guaranteed by article I, section 7 of the Idaho Constitution. This Court affirmed the district court's holding that Idaho's Dram Shop Act prohibited Coghlan from bringing a cause of action against the providers of alcohol. Id. at 394, 987 P.2d at 306. The Court rejected Coghlan's constitutional claims.

First, the Court held that ***HN23***[↑] Idaho Code section 23-808(4)(a) does not violate the equal protection guarantees of the Idaho and United States Constitutions

even though it allows recovery by third parties but not intoxicated persons. *Id. at 395, 987 P.2d at 307*. The Court held that rational basis scrutiny applied, and held that the disparate treatment of intoxicated persons under *section 23-808* is rationally related to legitimate governmental purposes. *Id. at 397, 987 P.2d at 309*. The Court **[***39]** also rejected Coghlan's claim that *section 23-808* impermissibly revived the doctrine of contributory negligence. *Id.* Third, the Court held that the Idaho Dram Shop Act does not violate *Article 1, Section 7 of the Idaho Constitution* because the claimed cause of action—alcohol provider liability for an injury suffered by the intoxicated person to whom the alcohol was provided—did not exist at common law at the time the Idaho Constitution was adopted. *Id. at 398, 987 P.2d at 310*.

[1191]** **[*562]** The Appellants make three constitutional arguments here. First, the Appellants claim that *Idaho Code section 23-808(5)* is unconstitutional when applied to minors. Second, Appellants argue that *section 23-808(5)* is unconstitutional because it violates *Article 3, Section 19 of the Idaho Constitution.* Third, Appellants claim that the statute violates equal protection and due process standards under the Idaho and United States Constitutions. Even if the statute survives constitutional scrutiny, the Appellants allege *subsection (5)* contravenes the stated purpose of *Idaho Code section 23-808*, and must be stricken.

a. Whether Idaho Code section 23-808(5) is unconstitutional when applied to minors.

Appellants argue that *Idaho Code section 23-808(5)* is unconstitutional as applied to minors. The Appellants rely on *Slade* to assert, "the Supreme Court recognized this distinction when stating that the legislature was 'specific' in not curtailing the 'right' as it applied to supplying alcohol to minors." **[***40]** Appellants urge this Court to consider this "guidance" when considering the constitutionality of *Idaho Code section 23-808* as it applies to service to minors rather than service to obviously intoxicated persons. Appellants did not provide any other argument or authority for their assertion that *section 23-808(5)* is unconstitutional as applied to minors beyond their interpretation of the Court's statements in *Slade*, which we rejected above. "The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." *Olsen, 117 Idaho at 709, 791 P.2d at 1288*. The Appellants have failed to meet this burden and we therefore affirm the district court as to this assertion.

b. Whether Idaho Code section 23-808(5) is unconstitutional because it violates Article III, Section 19 of the Idaho Constitution.

Appellants argue that *Idaho Code section 23-808* violates *Article III, Section 19 of the Idaho Constitution* because it limits a person's ability to pursue a common law dram shop cause of action with respect to a sub-class of claimants bringing negligence claims. In support, Appellants point out the inconsistencies between the notice requirements under *section 23-808(5)* and the notice requirement of the Idaho Tort Claims Act, which contains a "reasonableness provision," allowing the notice period to run from the "date the claim arose or reasonably should have been discovered, **[***41]** whichever is later." *I.C. § 6-906*.

HN24[↑] *Article III, Section 19, of the Idaho Constitution* prohibits "local and special laws" on several issues. This Court has outlined three characteristics of special laws:

> First, a special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. It is important to note that a law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable. Second, we have found that when the Legislature pursues a legitimate interest in protecting citizens of the state in enacting a law, then it is not special. Lastly, courts must determine whether the [statute's] classification is arbitrary, capricious, or unreasonable. If a law's classification is arbitrary, capricious, or unreasonable, it is a special law. In assessing the legitimacy of a particular law, as well as whether it is arbitrary, capricious, or unreasonable, this Court has on occasion examined not just the law itself, but its legislative history.

Citizens Against Range Expansion v. Idaho Fish And Game Dep't, 153 Idaho 630, 636, 289 P.3d 32, 38 (2012) (internal citations and quotations omitted).

The district **[***42]** court found that ***HN25***[↑] Idaho's Dram Shop Act is neither a local nor a special law because it applies generally to all members of the class

it creates, and it is not arbitrary, capricious, or unreasonable. We agree. As the district court noted, the Appellants failed to identify which fundamental right is allegedly encroached upon. Their argument on appeal suffers from the same **[**1192]** **[*563]** flaw. Without the ability to identify what fundamental right was infringed upon, we affirm the district court's holding that the Idaho Dram Shop Act does not violate *Article III, Section 19 of the Idaho Constitution.*

c. Whether Idaho Code section 23-808 violates equal protection and due process.

Next, Appellants argue that *Idaho Code section 23-808(5)* violates the equal protection clause of the Idaho and United States Constitution because it discriminates between claimants who notify the negligent seller or furnisher of alcohol and those who do not. The Appellants also claim that the notice by "certified mail" requirement irrationally discriminates between negligent purveyors of alcohol who will be held liable and negligent purveyors who will not, even though they may have engaged in the same degree of negligence. The district court declined to issue an advisory opinion on this argument because the Appellants gave no notice **[***43]** under the Idaho Dram Shop Act in this case. We likewise decline to issue an advisory opinion on this hypothetical issue. *See PHH Mortg. v. Nickerson, 160 Idaho 388, 399, 374 P.3d 551, 562 (2016)* (determining it would be inappropriate for this Court to issue an advisory opinion on a hypothetical issue presented by the appellants).

HN26[↑] As to the merits of this claim directly, this Court has evaluated whether the Idaho Dram Shop Act violates equal protection, concluding:

> This Court has also previously recognized that "[n]ot every legislative classification which treats different classes of people differently can be said to be 'discriminatory,' much less 'obviously' 'invidiously discriminatory.' " *State v. Beam, 115 Idaho 208, 212, 766 P.2d 678, 682 (1988)*. "For a classification to be 'obviously' 'invidiously discriminatory,' it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *Id.* *I.C. § 23-808* limits dram shop liability to those persons who are innocently injured as a result of the negligent provision of alcohol. Preventing intoxicated persons from recovering from the negligent providers of alcohol furthers this purpose and is not calculated to excite animosity or ill will. The classification at issue here is neither invidiously discriminatory nor **[***44]** does it involve a fundamental right.

Coghlan, 133 Idaho at 396, 987 P.2d at 308. Though the equal protection claim in *Coghlan* concerned the disparate treatment of intoxicated persons, the Court held it was not invidiously discriminatory, thus, it was subject to scrutiny under the rational basis standard. *Id.* Likewise, the disparate treatment of claimants who notify the negligent furnisher of alcohol and those who do not is not invidiously discriminatory, thus, rational basis test applies.

HN27[↑] On rational-basis review, courts do not judge the wisdom or fairness of the legislation being challenged. *Id.* The United States Supreme Court has held that "[o]n rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' " *Id.* (quoting *Federal Communications Comm'n v. Beach Comm'n Inc., 508 U.S. 307, 314-15, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)*). "Under the rational basis test, a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it." *Id. at 396-97, 987 P.2d at 308-09* (internal quotation omitted).

The district court determined that***HN28***[↑] Idaho had a legitimate and rational basis for enacting Idaho's Dram Shop Act: it wanted **[***45]** to limit liability upon purveyors of alcohol and implicitly leave liability for injuries caused by inebriated persons upon the person who allowed themselves to become inebriated: the inebriate himself. The exceptions to this rule are limited to those who lack capacity at the time they were served or who are otherwise not allowed to drink alcohol: obviously intoxicated persons and minors. We agree with the district court's holding that these bases are enough to satisfy rational basis review.

That said, the Appellants urge us to reject the ordinary presumption of constitutionality because the statute "irrationally and arbitrarily discriminates against a class of tort **[**1193]** **[*564]** victims for the benefit of a segment of the business community selling an intoxicating drug. [Thus,] [t]he judicial deference to the judgment of the legislature is unwarranted and unwise under such circumstances." Appellants claim the Court must step forward to examine and remedy the improvident decisions of the legislature, especially

under such circumstances where factors justify a constitutional review. Despite stating that "[s]uch factors exist here," Appellants do not fully articulate what factors mandate such review, **[***46]** nor do they cite any authority for why this Court should reject the well-established principle that***HN29***[] legislative acts are presumed to be constitutional. *Olsen, 117 Idaho at 709, 791 P.2d at 1288*. Without authority or express argument in support of the Appellants' position, we affirm the district court's conclusion, based on the standard of rational basis review articulated above.

The Appellants separately claim that *Idaho Code section 23-808(5)* violates due process. That said, the Appellants did not support this claim with any argument or authority. ***HN30***[] "Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." *Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010)* (citing *Inama v. Boise Cnty ex rel. Bd. of Comm'rs, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003)*). Appellants also failed to provide argument on this issue before the district court. After rejecting the Appellants' arguments below, the district court recognized: "Although Plaintiff states that *I.C. § 23-808(5)* violates the *Due Process Clauses of the Idaho* and *Federal Constitutions*, Plaintiff never articulates any reasoning to support that conclusion." For the same reasons, we decline to consider the Appellants' due process claims on appeal.

*d. If Idaho Code section 23-808(5) survives constitutional scrutiny, whether **[***47]** subsection (5) contravenes the stated purpose of Idaho Code section 23-808, renders the statute ambiguous, and should be stricken*.

Last, Appellants claim that *subsection (5)* contravenes the stated purpose of *Idaho Code section 23-808*. In describing the legislative intent behind *section 23-808*, the statute provides:

> The legislature finds that it is not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons and it is the intent of the legislature, therefore, to limit dram shop and social host liability; provided, that the legislature finds that the furnishing of alcoholic beverages may constitute a proximate cause of injuries inflicted by intoxicated persons under the circumstances set forth in *subsection (3)* of this section.

I.C. § 23-808(1).

Appellants argue this reflects the legislative balance between shielding furnishers of alcohol from potential liability, while protecting victims and the public welfare by providing that a victim may maintain a cause of action where the harm resulted from a purveyor of alcohol furnishing alcohol to an obviously intoxicated person. ***HN31***[] *Subsection (3)(b)* provides that a person may maintain a cause of action against the furnisher of alcohol where "[t]he intoxicated person was obviously intoxicated at the time the alcoholic beverages were **[***48]** sold or furnished, and the person who sold or furnished the alcoholic beverages knew or ought reasonably to have known that the intoxicated person was obviously intoxicated."

Appellants allege that they may seek recovery against Lynn under *section 23-808(3)(b)*; however, *subsection (5)* then strips their statutory right to bring a claim. Appellants argue that there is an irreconcilable conflict between *section 23-808(5)* and *subsections (1)* and *(3)*, and that this conflict can only be resolved by allowing the more specific statutes—*Idaho Code section 23-808(1)* and *(3)*—to prevail to the exclusion of *subsection (5)*.

> A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. ***HN32***[] Thus, the more **[**1194]** **[*565]** general statute should not be interpreted as encompassing an area already covered by one which is more specific.

Valiant Idaho, LLC v. JV L.L.C., 164 Idaho 280, 289, 429 P.3d 168, 177 (2018) (internal citations omitted).

The stated purpose of the Idaho Dram Shop Act is to limit a person's ability to sue furnishers of alcohol. ***HN33***[] Thus, the 180-day notice requirement in *subsection (5)* aligns with the purpose of the statute and does not conflict with *subsection (1)* or *(3)*. As such, we reject the Appellants' argument that the statute is ambiguous or that *subsection (5)* contravenes the purpose of *Idaho Code section 23-808*.

H. We decline to award attorney fees on appeal.

Both parties **[***49]** request attorney fees under Idaho Code section 12-121. The Appellants request attorney fees on appeal under Idaho Code section 12-121 "[b]ecause Lynn lied to the police and obstructed justice." The Appellants emphasize that Lynn's actions caused the matter to proceed to summary judgment. Lynn also requests attorney fees under section 12-121, arguing that the appeal was brought "frivolously." Although Lynn cites Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 117 P.3d 130 (2005), she provides no argument in further support of her request.

HN34[↑] Idaho Code section 12-121 allows the award of attorney fees in a civil action if the appeal merely invites the Court to second guess the findings of the lower court. Owen v. Smith, 168 Idaho 633, 485 P.3d 129, 143 (2021) (citing Bach v. Bagley, 148 Idaho 784, 797, 229 P.3d 1146, 1159 (2010)). Attorney fees may also be awarded under section 12-121 "if the appeal was brought or defended frivolously, unreasonably, or without foundation." Id. at , 485 P.3d at 143-44. An award of fees under section 12-121 is within this Court's discretion. *Id.*

HN35[↑] A party seeking attorney fees on appeal must state the basis for such an award. Bromund v. Bromund, 167 Idaho 925, 932, 477 P.3d 979, 986 (2020) (citing I.A.R. 35(a)(5), (b)(5)). In addition, the party seeking fees must provide argument on the issue. I.A.R. 35(a)(6), (b)(6). "[A]bsent any legal analysis or argument, 'the mere reference to [a] request for attorney fees is not adequate.' " *Id.* (quoting Johnson v. Murphy, 167 Idaho 167, 176, 468 P.3d 297, 306 (2020) (second alteration in original).

We decline to award either party attorney fees under Idaho Code section 12-121. The Appellants are not the prevailing party on appeal, **[***50]** thus, they are not entitled to attorney fees. Even though we have concluded that Lynn is the prevailing party on appeal, she provided no argument to support her request for attorney fees. Because a "mere reference to [a] request for attorney fees is not adequate" we decline to award Lynn attorney fees on appeal. We also recognize that the Appellants raised important, complex issues that merited review; thus, their appeal was not brought frivolously, unreasonably, or without foundation.

V. Conclusion

We affirm the decision of the district court. Costs, but not attorney fees, are awarded to Lynn as the prevailing party on appeal.

Justices BRODY, MOELLER and ZAHN, CONCUR.

Concur by: STEGNER

Concur

STEGNER, Justice, specially concurring.

I concur fully in the majority's decision; however, I write separately to note that the majority's opinion leaves open the question of whether equitable estoppel could have been successfully invoked against Lynn. Though Appellants argue spoliation and unclean hands, neither doctrine squarely fits the facts of this case. Equitable estoppel, on the other hand, " 'is available to a plaintiff when the defendants, by their representations or conduct, kept the plaintiff from pursuing **[***51]** a cause of action during the limitation period.' " Gregory v. Stallings, 167 Idaho 123, 131, 468 P.3d 253, 261 (2020) (quoting Knudsen v. Agee, 128 Idaho 776, 779, 918 P.2d 1221, 1224 (1996)). "The doctrine does not 'extend' the statute of limitations, but prevents a party from asserting it, even if it would otherwise bar the action." *Id.* To succeed on a claim of equitable estoppel, a plaintiff must show:

> **[**1195]** **[*566]** (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth;
> (2) that the party asserting estoppel did not know or could not discover the truth;
>
> (3) that the false representation or concealment was made with the intent that it be relied upon; and
>
> (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Id. at 131-32, 468 P.3d at 261-62.

I agree that, as the majority concludes, Appellants were required to comport with the 180-day notice requirement of Idaho's Dram Shop Act in order to bring a cause of action against Lynn. *See* I.C. § 23-808(5). However, if it is true that Lynn intentionally lied to police about whether she had purchased alcohol for the boys, and there does not seem to be any dispute that it is, it appears Appellants could have successfully invoked

equitable estoppel to prevent Lynn from **[***52]** asserting Appellants' failure to provide Lynn notice within 180 days barred Appellants' claim against Lynn.

At the end of the day, the majority's opinion should not be read to preclude equitable estoppel from being employed in a future case in which a defendant lies to the police and in so doing prevents a plaintiff from learning facts which would give rise to a violation of Idaho's Dram Shop Act. The resolution of that case will have to await a situation in which the facts give rise to a claim of equitable estoppel and in which the plaintiff raises such a claim. Equitable estoppel must be asserted by the party seeking to have it employed. *See* *Med. Recovery Servs., LLC v. Siler, 162 Idaho 30, 35, 394 P.3d 73, 78 (2017)* ("It was error for the magistrate court to *sua sponte* raise the defenses of quasi and equitable estoppel."). Because equitable estoppel was not raised by Appellants, it is not available to this Court to employ here. I therefore fully join the majority's opinion, and leave the question of equitable estoppel for another day.

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Jones v. Nosworhty

First Judicial District Court of Idaho, Kootenai County

August 9, 2018, Decided; August 9, 2018, Filed

CASE NO. CV-2017-3456

Reporter
2018 Ida. Dist. LEXIS 20 *; 2018 AMC 2903

BRANDI JONES, natural parent of REGINALD JUSTICE NAULT, and DASHA DRAHOS (a/k/a DASHA HUNTER), biological sister of REGINALD JUSTICE NAULT, decedent, Plaintiffs, v. CAMEREN NOSWORHTY, BRODY LUNDBLAD, TRACEY LYNN, DALE ATKISSON, CHRISTOPHER NOS WORTHY, and DOE DEFENDANTS, 1-10, Defendants.ANDREW NAULT, natural parent of REGINALD JUSTICE NAULT, Decedent, Plaintiff, v. CAMEREN NOSWORHTY, BRODY LUNDBLAD, TRACEY LYNN, DALE ATKISSON, CHRISTOPHER NOS WORTHY, and DOE DEFENDANTS, I-X, Defendants.

Subsequent History: Motion denied by *Jones v. Nosworthy, 2018 Ida. Dist. LEXIS 21 (Idaho Dist. Ct., Aug. 9, 2018)*

Affirmed by, Costs and fees proceeding at, Request granted, in part, Request denied by, in part *Jones v. Lynn, 2021 Ida. LEXIS 179, 2021 WL 5441515 (Idaho, Nov. 22, 2021)*

Core Terms

dramshop, maritime, boat, alcohol, maritime law, cases, state law, spoliation, genuine issue of material fact, vessel, jump, ship, preempt, dramshop law, limits, summary judgment, navigable waters, social host, notice, cause of action, drinking, courts, summary judgment motion, maritime jurisdiction, federal statute, line of cases, federal law, ship owner, classification, admiralty

Judges: **[*1]** Cynthia K.C. Meyer, District Judge.

Opinion by: Cynthia K.C. Meyer

Opinion

MEMORANDUM DECISION AND ORDER GRANTING LYNN'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING IN PART AND DENYING IN PART NOS WORTHY'S MOTION FOR SUMMARY JUDGMENT.

Defendants' Motions For Summary Judgment came on for hearing before Cynthia K.C. Meyer, District Judge, on the 11th day of July, 2018. Plaintiffs Jones and Drahos were represented by Monica Flood Brennan and Leander James. Plaintiff Nault was represented by Jane Gordon. Nosworthy Defendants were represented by Julianne Hall. Defendant Lynn was represented by Daniel Stowe. Defendant Lundblad was represented by Michael Howard.

I. INTRODUCTION

On July 21, 2015, Reginald Nault (Reggie) boarded a boat with his friends, Defendants Cameren Nosworthy and Brody Lundblad, to go on a cruise down the lake. The boat was owned by Defendant Christopher Nosworthy, Cameren's father. Cameren, Brody, and Reggie obtained approximately 12 beers from an unknown source and drank beers while boating. Cameren, Brody, and Reggie stopped at a restaurant and bar, Shooters, near the south end of the lake. Defendant Lynn and the late Defendant Atkisson allegedly provided Cameren, Brody, and Reggie with a Derailer. **[*2]** Cameren, Brody, and Reggie left Shooters and drank the Derailer on the lake. At some point during the trip, Reggie entered the water and drowned. Following Reggie's death, the Plaintiffs Brandi Jones, Reggie's mother, and Dasha Drahos, Reggie's sister, brought a wrongful death claim against Defendants. Plaintiff Andrew Nault, Reggie's natural father, filed a similar Complaint against Defendants on June 19, 2017 in case number CV-2017-4759. Plaintiff Nault's case was later consolidated into the above case, CV-2017-3456. Dasha Drahos's wrongful death claim was dismissed pursuant to a motion for summary judgment. Defendant Lynn now brings a motion for

summary judgment based on the Idaho Dram Shop Act. Nosworthy Defendants and Lundblad now bring a motion for summary judgment based on several theories.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, affidavits, and discovery documents on file with the court. . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership, 145 Idaho 735, 738, 184 P.3d 860, 863 (2008)* (quoting *Badell v. Beeks, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)*(citing *I.R.C.P. 56(a)*). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp., 144 Idaho 68, 70, 156 P.3d 569, 571 (2007)* (citing *Evans v. Griswold, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997))*. "Once **[*3]** the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)* (citing *Hei v. Holzer, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003))*; *Samuel v. Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, 87, 996 P.2d 303, 306 (2000)*. In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co., 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008)*. A motion for summary judgment will not be granted where there are unresolved issues of material fact. *McKinley v. Fanning, 100 Idaho 189, 190, 595 P.2d 1084, 1086 (1979)*. If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard, 100 Idaho 67, 593 P.2d 402 (1979)*.

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc., 128 Idaho 851, 854, 920 P.2d 67, 69 (1996)*. The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. *I.R.C.P. 56(c)*; *see Rhodehouse v. Stutts, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994)*. "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008)* (citing *Atwood v. Smith, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006))*.

III. ANALYSIS

A. Maritime Jurisdiction

Plaintiff seeks the application of maritime jurisdiction pursuant to *28 U.S.C. § 1333(1)*.

> [A] party seeking to invoke federal admiralty jurisdiction **[*4]** pursuant to *28 U.S.C. § 1333(1)* over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. 46 U.S.C.App. § 740. The connection test raises two issues. A court, first, must "assess the general features of the type of incident involved," *497 U.S., at 363, 110 S.Ct., at 2896*, to determine whether the incident has "a potentially disruptive impact on maritime commerce," *id., at 364, n. 2, 110 S.Ct., at 2896, n. 2*. Second, a court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 115 S. Ct. 1043, 1048, 130 L. Ed. 2d 1024 (1995).

Here, it is uncontroverted that the alleged torts occurred on a navigable lake; therefore, the location test is satisfied.

Thus, the Court must next characterize the type of incident (as opposed to the specific facts of the incident) in order to determine whether the incident's general features and character were of the type likely to disrupt maritime commerce. *Grubart at 538, 1050-51*. The U.S. Supreme Court in *Grubart* noted that the characterization of the incident could provide levels of generality too specific or general to be **[*5]** useful, applied an intermediate level of generality, then determined "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." *Id. at, 539, 1051*.

The incident's character could be described as a drowning occurring after an intoxicated minor was

served alcohol while recreationally boating and who jumped or fell from an allegedly negligently operated recreational boat because of his intoxication; or more generally, a drowning in navigable waters involving a passenger on a moving boat; or more generally yet, a death. For purposes of evaluating the applicability of maritime jurisdiction, the Court applies the intermediately general characterization of the incident: a drowning in navigable waterway involving a passenger on a moving boat. Given the somewhat factually detached level of review mandated by United States Supreme Court precedent attempting to force uniformity of law between the Port of Los Angeles and any inland body of water meeting the definition of "navigable," this Court must find that such an incident belongs within a class of incidents posing more than a fanciful risk to commercial shipping. If such an incident occurred **[*6]** in another location, it and the ensuing search could potentially impair commercial shipping.

The Court must now determine "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Grubart at, 539, 1051*. Use of a recreational boat which includes "navigating" from a marina to a resort boat ramp to a restaurant on the far side of the lake with periodic stops to swim is certainly a "traditional maritime activity" for Lake Coeur d'Alene. If a fire on a "pleasure yacht" docked at a marina shows a substantial relationship to traditional maritime activity, the facts of this case regarding recreational boating surely qualify. *Sisson v. Ruby, 497 U.S. 358, 365-67, 110 S. Ct. 2892,2897-98, 111 L. Ed. 2d 292 (1990)*.

For the reasons stated above, maritime jurisdiction pursuant to *28 U.S.C. § 1333(1)* applies to this case.

B. Dram Shop Liability

Plaintiffs assert that federal maritime jurisdiction case law preempts Idaho's Dram Shop Act where there is a conflict. On its face, this is a correct argument. The problem with this argument is that there is not any one consistent body of federal maritime case law applicable to the facts of this case, as would be the case if there were a United States Supreme Court ruling or federal statute on point **[*7]** and directly conflicting with Idaho's Dram Shop Act. In addition, the line of cases cited by Plaintiff only found ship owners who turned their ships into "floating dram shops" liable. Finally, there is no conflict between the line of cases cited by Plaintiff and the Idaho Dram Shop Act under the facts of this matter.

"State courts have concurrent jurisdiction with the federal courts to try cases at admiralty, but in doing so must apply federal maritime law rather than state *law." Fisk v. Royal Caribbean Cruises, Ltd., 141 Idaho 290, 292, 108 P.3d 990, 992 (2005)*. "[S]tate law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with maritime law." *Id. at 294, 994*.

The genesis of the published maritime dram shop cases Plaintiff cites is *Reyes v. Vantage S. S. Co., 558 F.2d 238 (5th Cir. 1977)*, *on reh'& 609 F.2d 140 (5th Cir. 1980)*, where a ship owner was found liable to an injured third party for selling alcohol to crew members and turning the ship into a "floating dram shop." Notably, the portion of the opinion dealing with the ship owner's negligence for dram shop law cites no authority for its rule; it just seems to have created a rule:

> It is the opinion of this Court that the practice revealed by this record of operating a floating dram shop makes a ship unseaworthy, **[*8]** and if not that, at least clearly negligent. Certainly the sea holds enough perils for a sailor, even a sober one. But for his employer to supply the beer without adequate control and then complain that Reyes was negligent for being drunk on board ship is indeed ironic.

Reyes at 244-45. On rehearing, the Court quoted its prior opinion on the matter as authority for the rule it created. *Reyes v. Vantage S.S. Co., 609 F.2d 140, 146 (5th Cir. 1980)*.

Reyes failed to conduct a *Wilburn* analysis, and this Court believes that *Reyes* was wrongly decided for that reason. In *Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313, 75 S. Ct. 368, 370, 99 L. Ed. 337 (1955)*, the United States Supreme Court was faced with the question of whether the Court should create a judicial maritime rule or apply Texas law. The Court noted that "[i]n the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States." *Wilburn at 313, 370* (footnotes omitted). The Court ultimately concluded that under the facts of that case, the problem was best left to legislatures, and where the United States Congress had failed to enact a national law, the problem was best left to state legislatures. *Id. at 321, 374*. There is no evidence of any such thoughtful analysis conducted by the *Reyes* court, and the *Reyes* Court fashioned a maritime rule by judicial fiat and **[*9]**

applied it over existing state law.

The next in the line of cases cited by Plaintiffs is *Thier v. Lykes Bros., 900 F. Supp. 864 (S.D. Tex. 1995)*, where the Court found the defendant ship owners "were negligent in operating a floating dram shop with insufficient supervision to prevent Mr. Borzi from becoming intoxicated while on the vessel, and this negligence was a proximate and producing cause of Plaintiffs damages." *Thier at 878*, citing *Reyes*. The Court further found that the Defendant ship owners "were negligent in failing to monitor alcohol consumption onboard, fostering a party atmosphere, and failing to prohibit drunk officers from driving and this negligence was a legal and factual cause of Plaintiffs injuries." *Id. at 879*. Notably, the ship owner did not provide the alcohol; its liability was based on a duty to maintain an orderly ship by virtue of its status as the ship's owner.

The last in the line of maritime dram shop cases Plaintiff cites *Young v. Players Lake Charles, L.L.C., 47 F. Supp. 2d 832 (S.D. Tex. 1999)*, where the Court applied maritime jurisdiction over a state law prohibiting dram shop liability where a riverboat casino patron got drunk, drove, and killed the plaintiff's family member. The Court found that maritime dram shop jurisdiction applied and that the ship owner providing the alcohol was liable to the **[*10]** party injured by the drunken patron.

Thus, this line of cases is based on *Reyes*, which failed to apply the analysis of *Wilburn* when creating a maritime rule and applying it over state law[1]. Moreover, this line of cases stands for no more than the proposition that the owner of a ship can be held liable under maritime rules when the owner allows his boat to become a "floating dram shop." Implicit in that liability is the duty of a ship owner to maintain order and safety on his ship. Such a duty would not extend to Lynn, who did not own the boat.

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[1] Plaintiff also cites two unpublished cases: *Doe v. Royal Caribbean Cruises, Ltd*, No. 11-23323-CIV, 2011 WI 6727959 (S.D. Fla. Dec. 21, 2011); and *Doe v. NCL (Bahamas) Ltd.*, No. 11-22230-CIV, 2012 WI 5512347 (S.D. Fla. Nov. 14, 2012). These cases are similar to those discussed above in that they only found liability against the boat's owner. These cases are somewhat different from the cases above in that they were both cruise ships with bars serving alcohol, but this is also distinct from the facts of this matter, and these cases are no more applicable to this case than those discussed above. In addition, these two cases do not resolve the conflicting rulings regarding the application of maritime dram shop law over state laws.

Other courts have analyzed federal preemption of state dram shop laws and found that there is no federal preemption because there is no uniform body of federal case law to preempt the state law on point. For example:

> In wrestling with this decision, we are guided by the fundamental tenet of preemption doctrine that federal law will not preempt state law "absent a clear statement of congressional intent to occupy an entire field" or unless applying state law would conflict with or otherwise frustrate a federal regulatory scheme. *Barske v. Rockwell Ina Corp., 514 N.W.2d 917, 925 (Iowa 1994)*. Plainly there is no federal maritime statute comparable to **[*11]** *Iowa Code section 123.92* governing the rights and liabilities of dram shops or third parties victimized by their patrons. And as the federal trial court in *Meyer* observed, neither is there a consistent or uniform body of maritime common law imposing tort liability on sellers of alcohol for injuries resulting from their sales. *Meyer*, 1994 WL 832006, at *4.

Horak v. Argosy Gaming Co., 648 N.W.2d 137, 146-47 (Iowa 2002).

> The Defendant argues that there is no existing maritime rule regarding what is essentially dram shop liability, that application of maritime law is inappropriate here, and that, under *Wilburn*, this Court must apply state law. In support of its argument, the Defendant cites a decision of a United States District Court in California in which that court held that, although the court had admiralty jurisdiction over the passenger's tort action pursuant to general maritime law, no federal maritime dram shop rule existed and that, as a consequence, California's dram shop statute provided the substantive law governing the plaintiffs admiralty *claim. See Meyer v. Carnival Cruise Lines, Inc.*, 1994 WL 832006, at *4 (N.D.Cal. Dec.29, 1994) (citing *Wilburn, 348 U.S. at 313, 75 S.Ct. 368*). That court, thus, declined to fashion a federal maritime dram shop rule that would impose tort liability on sellers of alcohol for injuries resulting from their sales. *Id.* The Plaintiff, however, cites a decision of a United States **[*12]** District Court in Texas in which that court held that admiralty jurisdiction existed over a casino riverboat owner when a passenger who became intoxicated while drinking alcoholic beverage at the casino riverboat killed three persons while operating his automobile after departing the riverboat. *Young v. Players Lake*

Charles, L.L.C., 47 F.Supp.2d 832 (S.D.Tex.1999). The *Players* court determined that a defendant can be held liable under general maritime law for providing alcohol without adequate supervision, stating that because "there is an existing maritime rule governing the issue of dram shop liability," "there is no need to perform a *Wilburn* analysis to determine whether the Court must apply state dram shop law." *Id. at 837*. Thus, the briefs and arguments submitted by the parties demonstrate the unsettled nature of this area of federal law. Furthermore, in presenting this issue to the Court, the parties were not able to identify authority in the Seventh Circuit that would resolve this dispute, and the Court has been unable to find such.

Kludt v. Majestic Star Casino, LLC, 200 F. Supp. 2d 973, 979 (N.D. Ind. 2001).

It appears that federal trial courts have disagreed on whether there is a maritime dram shop law. *Compare* *Bay Casino, LLC v. M/V Royal Empress, 199 F.R.D. 464, 467 (E.D.N.Y.1999)*(finding that federal maritime law may be applied to a dram shop liability cause of action), *Young v. Players Lake Charles, L.L.C., 47 F.Supp.2d 832, 837 (S.D.Tex. 1999)*("there is an existing maritime **[*13]** rule governing the issue of dram shop liability"), *with Meyer v. Carnival Cruise Lines, Inc.*, No. C-93-2383 MHP, 1994 WL 832006, at *4 (N.D.Cal. Dec. 29, 1994)(finding no authority supporting federal maritime dram shop law and applying the state's dram shop law), *Horak v. Argosy Gaming Co., 648 N.W.2d 137, 147 (Iowa 2002)*(finding no federal maritime statute or maritime dram shop law preempting the state dram shop law), *Kludt v. Majestic Star Casino, LLC, 200 F.Supp.2d 973 (N.D.Ind.2001)*(applying state dram shop law to supplement general maritime law).

Vollmar v. O.C. Seacrets, Inc., 831 F. Supp. 2d 862, 870 (D. Md. 2011).

Other courts have applied state law because there was no specific conflict between state dram shop law and federal maritime dram shop law under the facts of the case. For example, in *Christiansen v. Christiansen, 152 P.3d 1144 (Alaska 2007)*, the state dram shop act provided immunity for social hosts, but not for licensed alcohol sellers. The case involved an unlicensed social host on a boat who would be protected from liability by the Alaska statute. The plaintiff in *Christiansen* cited the same line of cases cited by Plaintiff here: *Young, Reyes*, and *Thier*. The Court stated:

[T]hese cases fall to support Almeria's claim. None of them deals with a vessel owner who acted merely as a social host, and none purports to recognize or create a general rule of maritime law that would abrogate the traditional social-host immunity **[*14]** rule as it existed at common law.
Given the lack of analogous precedent in maritime law, the superior court found no 'controlling federal rule' imposing liability on an unlicensed social host. We agree. In the absence of a controlling federal rule, we conclude that Almeria has not demonstrated that a characteristic feature of maritime law would be materially prejudiced by applying AS 04.21.020 in this case.

Christiansen v. Christiansen, 152 P.3d 1144, 1147 (Alaska 2007).

This Court finds that there is no uniform body of federal maritime dram shop law which would preempt Idaho's Dram Shop Act. The maritime law is unsettled in this area, and the Court would have to choose from the conflicting federal rulings on the issue if any of the rules directly addressed the factual circumstances here, which they do not.

Federal law may preempt state law in one of two ways. First, if Congress has shown the intent to occupy a given field, any state incursion into that field is preempted by federal law. Second, even if the field is not preempted, if state law conflicts with federal law, it is preempted to the extent of the conflict.

Christian v. Mason, 148 Idaho 149, 152, 219 P.3d 473, 476 (2009)(internal citations omitted).

In addition, the cases Plaintiff cites do not apply to the facts of this case and preempt Idaho's Dram Shop **[*15]** Act because there is no conflict. The cases Plaintiff cites provide only for dram shop liability against boat owners. There is no allegation that the owner of the boat at issue, Chris Nosworthy, provided alcohol. While a conflict between LC. *§ 23-808* and federal maritime law is theoretically possible under some combination of facts, the Court will not concoct a hypothetical conflict from facts not at issue in this matter. As applied to the facts of this matter, there is no conflict between federal maritime dram shop laws and Idaho's Dram Shop Act.

Idaho's Dram Shop Act applies to these facts, and it shields from liability "any person who sold or otherwise

furnished alcohol" who did not receive notice "within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail." I.C. § 23-808.

Plaintiffs *cite* **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327 (2016)**, and argue that Defendants cannot assert the 180-day deadline for giving notice in Idaho's Dram Shop Act because they have unclean hands because they were not honest about the alcohol. Although the Court is inclined to agree with Plaintiffs regarding the equities of Defendants benefiting from lying about alcohol and then asserting the notice provision of I.C. § 23-808(5), the unclean hands **[*16]** doctrine is inapplicable to these facts because the notice provision of I.C. § 23-808(5) is not an equitable remedy, but a statutory bar to relief, and the equitable doctrine of unclean hands doctrine applies only against a person who is pursuing an equitable remedy. See Ada Cty. Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 371, 179 P.3d 323, 334 (2008). Here, Defendants are asserting an unambiguous statutory bar.

Because liability pursuant to Idaho's Dram Shop Act is precluded by Plaintiffs not giving timely notice, it is unnecessary to evaluate Lynn's argument that wrongful death actions are precluded by Idaho's Dram Shop Act and Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 987 P.2d 300, (1999).

C. Federal Courts Have Applied State Wrongful Death Laws Absent Federal Preemption

Plaintiff clearly filed both an Idaho state law wrongful death claim pursuant to I.C. § 67-7032 and under federal maritime law. Regardless of whether federal maritime law consistently recognizes a wrongful death claim named as such, the Amended Complaint gives ample notice of a maritime claim for breach of duties set forth in the general allegations. For example: "The conduct of Defendants herein created the existence of conditions involving an unreasonable risk of serious bodily [injury] on a vessel in the navigable waters of the United States of America." Amended Complaint, ¶ 2.28.

[*17] Several U.S. Circuit Courts of Appeals have recognized a maritime survival action, but the U.S. Supreme Court has declined to rule on the issue of whether such an action exists as a creature of federal maritime law. Miles v. Apex Marine Corp., 498 U.S. 19, 34, 111 S. Ct. 317, 326-27, 112 L. Ed. 2d 275 (1990). Often when the Courts of Appeals have found a maritime survival action, it has done so by applying state tort survival statutes. The U.S. Supreme Court has applied state wrongful death statutes to cases involving deaths on navigable waters within states.

> [W]hen a State, acting within its province, has created liability for wrongful death, the admiralty will enforce it. . . .
>
> This criterion is manifestly not limited to cases of wrongful death. It is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction. See Minnesota Rate Cases, 230 U.S. 352, 402-410, 33 S.Ct. 729, 741-744, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18. We see no reason why, under this test, the Florida rule in providing for the survival of a cause of action against a deceased tortfeasor for injuries occurring on navigable waters within the limits of the State should not be applied.

Just v. Chambers, 312 U.S. 383, 388-91,61 S. Ct. 687, 691-93, 85 L. Ed. 903 (1941).

> Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold, **[*18]** in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases.

Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 202, 116 S. Ct. 619, 621-22, 133 L. Ed. 2d 578 (1996). Therefore, consistent with the approach of the U.S. Supreme Court in maritime wrongful death cases, this Court will apply the state law of the forum.

D. Remedies

Nosworthys argue "[u]nder general maritime law in a wrongful death cause of action, non-pecuniary damages are no longer recoverable in the wake of Miles v. Apex Marine Corp, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990)." That is an overbroad reading of *Miles*.

Miles involved two claims: a claim for negligence for the death of a seaman under the Jones Act, and a claim for the deceased seaman's future earnings under general

maritime principles for "unseaworthiness." The rule cited by Nosworthys involved whether the seaman's mother could recover his future wages under general maritime principles. The Court ruled she could not. However, in making that determination, the Court resorted to the Jones Act, which applies only to seamen. *46 U.S.C. § 30104*. Reggie Nault was not a seaman. See *Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S. Ct. 2172, 132L*. Ed. 2d 314 (1995). As the Court explained in *Miles*:

> **Because this case involves the death of a seaman, we must look to the Jones Act**.
>
> The Jones Act/FELA survival provision limits recovery to losses suffered during **[*19]** the decedent's lifetime. See *45 U.S.C. § 59*. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, see *St. Louis, I.M & S.R. Co., supra, 237 U.S., at 658, 35 S.Ct., at 706*, and it is the rule under the Jones Act. See *Van Beech; supra, 300 U.S., at 347, 57 S.Ct., at 454-455*. **Congress has limited the survival right for *seamen's* injuries resulting from negligence**. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability. We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for ***seamen's*** injury and death. Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

Miles, at 36, 328 (emphasis added). This is essentially a finding that Congress has already spoken to the issue of what a seaman's personal representative can recover, and the Court would not create a remedy contravening that congressional intent. However, that concern is not at play here because Reggie Nault was not a seaman, and Congress has not acted to limit the recovery for every death occurring in navigable waters.

Nosworthy also cites to **[*20]** *Newhouse v. United States, 844 F. Supp. 1389 (D. Nev. 1994)*, which applied *Miles's* rule to non-seamen. Some other courts have done the same. This Court does not find those cases persuasive, and they are not authoritative on this Court[2]. The Court is more persuaded by a contrary line of cases finding that *Miles's* rule was statutorily based and limited to seamen. See *Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994)*, where the 9th Circuit Court of Appeals found that the parents of boaters who were killed when a recreational boat collided with a Navy mooring buoy in state territorial waters were entitled to recover non-pecuniary damages, including for loss of society. The Court stated "the fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute, *Miles, 498 U.S. at 32-33, 111 S.Ct. at 325-26*, and that statute does not limit recoveries for the deaths of non-seamen." *Sutton v. Earles, 26 F.3d 903, 917 (9th Cir. 1994)*.

Thus, it does not appear to the Court that various federal courts have created a uniform rule applicable to the facts of this case. Where there is no uniform rule of maritime law, this Court will follow the approach of *Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 202, 116 S. Ct. 619,621*-22, *133 L. Ed. 2d 578 (1996)*, which states:

> Traditionally, state remedies have been applied in accident cases of this order—maritime wrongful-death cases in which no federal statute specifies the appropriate relief and **[*21]** the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold, in accord with the United States Court of Appeals for the Third Circuit, that state remedies remain applicable in such cases.

However, Chris Nosworthy is correct that his liability, if any, is limited to the value of the boat. This is because there is a federal statute directly on point, and this preempts any Idaho law on the subject. 46 U.S.C. § 30505 states in relevant part:

> **(a) In general**.—Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

[2] "[S]tate courts are not bound by circuit court precedent even on matters of federal law." *State v. McNeely, 162 Idaho 413, 416, 398 P.3d 146, 149 (2017)*. "Such decisions are authoritative only if the reasoning Is persuasive." *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc., 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)*.

> **(b) Claims subject to limitation**.--Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, **[*22]** or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Section 30506 is only applicable to seagoing vessels, and therefore not applicable here.

Plaintiff argues that 46 U.S.C. § 30505 is intended to apply only to vessels carrying freight. It appears to this Court that the whole of maritime law is intended primarily to protect commercial shipping, and its ends are not necessarily well-matched to purely recreational outings in inland navigable waters, but maritime law has been expanded to apply in those situations with the intended goal of uniformity. Here, the statute at issue has clearly been expanded to cover recreational boating: "[e]xcept as otherwise provided, this chapter (except section 30503) applies to seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." *46 U.S.C. § 30502*. This limitation of liability is not confined to commercial vessels, and applies even to jet skis. *Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1230 (11th Cir. 1990)*. 46 U.S.C. § 30505 limits Chris Nosworthy's liability, if any, to the value of the boat.

Additionally, 46 U.S.C. § 30505 conflicts with the vicarious liability provision of *I.C. § 67-7032*, and preempts it to the extent of the conflict. The conflict **[*23]** is the limitation of liability contained in 46 U.S.C. § 30505, which limits damages to the value of the boat, whereas *I.C. § 67-7032* makes the boat owner fully liable. Additionally, *I.C. § 67-7032(3)* states: "[n]othing contained herein shall deprive the owner of any vessel of any of the rights, limitations or exemptions from liability afforded such owner under any federal statutes."

E. Idaho's Dram Shop Act is Constitutional

Plaintiff argues that Idaho's Dram Shop Act is unconstitutional because it violates *Art. 3, § 19 of the Idaho Constitution*, as well as the equal protection and due process clauses of the Idaho and United States Constitutions.

Art. 3, § 19 of the Idaho Constitution prohibits "local and special laws" on a variety of issues. Idaho's Dram Shop Act is neither a local nor special law because it applies generally to all members of the classes it creates, and it is not arbitrary, capricious, or unreasonable.

> This Court has clearly set forth three characteristics of special laws. First, "[a] special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality." *ISEEO IV, 140 Idaho at 591, 97 P.3d at 458*. It is important to note that "[a] law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases **[*24]** and all similar localities and to all belonging to the specified class to which the law is made applicable." *Id.* Second, we have found that when the Legislature pursues a "legitimate interest in protecting citizens of the state" in enacting a law, then it is not special. *Id.* Lastly, courts must determine "whether the [statute's] classification is arbitrary, capricious, or unreasonable." *Arel, 146 Idaho at 35, 189 P.3d at 1155*.

Citizens Against Range Expansion v. Idaho Fish And Game Dep't, 153 Idaho 630, 636, 289 P.3d 32, 38 (2012).

Plaintiff argues "By enacting the statute, the legislature attempted to 'limit' the common law dram shop cause of action with respect to a sub-class of claimants bringing negligence claims. The legislature encroached upon a fundamental right protected by *Art. 3, § 19 of the Idaho Constitution.*" Plaintiff never identifies which fundamental right is allegedly encroached upon, and the Court does not know or understand Plaintiff's argument.

It appears to the Court that the Idaho had a legitimate and rational basis for enacting Idaho's Dram Shop Act: it wanted to limit liability upon purveyors of alcohol, discourage irresponsible drinking, and implicitly leave liability for injuries caused by inebriated persons upon the person who allowed themselves to become inebriated: the inebriate himself. The exceptions to this rule are limited to those **[*25]** who lack capacity at the time they were served or who are not otherwise allowed to drink alcohol: obviously intoxicated persons and minors.

Plaintiff argues: "*I.C. § 23-808(5)* segregates out a class of plaintiffs among personal injury plaintiffs suing in negligence (who all have a two-year statute of

limitations) and unconstitutionally limits their claims by a 180-day statute of limitations."

The Court has evaluated similar claims regarding the Idaho Drain Shop Act in the context of equal protection, and stated:

> This Court has also previously recognized that "[n]ot every legislative classification which treats different classes of people differently can be said to be 'discriminatory,' much less 'obviously' invidiously discriminatory.' "*State v. Beam, 115 Idaho 208, 212, 766 P.2d 678, 682 (1988)*. "For a classification to be 'obviously' invidiously discriminatory,' it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." Li *I.C. § 23-808* limits dram shop liability to those persons who are innocently injured as a result of the negligent provision of alcohol. Preventing intoxicated persons from recovering from the negligent providers of alcohol furthers this purpose and is not calculated to excite animosity **[*26]** or ill will. The classification at issue here is neither invidiously discriminatory nor does it involve a fundamental right.

Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999). Therefore, the Court applied rational basis scrutiny.

The situation here is the same. The notice provision does not distinguish between individuals or groups odiously or in an attempt to excite animosity or ill will. Rather, it appears that the Legislature wanted to discourage irresponsible drinking by leaving the liability with the drinker instead of shifting it onto purveyors of alcohol. It created two narrow exceptions to this general rule, which were further narrowed by the time limit of *I.C. § 23-808(5)*.

> On rational basis review, courts do not judge the wisdom or fairness of the legislation being challenged. *See Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211, 221 (1993)*. The United States Supreme Court has held that "[o]n rational-basis review, a classification in a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Federal Communications Comm'n, 508 U.S. at 314-15, 113 S.Ct. at 2101-02, 124 L.Ed.2d at 222*. This Court also recognized in *Meisner* that "[u]nder the 'rational basis test,' a classification will withstand an equal protection challenge if there is **[*27]** any conceivable state of facts which will support it." *131 Idaho at 262, 954 P.2d at 680* (citing *Bint v. Creative Forest Prod, 108 Idaho 116, 120, 697 P.2d 818, 822 (1985))*.

Id. at 396-97, 308-09.

Limiting liability primarily to the inebriated person whose actions were the immediate cause of the injury both limits dram shop and social host liability and discourages irresponsible consumption of alcohol. The Court therefore finds that disparate treatment of personal injury plaintiffs under *I.C. § 23-808(5)*[3] vs. *I.C. § 5-219(4)* is rationally related to legitimate governmental purposes. Accordingly, this Court holds that *I.C. § 23-808* does not violate the Equal Protection Clauses of the Idaho or United States Constitutions, or *Art. 3, § 19 of the Idaho Constitution.*

Although Plaintiff states that *I.C. § 23-808(5)* violates the Due Process Clauses of the Idaho and Federal Constitutions, Plaintiff never articulates any reasoning to support that conclusion. Plaintiffs have not met their burden of proof for this claim, and the Court does not find that *I.C. § 23-808(5)* violates the Due Process clauses of the Idaho and Federal Constitutions.

Plaintiff next argues that the Idaho Dram Shop Act is ambiguous because "Where is an irreconcilable conflict between *I.C. § 23-808(5)* and *I.C. §§ 23-808(1)* and *(3)*" and therefore the statute must be stricken. Plaintiff provides no authority for the prospect that an allegedly ambiguous civil statute limiting liability must be stricken. Regardless, the Court finds no conflict and no ambiguity.

The **[*28]** Idaho Legislature found that except in specific instances, furnishing alcohol to a person was not the proximate cause of injuries inflicted by the person who was provided with alcohol. *I.C. § 23-808(1)*. The Legislature stated therefore, it intended to limit dram shop and social host liability. *Id.* It accomplished this goal by using language broader than necessary to accomplish that intent, but certainly broad enough to

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[3] Plaintiffs also argue that there is no rational basis for requiring notice via certified mail vs. regular mail, and this is discriminatory. These facts are not at issue here because the Plaintiffs provided no notice. The Court will not issue an advisory opinion for a hypothetical state of facts not at issue.

accomplish its stated intent: "any person who sold or otherwise furnished alcoholic beverages." I.C. § 23-808(3). The Legislature then further limited dram shop and social host liability by providing a notice provision without any discovery exception. I.C. § 23-808(5). If the legislature intended for the Dram Shop Act to apply only to social hosts, it easily could have merely repeated the words "dram shop or social host" instead of using the different, longer, and more expansive phrase "any person who sold or otherwise furnished alcoholic beverages." It is also entirely possible that the legislature did not intend to incentivize dishonesty by enacting I.C. § 23-808(5), but it is not the Court's job to second-guess the Legislature's wisdom in crafting legislation; it is the Court's job to apply unambiguous law as written. I.C. § 73-113(1). If the **[*29]** language of a civil statute of this nature was ambiguous, the Court would engage in statutory construction to discern legislative intent rather than strike the statute as unconstitutional. I.C. § 73-113(2).

F. Nosworthy's Arguments About Duty

Nosworthy Defendants argue that Cameren Nosworthy did not owe Reggie Nault a duty because: 1) there is no affirmative duty to prevent Reggie from jumping off the boat absent a special relationship; and 2) no duty existed because Reggie's act of jumping from the moving boat was not foreseeable.

First, Brody Lundblad's deposition testimony at 48:19 - 52:19 makes it incredibly obvious that Reggie Nault might jump from the moving boat. Per Brody's testimony, Reggie told Cameren and Brody that he was going to jump as the boat was moving, Reggie had jumped from boats on previous occasions when traveling very fast, Reggie made these statements about 10 minutes after finishing the derailer, and Reggie was not wearing a life jacket. Cameren's deposition testimony at 43:1 - 11 was largely consistent with Brody's and also said that Reggie stated he was going to jump. The declaration of Lexie Bond noted that the Snapchat video had the speedometer filter on, and stated "It seemed **[*30]** that the boys knew that Reggie was going to enter the water because they were purposefully video-taping and had selected the speed." It was foreseeable that Reggie Nault might jump from the boat considering that he said he was going to jump from the boat after drinking and both Brody and Carneren told him not to jump. Reasonable minds could not differ on this issue under these facts. There may be issues of comparative negligence at play[4], but it was foreseeable that Reggie might jump from the boat and that he could drown when doing so.

Second, the Court rejects Nosworthy's characterization of the duty as limited to preventing Reggie from jumping. "[E]very person has a duty to exercise ordinary care to prevent unreasonable, *foreseeable* risks of harm to others." Johnson v. McPhee, 147 Idaho 455, 467, 210 P.3d 563, 575 (Ct. App. 2009) (internal quotations omitted, emphasis in original). The Court expects that, for example, Plaintiffs will argue at trial that Cameron was driving too fast under the circumstances (knowing that Reggie was drinking and making statements about jumping from the moving boat while not wearing a life jacket) and breached his duty to use ordinary care in doing so.

> Every person has a general duty to use due or ordinary care not to injure **[*31]** others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury. . . . The degree of care to be exercised must be commensurate with the danger or hazard connected with the activity.

Whitt v. Jarnagin, 91 Idaho 181, 188, 418 P.2d 278,285 (1966).

G. Negligence Per Se

> In order to replace a common law duty of care with a duty of care from a statute or regulation, the following elements must be met: (1) the statute or regulation must clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury.

O'Guin v. Bingham Cty., 142 Idaho 49, 52, 122 P.3d 308, 311 (2005).

The first three elements of this test are met here

[4] See Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 1040-41, 793 P.2d 711, 713-14(1990) (attributing deceased's negligence to his parents in a wrongful death action).

regarding I.C. § 67-7034(1). However, there is a genuine issue of material fact precluding summary judgment regarding Plaintiff's negligence per se claim pursuant to I.C. § 67-7034(1): there is evidence that Cameren Nosworthy was drinking on the day of the incident, but there is a genuine issue of material fact as to his blood alcohol level. There is also a genuine issue **[*32]** of material fact regarding whether Cameren's drinking, to the extent his blood alcohol level makes the statute applicable to him, was the proximate cause of the accident Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7016. However, there is a genuine issue of material fact regarding breach of duty created by this statute, and whether any breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7019. However, there is a genuine issue of material fact regarding breach of duty created by this statute, and whether any breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 67-7027(2). However, there is a genuine issue of material fact regarding breach of duty created by this statute, and whether any breach was a proximate cause of damage. It appears to the Court that Defendants Cameren and Brody attempted to give aid, but there are questions of fact and law as to what level of aid would meet the duty created by this statute. Summary judgment on this claim is denied.

The first three **[*33]** elements of this test are met here regarding I.C. § 67-7027(3). There is no genuine issue of material fact that Defendants Cameren and Brody did not give notice immediately by the quickest means of communication. Instead, they called Brody's girlfriend, who then instructed them to call the police. However, there is a genuine issue of material fact whether this breach was a proximate cause of damage. Sununary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 18-5413(1). There is no genuine issue of material fact that Defendants Cameren and Brody gave false information to the police regarding an offense or offenses related to their consumption of alcohol. However, there is a genuine issue of material fact whether this breach was a proximate cause of damage. Summary judgment on this claim is denied.

The first three elements of this test are met here regarding I.C. § 18-705. There is no genuine issue of material fact that Defendants Cameren and Brody gave false reports to the police related to their consumption of alcohol. However, there is a genuine issue of material fact whether this breach was a proximate cause of damage. Summary judgment on this claim is denied.

H. Spoliation

As stated **[*34]** above, maritime jurisdiction applies to the facts of this case. None of the parties have cited maritime cases where the court has applied spoliation. As such, the Court has researched the issue and has been unable to find a maritime case where spoliation was applied as a cause of action. Miler, the cases the Court has located[5] have treated spoliation as an evidentiary sanction. "Spoliation is a rule of evidence, and the decision to impose sanctions for violations is one administered at the discretion of the trial court and governed by federal law." *Turner v. United States, 736 F.3d 274, 281 (4th Cir. 2013)* (internal quotations and citation omitted).

> A party seeking sanctions based on the spoliation of evidence must establish, inter alia, that the alleged spoliator had a duty to preserve material evidence. This duty arises "not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir.2001). Generally, it is the filing of a lawsuit that triggers the duty to preserve evidence. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522 (D.Md.2010). Moreover, spoliation does not result merely from the "negligent loss or destruction of evidence." *Vodusek, 71 F.3d at 156*. Rather, the

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[5] See ***Turner v. United States, 736 F.3d 274, 281 (4th Cir. 2013)***; Sharp v. Hylas Yachts, LLC, 872 F.3d 31,42 (1st Cir. 2017); ***Vulcan Materials Co. v. Massiah, 645 F.3d 249, 260 (4th Cir. 2011)***; ***Wheelings v. Seatrade Groningen, BV, 516 F. Supp. 2d 488,505 (E.D. Pa. 2007)***; *Fuesting v. LaFayette Par. Bayou Vermilion Dist.*, No. CIV.A. 02-2511, 2007 WI 2028160, at *1 (W.). La. July 11, 2007); In re Bridge Constr. Servs. of Fla., Inc., 185 F. Supp. 3d 459,472 (S.D.N.Y. 2016); Marbulk Shipping, Inc. v. Martin-Marietta Materials, Inc., 223 F.R.D. 640, 646 (S.D. Ala. 2004).

> alleged destroyer must have known that the evidence **[*35]** was relevant to some issue in the anticipated case, and thereafter willfully engaged in conduct resulting in the evidence's loss or destruction. *See id.* Although the conduct must be intentional, the pity seeking sanctions need not prove bad faith. *Id.*

Id. at 282. Thus, it appears under general maritime law that spoliation is an evidentiary remedy only available when a party destroys evidence, generally after a lawsuit has been filed. Spoliation does not appear to be a cause of action under general maritime law.

In the maritime cases the Court found where there were spoliation claims as causes of action, the cases were in federal court where there was also diversity jurisdiction, and the courts therefore applied state law regarding spoliation pursuant to the *Erie* doctrine. "Lakewood's spoliation counterclaim, brought in diversity, is controlled by the laws of the State of Washington." *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 367 (9th Cir. 1992)*. Also see *Favaloro v. S/S Golden Gate, 687 F. Supp. 475, 480 (N.D. Cal. 1987)*; *Kolanovic v. Gida, 77 F. Supp. 2d 595, 596, n.1 (D.N.J. 1999)*, *Bravo v. Foremost Ins. Grp.*, No. C94-20467 RPA, 1994 WL 570643, at *1 (N.D. Cal. Oct. 11, 1994).

This Court is not a federal court, so diversity jurisdiction and the *Erie* doctrine do not apply. It appears to the Court that under maritime law, spoliation of evidence is an evidentiary sanction; not a tort. Because maritime law applies to the facts of this case, **[*36]** Defendants are entitled to summary judgment on Plaintiff's spoliation claim as a matter of law.

IV. CONCLUSION AND ORDER

For the reasons stated above, the Plaintiffs' Idaho Dram Shop Act claims are dismissed as a matter of law. Maritime rules preempt Idaho state laws to the extent there are United States Supreme Court rulings or federal statutes on point, and those rulings and statutes conflict with Idaho law. In circumstances where there is no maritime law consensus or federal statute directly on point, this Court will apply Idaho law.

Idaho's Dram Shop Act is constitutional, and does not violate equal protection or due process rights.

Remedies beyond pecuniary damages are available in a maritime wrongful death suit. However, Chris Nosworthy's liability, if any, is limited to the value of the boat.

There are genuine issues of material fact regarding Plaintiff's negligence per se claims which preclude summary judgment.

It was foreseeable that Reggie might jump from the boat and that he could drown when doing so.

Plaintiffs' spoliation claim is dismissed as a matter of maritime law.

Dated August 9th, 2018.

/s/ Cynthia K.C. Meyer

Cynthia K.C. Meyer

District Judge

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As of: February 17, 2023 5:54 PM Z

Self Storage Advisors v. SE Boise Boat & RV Storage

United States District Court for the District of Idaho

February 3, 2021, Decided; February 3, 2021, Filed

Case No. 1:18-cv-00294-BLW

Reporter
2021 U.S. Dist. LEXIS 21971 *; 2021 WL 372789

SELF STORAGE ADVISORS, LLC, a Washington Limited Liability Company, Plaintiff, v. SE BOISE BOAT & RV STORAGE, LLC, an Idaho Limited Liability Company, Defendant.

Subsequent History: Motion granted by, Motion denied by, Reconsideration granted by, Motion dismissed by, As moot, Reconsideration denied by *Self Storage Advisors v. V., 2021 U.S. Dist. LEXIS 65223, 2021 WL 1238368 (D. Idaho, Apr. 2, 2021)*

Prior History: *Self Storage Advisors, LLC v. SE Boise Boat., 2018 U.S. Dist. LEXIS 230950, 2018 WL 9988656 (D. Idaho, Dec. 26, 2018)*

Core Terms

motion in limine, property management, damages, breaches, operating agreement, exclude evidence, present value, defenses, horizon, parties, revised agreement, quasi-estoppel, calculations, motions, revised, unfair

Counsel: **[*1]** For Self Storage Advisors, LLC, a Washington Limited Liability Company, Plaintiff: Thomas John Lloyd, III, LEAD ATTORNEY, Elam & Burke, P.A., Boise, ID.

For SE Boise Boat & RV Storage LLC, an Idaho Limited Liability Company, Defendant: Adam C Collins, Jami K Elison, LEAD ATTORNEYS, PRO HAC VICE, The Collins Law Group PLLC, Issaquah, WA; Justin B Oleson, LEAD ATTORNEY, BLASER SORENSEN & OLESON, Blackfoot, ID.

Judges: B. Lynn Winmill, United States District Judge.

Opinion by: B. Lynn Winmill

Opinion

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before the Court are numerous motions in *limine* filed by the parties. Defendant submitted a notice segregating six of its thirteen motions for early resolution. Dkt. 67. Thus, the Court will rule on Defendant's motions in *limine* # 1, 2, 5, 6, 7, and 10 (Dkt. 59), and on Plaintiff's motions in *limine* # 1 (Dkt. 68), 2 (Dkt. 69), 3 (Dkt. 70), and 4 (Dkt. 71).[1] The motions are fully briefed and at issue.

BACKGROUND

Trial for this matter is set for April 5, 2021. Self Storage Advisors, LLC ("SSA") has sued SE Boise Boat & RV Storage ("BBRV") for breach of contract, based on a Property Management Agreement signed by the parties in which SSA agreed to manage the operation of BBRV's storage **[*2]** facility. *See Amend. Compl.*, Dkt. 5 at ¶ 11; *Answer*, Dkt. 18 at ¶ 11. SSA seeks damages in the form of lost management fees. Dkt. 5 at ¶ 43.

LEGAL STANDARD

There is no express authority for motions in *limine* in the Federal Rules of Evidence. Nevertheless, these motions are well recognized in practice and by case law. *See, e.g., Ohler v. United States, 529 U.S. 753, 758, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000)*. The key function of a motion in limine is to "exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce*

[1] Defendant's motions in *limine* 3, 4, 8, 9, 11, 12 and 13 will be addressed in a separate order if this case does not settle.

v. United States, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984). A ruling on a motion in *limine* is essentially a preliminary ruling, which may be reconsidered in the context of trial. Id. at 41.

Motions in *limine* are beneficial tools that promote judicial efficiency by presenting the Court with an opportunity "to rule in advance of trial on the relevance of certain forecasted evidence . . . without lengthy argument at, or interruption of, the trial." *D.A.*, 2013 WL 12147769, at *2 (quoting Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996)). But these pretrial evidentiary rulings are made before the court has seen or heard the challenged evidence, and they restrict a party's presentation of their case. *Id.* Thus, "courts have recognized that motions in limine should be granted sparingly and only in those instances when the evidence plainly is inadmissible on all potential grounds." ***[*3]*** *Id.* (internal quotation marks and citation omitted).

In resolving these motions, the Court is guided by Federal Rules of Evidence 401 and 403. The Court must evaluate whether the proposed evidence is relevant—that is—whether the evidence has "any tendency to make a fact more or less probable than it would be without the evidence" and whether "the fact is of consequence in determining the action." Fed. R. Evid. 401. Even if the evidence is relevant, the Court may exclude it if "its probative value is *substantially* outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

ANALYSIS

A. BBRV's Motions in *Limine*

1. Motion in *Limine* No. 1 re: expert witness Keith Pinkerton

BBRV first seeks to exclude SSA's expert, Keith Pinkerton, from testifying at trial. BBRV argues that Pinkerton's opinions will not assist the jury in resolving a factual dispute, and that his opinion is based on pure speculation on matters outside of his area of expertise.

An expert witness may testify in the form of an opinion if the Court finds that: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier **[*4]** of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

To admit expert testimony, the Court must "perform a 'gatekeeping role' of ensuring that the testimony is both 'relevant' and 'reliable' under Rule 702." United States v. Ruvalcaba-Garcia, 923 F.3d 1183, 1188 (9th Cir. 2019) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)). The proponent of the testimony bears the burden of establishing admissibility. *See* Fed. R. Evid. 702 advisory committee notes (2000) ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

SSA seeks to have Pinkerton testify as to the present value of the management fees that SSA would have received from BBR had BBR not allegedly breached the Property Management Agreement. His opinion is based on three elements: "the amount of the fees that would have been payable to SSA, the time horizon over which the contract would have been in place, and a proper discount rate with which to bring the **[*5]** payments to a present-day value." Ex. A, Dkt. 59-1 at 31.

The Court finds that Pinkerton's proposed testimony of the methodology he used to calculate likely monthly fees and the present value of these payments is relevant and reliable, and thus admissible under Rule 702. Pinkerton's expert report explicitly identified his calculations and the rates he used for the present value. Dkt. 59-1 at 40-42. SSA has demonstrated that Pinkerton's testimony will be helpful to the jury in determining the present value of the monthly fees allegedly payable to SSA.

However, the Court finds problematic the portion of Pinkerton's report where he opines that "the most reasonable conclusion regarding the Property Management Agreement is that all parties considered this to be a long-term arrangement," and that 20 years is therefore the appropriate time horizon to use in his calculations. Pinkerton—as a financial analyst—is certainly qualified to render an opinion on fee calculations and the present value thereof, but he has no "scientific, technical, or other specialized knowledge"

which would qualify him to render an opinion on the legal interpretation of the Agreement. Fed. R. Evid. 702. Moreover, Pinkerton does not provide any **[*6]** explanation of how he arrived at a 20-year figure for calculating the total lost profit amount. If that number came from his interview with Jay Graham, then Graham will be able to testify to it as a lay witness.

In light of these considerations, the Court finds that any probative value of Pinkerton's testimony regarding the 20-year time horizon is substantially outweighed by the risk of unfair prejudice to BBRV. Accordingly, the Court will deny BBRV's first motion in *limine* in part to the extent that Pinkerton may testify as an expert as to the appropriate monthly fees payable to SSA under the contract and the present value of those fees. The Court will grant BBRV's motion in part to the extent that Pinkerton may not testify about his interpretation of the contract as a "long-term arrangement" and, if no other testimony is offered in support of such a time frame, he may not testify about the 20-year time horizon for lost compensation. On the other hand, if there is other evidence presented from which the jury could conclude that parties' agreement made the 20-year time horizon appropriate, Pinkerton will be permitted to include in his opinion lost compensation predicated on that time **[*7]** frame. In that case, the Court will provide the jury with a limiting instruction that they are to consider such testimony only if they find that the parties' agreement required such a time horizon.

2. Motion in *Limine* No. 2 re: limiting damages to 23 months

BBRV next moves the Court to limit SSA's alleged damages to a maximum of 23 months. Dkt. 59-1 at 16. BBRV asserts that because Jay and Corinne Graham filed counterclaims in Idaho State Court in June 2020 seeking to judicially dissolve BBRV, SSA is now barred under quasi-estoppel from seeking damages past this period.

Quasi-estoppel applies "when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position." Willig v. Dept. of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969 (1995). Unlike equitable estoppel, quasi-estoppel does not require "concealment or misrepresentation of existing facts on the one side, [and] no ignorance or reliance on the other." *Id.* (citing Evans v. Idaho State Tax Comm., 97 Idaho 148, 150 (1975), 540 P.2d 810. Rather, quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." KTVB, Inc. v. Boise City, 94 Idaho 279, 281, 486 P.2d 992 (1971).

Here, the November 2016 Property Management Agreement provided that, "The initial term of this Agreement shall begin on the Effective Date and end if **[*8]** Jay and/or Corinne Graham divest their shares in the partnership [BBRV]." Ex. B, Dkt. 59-1 at 53. BBRV argues that the Grahams' request in Idaho State Court for the court to judicially dissolve BBRV triggers the termination provision in the Agreement. BBRV further asserts that quasi-estoppel prevents the Grahams—and by extension, SSA—from now attempting to prove damages past May 2020.

The Court agrees. The Grahams have sought judicial dissolution of BBRV, which will dissociate them as members. *See* Idaho Code § 30-25-602(16) ("A person is dissociated as a member when: . . . (16) The limited liability company dissolves and completes winding up."). SSA cannot now argue, to BBRV's detriment, that the Property Management Agreement would have continued into perpetuity and they are entitled to those management fees. Accordingly, the Court grants BBRV's second motion in *limine* and orders that SSA's alleged damages are limited to 23 months.

3. Motion in *Limine* No. 5 re: construction costs; Motion in *Limine* No. 6 re: capital calls; Motion in *Limine* No. 7 re: construction expertise

BBRV's fifth, sixth, and seventh motions in *limine* ask the Court to preclude on relevance grounds any evidence or testimony regarding construction **[*9]** costs, BBRV capital calls, and the parties' construction practices knowledge. Dkt. 59-1 at 17-18. Both parties acknowledge that the issues are not directly relevant to the claims at issue in the litigation, but SSA requests that the Court allow it to present evidence on the topics as background information. *Id.*; Dkt. 60 at 12-14. BBRV appears to agree that the evidence should be allowed in as background information. Accordingly, the Court will deny BBRV's motions in *limine* 5, 6, and 7.

4. Motion in *Limine* No. 10 re: Graham construction opinions

BBRV's final motion in *limine* asks the Court to preclude Jay Graham from testifying as to his opinion on the costs or means and methods of construction because he is not an expert in that field. Dkt. 59-1 at 19. SSA

agrees that Graham will not testify to anything that would be considered expert testimony related to construction of the BBRV facility and that he will only testify as to background information. As there does not appear to be any dispute over this motion, the Court will grant it.

B. SSA's Motions in *Limine*

1. Motion in *Limine* No. 1 re: expert witness testimony

SSA's first motion in *limine* asks the Court to prohibit BBRV from eliciting **[*10]** testimony from its proposed expert, William Partin, who was disclosed in response to SSA's disclosure of Keith Pinkerton. Dkt. 68-1 at 1-2. BBRV counters that it did not provide an expert report because it does not intend to call Partin. *Rule 26(a)(2)* mandates that when a party plans on using an expert witness, the party disclose a written report containing, *inter alia*, the "opinions the witness will express and the basis and reasons for them." *Fed. R. Civ. P. 26(a)(2)*. When a party fails to disclose information in compliance with *Rule 26(a)(2)*, *Rule 37(c)(1) of the Federal Rules of Civil Procedure* automatically precludes that party from using such expert evidence at trial unless there was a substantial justification for the noncompliance or unless the noncompliance was harmless. *Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 827 (9th Cir. 2011)*. Accordingly, the Court will grant SSA's motion and order that BBRV may not offer any expert testimony from Partin at trial.

2. Motion in *Limine* No. 2 re: pleaded defenses

SSA next moves the Court to exclude any evidence at trial of new defenses not previously raised by BBRV. Dkt. 69-1. The only specific evidence SSA points to is from a letter sent by BBRV's counsel alluding to "a way for business partners [to] free themselves from business relationships that have turned acrimonious." Dkt. 74 at 3. SSA is correct **[*11]** that, to the extent that oblique reference is intended as a defense, BBRV is precluded from such a defense at trial, as the deadline for amending pleadings and discovery has long passed. The Court will grant SSA's motion to the extent that SSA seeks to preclude evidence of this specific defense.

However, the Court will deny the motion to the extent that SSA seeks a general order that BBRV may not present any new defenses or theories at trial. *See D.A. v. Meridian Joint Sch. Dist. No. 2*, 2013 WL 12147769, at *2 (D. Idaho June 14, 2013) ("Where a party fails to pinpoint the challenged evidence, or the grounds on which is should be excluded, the motion in limine will be denied.").

3. Motion in *Limine* No. 3 re: revised property management agreement

SSA's third motion in *limine* seeks to exclude evidence relating to the Revised Property Management Agreement that this Court dismissed on summary judgment, finding that it lacked consideration. Dkt. 70. SSA is correct that issues relating to the revised agreement are no longer relevant to the remaining issues for trial, which relate solely to the first agreement.

The Court is not persuaded by BBRV's assertion that the existence of and circumstances surrounding the revised agreement are relevant to its affirmative defenses numbered 3, **[*12]** 4, 5, 7, and 11. Dkt. 72 at 12. Defenses 4 and 5 both refer to SSA's second cause of action, which was dismissed by the Court on summary judgment. *Answer*, Dkt. 18 at 9. Defense 11, which asserts that SSA's claims are "barred by failure of capacity for claims based on illegal forgery," also plainly refers to SSA's second cause of action, as the validity of the first agreement is not disputed by either party. *Id.* Defense number 3 alleges that "Plaintiff's claims are barred because of unclean hands. *Id.* But under Idaho law, the "unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322 (2016)*** (internal quotation marks, alterations, and citation omitted). Because the second cause of action relating to the revised agreement is no longer a controversy in issue, the revised agreement is not relevant to proving this defense. Finally, BBRV's seventh defense generally alleges that "Plaintiff's claims are barred by breach of contract," but BBRV fails to explain how any evidence relating to the revised agreement tends **[*13]** to prove that SSA's claims relating to the first agreement are barred by breach of contract.

The Court finds that any minimal relevance that the circumstances surrounding the creation and existence of the second revised property agreement has is

substantially outweighed by the dangers of unfair prejudice, misleading the jury as to the relevant issues, and creating delay. Accordingly, the Court will grant SSA's motion to exclude evidence regarding the revised property management agreement. The Court is also mindful, however, that evidence which seemed irrelevant or precluded by *Rule 403* in advance of trial may become very relevant after the trial begins and the dynamic of the trial unfolds differently than the Court could anticipate. For that reason, the evidence will be precluded, but without prejudice to a motion to reconsider by BBRV should circumstances at trial justify such a motion.

4. Motion in *Limine* No. 4 re: breaches of operating agreement by Jay Graham

SSA's final motion in *limine* seeks to exclude evidence as to any alleged breaches by Jay Graham of the BBRV operating agreement.

BBRV has failed to adequately articulate why evidence of Graham's alleged breaches of the BBRV operating agreement **[*14]** are relevant to this case. BBRV alludes to the provision of the management agreement that terminates the agreement if the Grahams' dissociate as members of BBRV—possibly suggesting that it intends to use evidence relating to the operating agreement to prove damages—but the Court has already agreed to limit SSA's potential damages to 23 months. It is not apparent how evidence of Jay Graham's breaches would tend to make any fact relating this *this* lawsuit more or less probable. The Court previously noted in an order resolving Defendant's Motion to Stay that, "this case and the state court action are not parallel—they involve different parties, concern different material facts, and require the interpretation of different—and disputed—contractual agreements." Dkt. 28 at 4.

Any potential relevance is substantially outweighed by the danger of unfair prejudice to SSA, which is solely owned by Jay Graham. Accordingly, the Court will grant SSA's motion to exclude evidence regarding alleged breaches of the BBRV operating agreement by Jay Graham. Again, it is possible that the evidence at trial may unfold in such a way that the Court will be required to reconsider this ruling. However, BBRV will **[*15]** carry a heavy burden of showing that the evidence has been made relevant by the evidence presented and that the prejudice to SSA has been substantially mitigated.

ORDER

IT IS ORDERED that:

1. BBRV's Motion in *Limine* No. 1 Re: Exclusion of Plaintiff's Expert, Ketih Pinkerton, From Testifying at Trial (Dkt. 59) is **GRANTED** in part and **DENIED** in part.

2. BBRV's Motion in *Limine* No. 2 Re: Limiting SSA's Alleged Damages to a Maximum of 23 Months (Dkt. 59) is **GRANTED**.

3. BBRV's Motion in *Limine* No. 5 Re: Evidence of Construction Costs (Dkt. 59) is **DENIED**.

4. BBRV's Motion in *Limine* No. 6 Re: Evidence of Capital Calls (Dkt. 59) is **DENIED**.

5. BBRV's Motion in *Limine* No. 7 Re: Construction Practices or Expertise (Dkt. 59) is **DENIED**.

6. BBRV's Motion in *Limine* No. 10 Re: Graham Construction Opinions (Dkt. 59) is **GRANTED**.

7. BBRV's Motions in *Limine* No. 3, 4, 8, 9, 11, 12 and 13 (Dkt. 59) will be ruled on by separate order. The parties are directed to file a notice if this case does not settle and a ruling on these motions is required.

8. SSA's First Motion in *Limine* No. 1 Re: Expert Witness Testimony (Dkt. 68) is **GRANTED**.

9. SSA's Motion in *Limine* No. 2 Re: Pleaded Defenses (Dkt. 69) is **GRANTED** in part **[*16]** and **DENIED** in part.

10. SSA's Motion in *Limine* No. 3 To Exclude Evidence Regarding Revised Property Management Agreement (Dkt. 70) is **GRANTED**.

11. SSA's Motion in *Limine* No. 4 To Exclude Evidence Regarding Alleged Breaches of Operating Agreement by Jay Graham (Dkt. 71) is **GRANTED**.

DATED: February 3, 2021

/s/ B. Lynn Winmill

B. Lynn Winmill

U.S. District Court Judge

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Neutral
As of: February 17, 2023 5:54 PM Z

Roost Project, LLC v. v. Andersen Contr. Co.

United States District Court for the District of Idaho

February 4, 2020, Decided; February 4, 2020, Filed

Case No. 1:18-cv-00238-CWD

Reporter
437 F. Supp. 3d 808 *; 2020 U.S. Dist. LEXIS 21677 **; 2020 WL 560574

THE ROOST PROJECT, LLC, a California limited liability company, Plaintiff/Counterdefendant, vs. ANDERSEN CONSTRUCTION COMPANY, an Oregon corporation, Defendant/Counterclaimant.

Subsequent History: Reconsideration denied by *Roost Project, LLC v. Andersen Constr. Co., 2020 U.S. Dist. LEXIS 121914, 2020 WL 3895757 (D. Idaho, July 10, 2020)*

Motion granted by, in part, Motion denied by, in part *Roost Project, LLC v. Andersen Constr. Co., 2020 U.S. Dist. LEXIS 192468, 2020 WL 6119509 (D. Idaho, Oct. 16, 2020)*

Motion denied by, Sanctions disallowed by *Roost Project v. Andersen Construction Company, 2020 U.S. Dist. LEXIS 199587, 2020 WL 6273977 (D. Idaho, Oct. 26, 2020)*

Prior History: *Roost Project, LLC v. Andersen Constr. Co., 2019 U.S. Dist. LEXIS 242019 (D. Idaho, Nov. 29, 2019)*

Core Terms

Contractor, delays, argues, concealed, parties, force majeure, weather, notice, substantial completion, equitable adjustment, schedules, disputes, alleges, punitive damages, updates, counterclaims, documents, winter, changes, genuine issue of material fact, partial summary judgment, labor shortage, state of mind, misstatements, misrepresent, promise, unjust enrichment, summary judgment, subcontractors, obligations

Counsel: **[**1]** For The Roost Project, LLC a California limited liability company, Plaintiff, Counter Defendant: Bradley J Dixon, LEAD ATTORNEY, Kersti Harter Kennedy, Givens Pursley LLP, Boise, ID.

For Andersen Construction Company an Oregon corporation, Defendant, Counter Claimant: Christopher P Graham, LEAD ATTORNEY, Brassey Crawford, PLLC, Boise, ID; Steven Zwierzynski, LEAD ATTORNEY, PRO HAC VICE, Seifer, Yeats, Zwierzynski & Gragg, LLP, Portland, OR.

Judges: Honorable Candy W. Dale, United States Magistrate Judge.

Opinion by: Candy W. Dale

Opinion

[*813] MEMORANDUM DECISION AND ORDER

INTRODUCTION

This case involves a dispute regarding the respective rights, obligations, and liabilities of the parties arising out of and relating to construction of The Fowler building in downtown Boise, Idaho. The Roost Project, LLC (Roost) and Andersen Construction Company (ACCO) entered into a contract (the Construction Agreement) to build The Fowler in December 2015. The project was delayed for a host of different reasons resulting in The Fowler being finished eight months after the initial contract completion date. As a result, Roost initiated this action against ACCO raising contract and tort claims. ACCO denies those claims and has filed counterclaims **[**2]** against Roost.

Presently before the Court are the parties cross motions for partial summary judgment, Roost's motion to amend the complaint to add punitive damages, and ACCO's motion to strike. The motions are fully briefed. The Court conducted a hearing on December 12, 2019. After careful consideration of the record, the parties' briefing and supporting materials, and oral argument, the Court finds there are several genuine issues of material fact in

this case which preclude summary judgment. The Court will therefore deny both summary judgment motions. The Court will also deny the motion to add punitive damages. The motion to strike will be granted in part and denied in part.

FACTS[1]

1. The Construction Agreement

On December 11, 2015, Roost and ACCO entered into the Construction Agreement to build The Fowler, a mixed-use building predominately developed as a residential apartment complex. (Dkt. 10-1.) The substantial completion date for the project was in June 2017. (Dkt. 10-2, Ex. B.) The project broke ground on February 5, 2016, and was substantially completed on February 21, 2018, eight months after the contract completion date. The parties disagree over which party breached and which **[**3]** party performed under the Construction Agreement and whether either party is otherwise liable for or entitled to damages outside of the contract.

Roost contends ACCO breached several terms of the Construction Agreement and is not entitled to any relief. Generally, Roost argues ACCO failed to deliver the project on time and failed to provide the project schedule updates, reports, and notices required by the Construction Agreement. Further, Roost argues ACCO mismanaged **[*814]** the project, misrepresented the project's status, and concealed information about the project from Roost. ACCO disputes Roost's claims, countering that it performed under the terms of the Construction Agreement, did not misrepresent or conceal information, properly managed the project, and that Roost failed to act in good faith by refusing to approve changes and equitable adjustments to the project schedule.

Several provisions of the Construction Agreement are implicated by the parties' positions in this case. The following are particularly relevant.

A. Contractor's General Representations and Warranties

Section 5.9 states, in relevant part:

> Contractor makes the following express representations and warranties to Owner, which are continuing **[**4]** during the term of this Agreement:
> 5.9.2 Contractor has thoroughly and carefully examined the Contract Documents (as a contractor, not a licensed design professional), and has found them to be complete, coordinated and suitable for Contractor's performance of the Work in accordance with this Agreement.
> 5.9.3 Contractor has thoroughly and carefully examined the Project Schedule and has found it to be complete and to provide suitable time for Contractor's performance of the Work in accordance with this Agreement.
> 5.9.6 Contractor is familiar with the local and other conditions which may be material to Contractor's performance of its obligations under the Contract Documents (including, but not limited to transportation, seasons and climates, access, the handling and storage of materials and fuel and availability and quality of labor and materials). Contractor has thoroughly and carefully examined the market conditions related to the Work, including the availability and pricing of materials, labor, supplies and all other things necessary for the performance of the Work and found them to be adequate for Contractor to perform the Work as provided in the Contract Documents.

(Dkt. 10-1 at § 5.9.)

B. [**5] Project Schedule Notifications, Delays, and Changes

The Construction Agreement states that ACCO will keep Roost "fully informed of Contractor's performance of the Work so Owner can have timely and meaningful opportunities to review and input" and "Contractor will promptly notify Owner of any actions or decisions required of Owner for Contractor to timely and properly perform the Work, and any deadlines pertaining thereto to prevent delays in the Work." (Dkt. 10-1 at § 5.2.1 and § 5.2.2.) Article 8.1 addresses the project schedule, stating:

> Contractor will commence performance of the Work upon Owner's notice to proceed and will diligently

[1] The parties each submitted a statement of facts with their respective summary judgment motions. (Dkt. 36, 40.) When discussing the facts, the parties' arguments, and the record herein, the Court will cite to the portion of the applicable statement of facts wherein the supporting documents are cited or will cite directly to the record or document itself.

> and expeditiously continue its performance until all Work has been fully completed. The dates in the Project Schedule are of the essence and will not be exceeded by Contractor without Owner's prior consent or as permitted in Section 8.3.2. If and when Contractor has reason to believe that any date in the Project Schedule may not be met, Contractor will make appropriate recommendations to Owner to keep the Work on schedule, bring the Work back on schedule and/or mitigate potential impacts of a delayed performance. Contractor represents and warrants to Owner that the Substantial **[**6]** Completion Deadline provides a reasonable time for completing the entire Work, including the time specified for the review of Contractor Submittals by Owner and Governmental Authorities.

[*815] Delays and extensions of time to the project schedule are covered by Article 8.3 which requires the Contractor to diligently avoid delays in timely performance and to immediately notify the Owner of any matter wholly or partially preventing or delaying timely performance and provide regular reports concerning the same. (Dkt. 10-1 at § 8.3.1.) Section 8.3.2, in particular, sets for the process for the Contractor to make a claim for an equitable adjustment to the project schedule where "the critical path of the Contractor's performance is wholly or partially prevented or delayed due to" certain listed circumstances. (Dkt. 10-1 at § 8.3.2.)

Changes in the work by the Owner are addressed in Article 10 of the Construction Agreement which sets forth the procedures for change orders and change directives. (Dkt. 10-1 at § 10.2, § 10.3.) Article 17 covers resolution of claims, setting forth the process for the Contractor to make a claim and setting forth the parties' rights and responsibilities in resolving a claim.

2. Construction of The Fowler

Between **[**7]** groundbreaking in February 2016 and July 2016, ACCO's superintendent, Tom Hayes, provided project schedule updates to Roost on February 16, March 28, April 22, and June 27. Hayes provided a master schedule update on July 20, 2016 which reported a new substantial completion date of June 16, 2017, a delay of a few days from the original contract completion date. ACCO attributed the delay to problems with the project's design and the concrete subcontractor's lack of adequate manpower and quality control issues. (Dkt. 40 at 9-12.)

Roost alleges the project schedule, from its inception, was not buildable and the Hayes updates made unrealistic predictions, did not provide the information required by the Construction Agreement, and concealed the true status of the project which was already behind schedule because of ACCO's mismanagement, poor scheduling, and failure to account for the local labor market. (Dkt. 36 at 9-12.) ACCO disputes that it concealed information about the project, arguing the schedules contained information about the project's delays and that ACCO believed the project was still buildable by the June 2017 completion date despite the delays. (Dkt. 40 at 8-13.) Further, ACCO **[**8]** maintains Roost knew of the problems delaying the project, as it had unfettered access to monitor and physically observe the construction progress and the delays were discussed with Roost in meetings, field reports, and emails. (Dkt. 40 at 6-12.)

In July 2016, Carl Benjamin replaced Hayes as ACCO's superintendent on the project. (Dkt. 40 at ¶ 28.) In early September 2016, Benjamin issued new master schedules. Roost alleges the new master schedules contained none of the information from the prior schedules, making it impossible to monitor the status of the project and, further, that the September 2016 schedules were unreasonable and concealed project information. (Dkt. 36 at 12-14, 25.) Roost further claims that, during the fall of 2016, it requested project information from ACCO but received no official schedule updates as required by the Construction Agreement, and the reports it did receive from ACCO concealed important information about the project's delays. (Dkt. 36 at 12-23, 25.) During this time, the summer/fall of 2016, ACCO argues the project was delayed by subcontractor labor shortage issues and disputes that it concealed information about the project; ACCO maintains that Roost **[**9]** was aware of the issues delaying the project. (Dkt. 40 at 13-17.) Regardless of the delays, ACCO asserts it still believed it could complete the project by the June 2017 **[*816]** substantial completion date. (Dkt. 40 at 16.)

On December 4, 2016, winter weather arrived in Boise. The following day, ACCO submitted a change request asking Roost for a one-day extension due to adverse weather conditions. Roost denied the request on December 6, 2016. The winter weather in late 2016 to early 2017 is the subject of much dispute between the parties with regard to their respective obligations and performance under the Construction Agreement and the impact of the weather on the project in terms of delays and damage to the building.

Roost alleges ACCO's mismanagement of the project from the beginning resulted in the roof not being completed and the building not being enclosed on time, causing the building to be exposed to the winter weather. (Dkt. 36 at 24.) Roost further alleges ACCO failed to take proper action to protect the building from the weather, and that ACCO failed to perform its obligations under the Construction Agreement or initiate any of the contract procedures to request relief for the delay. **[**10]**

ACCO argues the winter storm was unforeseeable and beyond its control and that it satisfied the Construction Agreement's notice requirements. (Dkt. 40 at 17-19.) ACCO further argues Roost was aware the winter weather had caused delays in the construction, noting Roost submitted and pursued a claim to the builder's risk insurance on January 13, 2016, relating to the weather, and the parties had ongoing communications about the delays and project schedule. (Dkt. 40 at 19-23.)

From January 2017 through April 2017, the substantial completion date reported on the project schedules remained June 2017. Roost alleges that, during this time, ACCO failed to provide schedule updates as required by the Construction Agreement and concealed information about labor shortages, its ability to timely complete the work, and the extent of project's delay. (Dkt. 36 at 25-31.) ACCO claims at this time, Roost knew the project was delayed, the issues causing the delay, and that there was insufficient information for ACCO to provide an updated schedule. (Dkt. 40 at 18-23.)

On May 6, 2017, ACCO issued a schedule update reporting a new completion date of January 26, 2018. (Dkt. 36 at 31, ¶ 112.) ACCO attributed **[**11]** the delay to the winter storm and labor shortages. (Dkt. 40 at 23-24.) Roost responded that the new schedule was unacceptable and argues now that ACCO knew it could not meet the new schedule, that ACCO was continuing to conceal and misrepresent information about the project, and that Roost was considering terminating ACCO from the project. (Dkt. 36 at 31-34.)

In response, ACCO created a more aggressive timeline for completing the project and issued a schedule update in June 2017 with a substantial completion date in early November 2017. (Dkt. 40 at ¶ 53.) This schedule, Roost argues, was "fabricated," because it was based on an accelerated schedule that ACCO knew was impossible to meet given the labor shortage and that ACCO continued to conceal and misrepresent information from Roost. (Dkt. 36 at 34-37.) ACCO maintains it did not conceal or misrepresent information from Roost and that it was "attempting to hit the November 2017 substantial completion date." (Dkt. 40 at 24-26.) Based on the information and assurances provided by ACCO, Roost decided to not terminate ACCO from the project. (Dkt. 36 at 37, ¶ 141.)

In the summer and fall of 2017, the project's substantial completion date **[**12]** remained early November 2017. Roost expressed concerns to ACCO about timely completion of the project and requested information from ACCO but, Roost argues, **[*817]** it received no official schedule updates and only "rudimentary" schedule information. (Dkt. 36 at 37-41.) Roost alleges during this time ACCO continued to misrepresent, conceal, and deprive Roost from important project information. ACCO maintains it did not conceal information, arguing it provided schedule updates and information and that Roost was aware of the problems with the project. (Dkt. 40 at 23-26.)

The Fowler was substantially completed on February 21, 2018. Following completion, the parties engaged in negotiations to close out the project, pay the subcontractors, and conclude their builder's risk insurance claim. During those negotiations, Roost alleges ACCO made demands concerning Roost's contract claim and leveraged the threat of subcontractor liens on the property to get Roost to agree to its demands. (Dkt. 36 at 41-42.) The parties ultimately agreed to a cooperation agreement to pay the subcontractors and jointly pursue and cooperate with the insurance claims. (Dkt. 36 at ¶ 170.)

On May 30, 2018, Roost filed its initial **[**13]** complaint in this case, which it amended on July 16, 2018, claiming: breach of the Construction Agreement; breach of the implied covenant of good faith and fair dealing; fraud; violation of the Idaho Consumer Protection Act; and breach of the implied warranty of workmanship. (Dkt. 1, 10.)[2] Roost also reserved the right to add a claim for punitive damages. On August 21, 2018, ACCO filed an answer and counterclaims for 1) breach of contract and the covenant of good faith and fair dealing; and 2) unjust enrichment and quantum meruit. (Dkt. 22.)

On September 25, 2019, Roost filed the present motion to amend the complaint to add punitive damages and

[2] The Court has jurisdiction over these proceedings based on diversity of citizenship pursuant to *28 U.S.C. § 1332*.

motion for partial summary judgment, seeking dismissal of ACCO's counterclaims. (Dkt. 34, 35.) On October 2, 2019, ACCO filed its motion for partial summary judgment on Roost's claims of fraud, violation of the Idaho Consumer Protection Act, and breach of the implied warranty. (Dkt. 39.) ACCO also filed a related motion to strike. (Dkt. 46.) The Court will first take up the motion to strike and next address the summary judgment motions and motion to add punitive damages.

STANDARD OF LAW

Summary judgment is appropriate when the evidence, viewed in **[**14]** the light most favorable to the non-moving party, demonstrates "there is no genuine issue of any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Galen v. County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007)*. Evidence includes "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...." *DeVries v. DeLaval, Inc., 2006 U.S. Dist. LEXIS 41599, 2006 WL 1582179, at *5 (D. Idaho June 1, 2006)*, report and recommendation adopted, *2006 U.S. Dist. LEXIS 55704, 2006 WL 2325176 (D. Idaho Aug. 9, 2006)*.

The moving party initially bears the burden to show no material fact is in dispute and a favorable judgment is due as a matter of law. *Celotex, 477 U.S. at 323*. If the moving party meets this initial burden, the non-moving party must identify facts showing a genuine issue for trial to defeat the motion for summary judgment. *Cline v. Indus. Maint. Eng'g & Contracting Co., 200 F.3d 1223, 1229 (9th Cir. 2000)*. The Court must grant summary judgment if the nonmoving party "fails to **[*818]** make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*.

DISCUSSION

1. Defendant's Motion to Strike

ACCO moves, under *Federal Rule of Evidence 408*, to strike materials and references to settlement and compromise statements from Roost's Statement of Facts and attached Exhibits. (Dkt. 46.)[3] Specifically, the email correspondence and attached documents from April 2018, after The Fowler was substantially **[**15]** completed, between Mike Brown, Patrick Boel, Martin Cloe, and Steve Jones.[4]

Under *Rule 408*, statements made during settlement negotiations generally cannot be used as evidence to either prove or disprove the validity or amount of a disputed claim or to impeach a statement made during such negotiations. *Rule 408* is intended to promote non-judicial settlement of disputes by making evidence of settlement or attempted settlement inadmissible when offered to either prove or disprove the validity or amount of a disputed claim or for impeachment. *Fed. R. Evid. 408*, advisory committee's note (1972). Evidence of offers of compromise and settlement negotiations are, however, admissible for purposes other than establishing the validity, invalidity, or amount of the disputed claim. *Fed. R. Evid. 408(b)* ("The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.")

Courts have admitted evidence of settlement negotiations for another purpose where that purpose is not the validity or amount of a disputed claim; such as to prove the existence and terms of the settlement agreement itself, **[**16]** *Seymour v. RenaissanceHealthcare Group, LLC, No. 3:14-CV-144-PLR-HBG, 2015 U.S. Dist. LEXIS 39939, 2015 WL 1458049, at *4 (E.D. Tenn. March 30, 2015)* (citing cases), or to prove a party's knowledge of a legal obligation, notice, or concealment to avoid a legal obligation, *In re: General Motors LLC Ignition Switch Litigation, 14-MD-2543(JMF), 2015 U.S. Dist. LEXIS 161741, 2015 WL 7769524, at *2-3 (S.D.N.Y. Nov. 30, 2015)*.

Roost argues the emails and exhibits referenced in ACCO's motion to strike are admissible under *Rule*

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[3] The motion to strike was initially brought under both *Rule 408* and Civil Rule of Procedure 12(f). ACCO agrees it is precluded from raising Rule 12(f) on this motion. (Dkt. 59.) The Court will therefore address only *Rule 408* in ruling on the motion.

[4] ACCO seeks to exclude: Paragraphs 165-171 in Roost's Statement of Facts (Dkt. 36); Exhibit 44 to the Affidavit of Bradley J. Dixon (Dkt. 36-4); and Exhibits Z, AA, BB, CC, and DD attached to Patrick Boel's Affidavit (Dkt. 36-2). (Dkt. 59 at 3.)

408(b) for another purpose, as evidence supporting Roost's motion to add a claim for punitive damages. (Dkt. 51.) The exhibits, Roost contends, show ACCO made threats and demands related to the payment of subcontractors, the insurance claim, and liquidated damages claim which evidence bad faith and bad acts needed to pursue punitive damages.

The Court finds the exhibits are admissible for the limited purpose of Roost's motion to add a claim for punitive damages. *See* Fed. R. Evid. 408, advisory committee's note (2006) ("Rule 408 in inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation."); *Malmquist v. OMS Nat. Ins. Co., No. 09-1309-PK, 2011 U.S. Dist. LEXIS 85565, 2011 WL 3298651, at *3 (Aug. 1, 2011)*. ACCO's motion to strike is denied in this regard.

The exhibits are not, however, admissible as evidence of any of the contract-based **[*819]** claims or to prove the validity or amount of those disputed claims. The motion to strike is **[**17]** granted to the extent the evidence is offered in support of either parties' motion for summary judgment on the breach of contract claims. The Court makes no determination at this time on the admissibility of this evidence at trial for any claims or any purpose.

2. Plaintiff's Motion for Partial Summary Judgment

Roost moves for partial summary judgment on ACCO's counterclaims. (Dkt. 35.) ACCO argues genuine issues of material fact preclude summary dismissal of the counterclaims. (Dkt. 44.) For the reasons that follow, the Court will deny Roost's motion.

A. Breach of Contract and Covenant of Good Faith and Fair Dealing

ACCO's breach of contract and the covenant of good faith and fair dealing claims allege Roost failed to pay ACCO for all of the costs it incurred due to delays to the project completion caused by Roost, including: failing to provide complete and adequate design documents; changing the design documents; refusing to adjust the project completion date for delays beyond ACCO's control; and refusing to approve change orders. (Dkt. 22.) ACCO further alleges Roost failed to obtain adequate insurance and unjustifiably charged ACCO liquidated damages. (Dkt. 22.)

Roost argues summary **[**18]** judgment on these counterclaims is appropriate because ACCO breached the contract by failing to timely deliver the project and is not entitled to any adjustments or other relief under the contract. (Dkt. 35.) ACCO counters, arguing genuine issues of material fact exist as to whether: Roost breached the Construction Agreement by refusing change requests; ACCO provided proper notice for equitable adjustments to the contract schedule; the winter weather and the labor shortage were events of force majeure; and, Roost breached the contract by failing to obtain adequate insurance coverage. (Dkt. 44.)

i. Change Requests and Equitable Adjustments

Roost argues ACCO failed to comply with the Construction Agreement's provisions for submitting an equitable adjustment claim or a change request. (Dkt. 35.) ACCO maintains it satisfied the contractual requirements and that Roost improperly denied its requests for schedule adjustments. (Dkt. 44.)

[*820] Section 8.3.2 of the Construction Agreement sets forth the process for equitable adjustments to the project schedule, stating:

> 8.3.2 If the critical path of Contractor's performance is wholly or partially prevented or delayed due to (a) any failure of Owner to fulfill its **[**19]** obligations to Contractor under the Contract Documents, (b) any interference with Contractor's performance by the action or inaction of Owner or, its employees, agents or separate contractors, (c) the occurrence of a Force Majeure or (d) any other matter in which Contractor believes Owner bears responsibility under the Contract Documents, Contractor may make a Claim for an Equitable Adjustment to the Project Schedule for any impacts on Contractor's performance that Contractor could not reasonably have been expected to avoid, overcome or mitigate through the exercise of due foresight and reasonable due diligence; provided, however, as a condition precedent to making any Claim for an Equitable Adjustment, Contractor will specifically notify Owner of (a) the specific events or occurrences that Contractor claims to be causing the prevention or delay of Contractor's performance, (b) if known to Contractor, the party or parties that Contractor believes to be responsible for the events or occurrences, and,(c) if known to Contractor, what actions Owner can take to avoid, overcome or mitigate the effects of the events or occurrences. Contractor is not entitled to any

> Equitable Adjustment for **[**20]** any impacts on Contractor's performance without prompt delivery of the foregoing notice to Owner (in this instance "prompt delivery" shall mean 24 hours or less). Owner will promptly respond to Contractor's notice. Upon receipt of an impact notice hereunder from Contractor, Owner will promptly use commercially reasonable efforts to cure impacts that are Owner's responsibility, will keep Contractor reasonably informed of Owner's efforts and will coordinate the efforts with Contractor. Contractor acknowledges and agrees that its sole remedy against Owner for any prevention or delay of Contractor's performance from any cause whatsoever is an Equitable Adjustment to the Project Schedule.

Section 10 of the Construction Agreement sets forth the process for change orders and change directives for Roost to make changes to the project work and the process for ACCO to agree, disagree, or implement those change orders or directives. Change orders were written agreements between the parties for changes to the project work. (Dkt. 10-1, Section 10.2.1.) Change directives were written orders from Roost to ACCO directing changes in the work. (Dkt. 10-1, § 10.3.)

Section 17.1 sets forth the process for ACCO to initiate a claim dispute, stating: **[**21]**

> 17.1.1 Contractor acknowledges the Owner's ability to investigate, remedy or mitigate Claims will be substantially prejudiced if Contractor does not initiate a Claim as soon as practical but in any event (a) before Contractor does anything to prejudice Owner's ability to investigate, remedy or mitigate the Claim, (b) no later than any applicable time obligation (including those set forth in Section 8.3.2), and (c) in any event no later than twenty-one (21) days after the date that Contractor first recognizes or should have recognized the occurrence or condition giving rise to the Claim, whichever is earlier.

(Dkt. 10-2 at § 17.1.1.) Article 18 states that "[a]ll notices...and other communications required or permitted by this Agreement must be in writing and delivered by hand..., [or] by electronic mail at the addresses set forth [herein]." (Dkt. 10-2 at Article 18.)

ACCO contends Roost improperly denied the majority of its requests for schedule adjustments resulting from the numerous change directives Roost issued during the course of the project; many of which related to changes in the design documents made during construction. (Dkt. 40 at 9-12.) Roost counters, arguing ACCO is not entitled to any adjustments **[**22]** because did not follow the Construction Agreement's claims procedure; in particular, the notice requirements. Further, Roost argues that ACCO warrantied the design documents, which ACCO knew were incomplete at the time of contracting, and accepted the project schedule when it signed the Construction Agreement. And, regardless, Roost asserts, the changes in the design documents were not the cause of the project's delay. (Dkt. 50 at 3.)

The Court finds genuine issues of material fact exist with regard to these claims, such as: what the parties' obligations were under the contract; the nature, number, type, and timing of changes **[*821]** to the design documents and the other change directives issued over the course of the project; the impact of those change directives on the project schedule; whether Roost met the contract requirements for making changes to the project work and handling requests for extensions of time; whether ACCO satisfied the Construction Agreement's processes for disputing change directives or making a claim for equitable adjustment. The materials filed by both parties to the Construction Agreement clearly show there are facts in dispute on these questions, including the conflicting **[**23]** expert witness reports. (Dkt. 36, 40); (Dkt. 36-1, Ex. A, Report of Stephen P. Warhoe, Ph.D.); (Dkt. 39-4, Ex. 1, Report of Jim Stoner, P.E., CMVP.) These disputes must be resolved by the fact finder at trial.

ii. Force Majeure Clause

ACCO asserts the project was delayed by force majeure events — the 2016-2017 winter weather and labor shortage — that warranted an equitable adjustment to the project's schedule. (Dkt. 44 at 6-17.) Roost argues ACCO failed to provide proper notice of a force majeure event and, regardless, the winter weather and labor shortage were not forces majeure because they were generally foreseeable, not beyond ACCO's reasonable control, and the risks of such events were specifically assigned to ACCO in the Construction Agreement's warranty provisions. (Dkt. 50.) ACCO contends there is no foreseeability requirement in the Construction Agreement's force majeure clause and, regardless, that there are genuine issues of material fact as to whether the events were beyond ACCO's reasonable control and unforeseeable at the time the Construction Agreement was signed, and whether ACCO provided the requisite notice of the events to be entitled to an equitable adjustment. (Dkt. 44.)

A force majeure **[**24]** excusing event, by its very nature, must be unforeseeable to some extent at the time of contracting. Black's Law Dictionary defines a force majeure clause as "[a] contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." Black's Law Dictionary 673-74 (8th ed. 2004). Even where, as here, a contract's force majeure clause does not expressly use the word "foreseeability," courts consider foreseeability when determining whether the event qualifies as force majeure. *See e.g.* *Burns Concrete, Inc. v. Teton County, 161 Idaho 117, 384 P.3d 364 (Idaho 2016)*; *In re Flying Cow Ranch HC, LLC, Case No. 18-12681-BKC-MAM, 2018 Bankr. LEXIS 4147, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018)*.

The Construction Agreement defines Force Majeure as:

> "**Force Majeure**" means acts, events or occurrences beyond the reasonable control of Contractor or Owner which delay or otherwise prevent Contractor or Owner from performing its respective obligations under the Contract Documents (other than an obligation to pay money), including fires; floods; epidemics; lightning; earthquakes; quarantine; blockade; governmental acts, orders or injunctions; war; insurrection or civil strife; sabotage; unusual delays in transportation through no fault **[**25]** of the party claiming Force Majeure; explosion; boycotts, strikes, lockouts, picketing, work slow-downs and other labor disputes provided that the labor disputes do not involve labor employed by Contractor, any Subcontractor or any sub-subcontractor of any tier; material or equipment shortages through no fault of the party claiming Force Majeure (or their Subcontractors or sub-subcontractors of any tier); changes in law; and any other similar acts, events or occurrences, but only to the extent they are beyond the reasonable control of Contractor or Owner despite prudent and diligent efforts to prevent, avoid, delay or mitigate the effect of the acts, events or occurrences. Applicable acts, events or occurrences do not include (a) those that are the result of willful or negligent actions or inactions of either party; (b) those that do not have a real, quantifiable and adverse impact on the performance of the affected party; and (c) the failures or defaults of any Subcontractor or sub-subcontractor of any tier.

[*822] When read in its entirety, the Construction Agreement contemplates that force majeure qualifying events are unanticipated or unforeseeable, at least to some extent. *See* *Burns Concrete, 384 P.3d at 367* (quoting **[**26]** *Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 9 P.3d 1204, 1214 (Idaho 2000)* (In construing a written instrument, the Court must "consider it as whole and give meaning to all provisions of the writing to the extent possible."). The catch-all sentence of the clause refers to events beyond the reasonable control of the Contractor "despite prudent and diligent efforts to prevent, avoid, delay, or mitigate...." (Dkt. 10-1, Article 1.) The Construction Agreement's notice requirement for claiming an equitable adjustment due to a force majeure event expressly applies to "impacts on Contractor's performance that Contractor could not reasonably have been *expected* to avoid, overcome or mitigate through the exercise of *due foresight* and reasonable due diligence...." (Dkt. 10-1 at § 8.3.2) (emphasis added.)

The Court finds, however, that there are material facts in dispute precluding summary judgment on this issue. Namely, whether the winter weather or labor shortage were events ACCO could have foreseen at the time of contracting or had reasonable control over, such that either or both of those events qualify as force majeure under the Construction Agreement. The parties have pointed to conflicting evidence on those questions. *See e.g.* (Dkt. 35 at 12-19) (citing evidence that **[**27]** the weather and labor shortages were foreseeable and in ACCO's reasonable control); (Dkt. 44 at 12) (pointing to evidence that at the time construction began, Idaho's construction labor market had begun to surge); (Dkt. 44 at 14-15) (citing evidence that the daily snow depth between December 2016 and January 2017 was ten times higher than average); (Dkt. 50 at 8-9.)

Similarly, there are questions of fact and conflicting evidence as to whether the winter weather and labor shortage caused the project delays. Both sides have retained experts who offer differing opinions regarding the 2016-2017 weather and labor shortage and whether the delays to the project's completion were attributable to either of those events. *See e.g.* (Dkt. 36-1, Ex. A, Warhoe Report); (Dkt. 39-3, Ex. 1, Report of Alicia C. Wasula Ph.D.); (Dkt. 39-4, Ex. 1, Stoner Report.)

Likewise, there are disputes regarding the parties' performance under the Construction Agreement, including whether ACCO provided proper notice of the force majeure event, whether Roost waived any such notice, whether an equitable adjustment was warranted,

and whether the risks of the winter weather and labor shortage were expressly assigned under **[**28]** the warranty provisions of the Construction Agreement.

iii. Builder's Risk Insurance

Roost seeks summary judgment on ACCO's claim that Roost breached the Construction Agreement by failing to obtain adequate insurance coverage. (Dkt. 35 at 19.) Roost maintains it was under no obligation to purchase insurance for the project under the express terms of the contract, pointing out that Section 12.3.1 of the Construction Agreement required ACCO, not Roost, to purchase builder's risk insurance. (Dkt. 50 at 10.) Roost further argues the Construction Agreement did not require the insurance to cover mold.

The Construction Agreement states:

> Section 12.3.1 Coverage Required. Contractor agrees to purchase and maintain property insurance for the entire Work on a replacement cost basis with commercially reasonable deductibles. The policy will be on a builder's risk "all-risk" or equivalent policy form insurance **[*823]** against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage,...windstorm or hail,...water damage, weight of rain, snow, ice or sleet....

(Dkt. 10-1, Ex. 1 at § 12.3.1.) Despite this express language, ACCO argues Roost elected to purchase the insurance coverage and, when **[**29]** doing so, procured a policy that provided for less coverage than what was required under the Construction Agreement. (Dkt. 44.)

"In Idaho, 'parties to a written contract may modify its terms by subsequent oral agreement or may contract further with respect to its subject matter.'" *Beyer v. Storey, No. 1:12-cv-00231-BLW, 2012 U.S. Dist. LEXIS 154376, 2012 WL 5273324, at * 3 (D. Idaho Oct. 24, 2012)* (quoting *Scott v. Castle, 104 Idaho 719, 662 P.2d 1163, 1168 (Idaho 1983)*). "One party, however, cannot unilaterally alter the contract's terms. Instead, modification requires assent and a meeting of the minds by both parties." *Id.* "Assent and a meeting of the minds may be implied by the parties' actions or course of conduct." *Id.* "The party asserting modification bears the burden of proving the modification by clear and convincing evidence." *Id.* "When a claim requires clear and convincing evidence, the question on summary judgment is whether a reasonable jury could conclude that clear and convincing evidence supports the claim." *Id.* (citing *Liberty Lobby*, 477 U.S. at 255).

The Court finds material facts are in dispute as to whether Roost became obligated to purchase the insurance required under Section 12.3.1 of the Construction Agreement by its conduct and election to purchase the builder's risk insurance and whether the insurance purchased was sufficient to meet the terms of **[**30]** the contract. What the parties said, understood, and agreed with regard to the purchase of the insurance policy and whether those facts altered or amended the express language of Section 12.3.1, turns on disputed questions of fact that must be reserved for resolution by a jury.

B. Unjust Enrichment and Quantum Meruit

ACCO's second counterclaim for unjust enrichment and quantum meruit is an alternative equitable theory of recovery asserted in the event the Court deems the Construction Agreement unenforceable. (Dkt. 22.) On this claim, ACCO alleges Roost is responsible for paying ACCO for the reasonable value of the work ACCO performed on the project which Roost benefited from and was unjustly enriched by at ACCO's expense and detriment. (Dkt. 22.)

Roost's motion for summary judgment appears to cover both counterclaims. (Dkt. 35, 50.) The parties do not, however, address the second counterclaim independent from the first. (Dkt. 35, 44, 50.) Regardless, the Court has considered the motion for summary judgment as to the second counterclaim and will deny the same.

Both unjust enrichment and quantum meruit are based on equitable principles that imply a contract between the parties when there is no express **[**31]** agreement between parties but their conduct evidences an agreement. *Barry v. Pac. W. Const., Inc., 103 P.3d 440, 447 (Idaho 2004)* (citing *Peavey v. Pellandini, 97 Idaho 655, 551 P.2d 610, 613 (Idaho 1976)*). "To establish a claim for unjust enrichment under Idaho law a plaintiff must prove: (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." *Nelson-Ricks Cheese Company, Inc. v. Lakeview Cheese Company, **[*824]** LLC, 331 F.Supp.3d 1131, 1145 (D. Idaho 2018)* (citing ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 326 (Idaho 2016)*** (citing *Teton*

Peaks Inv. Co. LLC v. Ohme, 146 Idaho 394, 195 P.3d 1207, 1211 (Idaho 2008)). For a court to award quantum meruit damages, there must be facts supporting the dual inferences of a request by one party and performance by the other. Barry, 103 P.3d at 447.

The doctrine of unjust enrichment does not apply where there is an enforceable express contract between the parties covering the same subject matter. Wilhelm v. Johnston, 136 Idaho 145, 30 P.3d 300, 307 (Idaho. Ct. App. 2001). In that circumstance, the contract remedies afford adequate relief. Triangle Min. Co., Inc. v. Stauffer Chem. Co., 753 F.2d 734, 742 (9th Cir. 1985); Thomas v. Thomas, 150 Idaho 636, 249 P.3d 829, 836 (Idaho 2011). "However, an express contract cannot provide adequate relief when it is not enforceable." Thomas, 249 P.3d at 836. "[O]nly when the express agreement is found to be enforceable is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract." *Wolford v. Tankersley, 695 P.2d 1201, 1203 (Idaho 1984)*.

Although neither party argues the Construction Agreement is unenforceable, neither has conceded that fact nor has it yet been determined that **[**32]** the Construction Agreement is enforceable. Genuine issues of material fact prevent the Court from ruling as a matter of law on the enforceability of the provisions in the Construction Agreement at issue, and whether either party breached the Construction Agreement. Therefore, it is premature to dismiss ACCO's unjust enrichment counterclaim at this time. *See* Ada County Hwy. Dist. v. Rhythm Engineering, LLC, No. 1:15-cv-00584-CWD, 2016 U.S. Dist. LEXIS 119363, 2016 WL 4582045, at *3 (D. Idaho Sept. 1, 2016); DBSI/TRI V v. Bender, 130 Idaho 796, 948 P.2d 151 at 160 (Idaho 1997) (quoting *Woldford, 695 P.2d at 1203*). The motion for summary judgment, therefore, will be denied on ACCO's second counterclaim.

3. Defendant's Motion for Partial Summary Judgment

ACCO moves to dismiss counts three, four, and five of Roost's amended complaint alleging: fraud (count three), violation of the Idaho Consumer Protection Act (ICPA) claim (count four), and breach of the implied warranty of workmanship (count five). (Dkt. 39.)

A. Fraud Claim

Roost's fraud claim alleges ACCO made material misstatements of fact which ACCO knew to be false and intended for Roost to rely upon, Roost had no actual or constructive knowledge of the falsity of ACCO's misstatements when it relied upon them, the misstatements prevented Roost from discovering the truth about the project's status and exercising **[**33]** its options under the contract, Roost's reliance was justified, and Roost was injured as a result. (Dkt. 10 at ¶¶ 128-135.)

The elements of an action for fraud are: "(1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity [or ignorance of its truth]; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury." Frontier Development Group, LLC v. Caravella, 157 Idaho 589, 338 P.3d 1193, 1198 (Idaho 2014). "Each of the elements of fraud must be established by clear and convincing evidence." *Id.* "[W]hether fraud has been proven by clear and convincing evidence is for the determination of the trier of fact." *Id.* "Fraud is to be determined **[*825]** from all the facts and circumstances of the case." Penn Mut. Life Ins. Co. v. Ireton, 57 Idaho 466, 65 P.2d 1032, 1039 (Idaho 1937).

ACCO challenges the first, sixth, and eighth fraud elements, arguing Roost's fraud claim should be dismissed as a matter of law, because: 1) the alleged misstatements regarding the substantial completion date are not statements of fact but are, instead, non-actionable statements of future intent to perform under the contract; 2) Roost cannot claim it was ignorant of the alleged falsity of ACCO's statements **[**34]** regarding substantial completion because Roost had knowledge of the project's delays; and 3) Roost's knowledge precludes it from arguing justifiable reliance. (Dkt. 39.)

i. Statements of Fact

The complaint alleges ACCO made thirty-four material misstatements of fact concerning the project status, schedule, and reasons for delay which ACCO knew to be false. (Dkt. 10 at ¶¶ 129(i)-(xxxiv).) ACCO disputes that it made any fraudulent statements or misstatements and, regardless, argues the statements were non-actionable statements of future intent to perform. (Dkt. 39 at 5-7.) Roost counters, arguing ACCO's misstatements are actionable fraudulent statements because they were factual reports concerning the project required by the contract, which ACCO knew

were false at the time they were made and, alternatively, the statements were made with the intent to mislead and with no intention of keeping. (Dkt. 43 at 2-24.)

In general, "[a]n action for fraud or misrepresentation will not lie for statements of future events." *Country Cove Dev., Inc. v. May, 143 Idaho 595, 150 P.3d 288, 294 (Idaho 2006)* (quoting *Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 61 P.3d 557, 564 (Idaho 2002)*). "Opinions and predictions cannot form the basis of a fraud claim because they do not speak to matters of fact." *Id.* "[T]he representation forming the basis of a claim **[**35]** for fraud must concern past or existing material facts." *Magic Lantern Prods, Inc. v. Dolsot, 126 Idaho 805, 892 P.2d 480, 482 (Idaho 1995)*.

An exception to the general rule exists where "the speaker made the promise without any intent to keep it, but to induce action on the part of the promisee" or "the promise was accompanied by statements of existing fact which show the promisor's ability to perform the promise and those statements were false." *Gillespie v. Mountain Park Estates, LLC, 142 Idaho 671, 132 P.3d 428, 431 (Idaho 2006)*; *Country Cove, 150 P.3d at 294* ("An exception to the general rule exists where a false prediction or opinion is given with the intent to mislead."); *see also April Beguesse, Inc. v. Rammell, 156 Idaho 500, 328 P.3d 480, 490 (Idaho 2014)*. That is to say, a "promise or statement that an act will be undertaken...is actionable, if it is proven that the speaker made the promise without intending to keep it." *Magic Lantern Prods., 892 P.2d at 482*. To succeed under this exception, a plaintiff must prove the speaker had no intent of performing the future act or knew the facts were false when the promise was made.

ACCO cites two cases from other jurisdictions where the courts concluded intentionally misleading statements falsely indicating an intention to perform under a contract or concealing a breach of contract do not give rise to an tort action for fraud, independent from claims of breach of contract. (Dkt. 39 at 6-7) (citing *Bridgestone/Firestone, Inc. v. Recovery Credit Services, Inc., 98 F.3d 13, 19 (2nd Cir. 1996)*; *IKEA North America Servs., Inc. v. Northeast Graphics, Inc., 56 F.Supp.2d 340, 342 (S.D.N.Y. 1999)*). Those cases involved intentionally false **[**36]** promises to perform in the future under a contract.

Here, however, the alleged fraudulent statements were not promises to **[*826]** perform in the future but were, instead, allegedly false statements or misrepresentations of The Fowler's then-existing construction status and completion schedule which ACCO knew were false at the time they were made. There is a fundamental difference between a statement about a fact that is demonstrably incorrect at the time it is made, and therefore actionable in fraud - such as the current status of the project, reasons for delay, and scheduling information - as opposed to a statement of future intent or promise to perform. Statements of future performance or intent are not statements of fact actionable in fraud, because their truth can only be judged in hindsight. Statements of fact such as those Roost has alleged here, on the other hand, were either true or untrue at the time they were made.

The Court finds Roost has pointed to evidence in the record raising genuine issues of material fact on the claim of fraud. Roost has identified evidence in the record upon which a reasonable jury could conclude ACCO made misstatements about the project's status, construction **[**37]** schedule, and substantial completion date that ACCO knew were false at the time they were made and, therefore, actionable in fraud. Alternatively, there are genuine issues of material fact as to whether the alleged misstatements were promises of future intent that ACCO made to mislead and with no intention of keeping. (Dkt. 43 at 22-24.)

Roost points to communications by ACCO which, Roost argues, establish that ACCO made statements of fact about the project that it knew were false when the statements were made and that the statements were given with the intent to mislead. (Dkt. 36 at ¶¶ 129-155.) For instance, Roost alleges ACCO's updates and communications of the project's status were false and the schedules ACCO provided were "fabricated" to report substantial completion dates that ACCO knew it could not meet. (Dkt. 36 at 36-37); (Dkt. 43 at 16-17.) ACCO disputes these arguments, asserting the evidence does not show ACCO made any false or fraudulent statements, the schedules were not fabricated, and there was no intent to deceive or mislead. (Dkt. 40 at ¶¶ 3, 37, 54); (Dkt. 55.)

ii. Ignorance of the Falsity of the Statement

ACCO argues Roost had first-hand knowledge of the events causing **[**38]** the project's delays — i.e., design problems, labor shortage, quality control issues, and winter weather - such that it cannot now claim it was ignorant of the allegedly false misstatements. (Dkt. 39.)

ACCO points out that Roost participated in OAC[5] meetings, and walk-throughs, and actively monitored The Fowler's progress. Roost counters that its general knowledge of the issues delaying the project is wholly different from the information ACCO was contractually required to provide concerning the critical path of the project. (Dkt. 43 at 2-5.) ACCO maintains that it provided information to Roost as required by the Construction Agreement, it did not conceal any information, and Roost has not shown how the information allegedly falsified or concealed was different from Roost's own general knowledge about the project's status. (Dkt. 55 at 6-15.)

The Court finds conflicting material facts exist on this issue. Whether ACCO's statements concerning the project's status were false and whether Roost knew they were false are both disputed questions. Roost has identified evidence, such as ACCO's internal communications, upon which a reasonable jury could conclude ACCO did not believe it could meet **[**39]** the schedules it provided to Roost and ACCO **[*827]** concealed that information from Roost. There is also countering evidence that Roost was aware of the problems and delays with the project which gives rise to a genuine issue of fact as to Roost's claim it was ignorant of the falsity of the statements.

iii. Justifiable Reliance

ACCO argues Roost's knowledge of the project's ongoing construction status and delays precludes Roost from claiming it justifiably relied on the alleged misrepresentations. (Dkt. 39 at 8.) Roost maintains its reliance on ACCO's alleged false statements was justified because ACCO was contractually required to provide truthful and complete schedules, updates, and reports. (Dkt. 43 at 2-5, 18-22.) Further, Roost asserts its own investigation and monitoring of the project does not negate its justifiable reliance on the allegedly false information it received, because ACCO concealed information making it impossible for Roost to have discovered the inaccuracy or falsity of the representations. (Dkt. 43 at 20-22.)

Genuine issues of material fact exist on this element, such as what information ACCO was required to provide under the Construction Agreement, when and what information **[**40]** was provided to Roost, whether ACCO concealed or misrepresented material information from Roost, and what Roost knew concerning the project's status, delays, and scheduling. These disputed facts must be reserved for the factfinder to resolve at trial.

B. Idaho Consumer Protection Act Claim (ICPA)

The ICPA is remedial legislation intended to deter unfair and deceptive trade practices and is to be construed liberally. *Western Acceptance Corporation, Inc. v. Jones, 117 Idaho 399, 788 P.2d 214, 216 (Idaho 1990)*. "An act or practice is unfair if it is shown to possess a tendency or capacity to deceive consumers." *Kidwell v. Master Distributors, Inc., 615 P.2d 116, 122 (Idaho 1980)*. It is not necessary to prove actual intent to deceive or actual deception on behalf of the defendant, as long as a tendency or capacity to mislead consumers has been established. *Id. at 122-23*.

Roost's fourth cause of action alleges ACCO violated the ICPA by engaging in misleading, false, and deceptive acts or practices by misrepresenting its business skills in order to obtain Roost's business; making repeated assurances of its substantial performance; failing to comply with its obligations to report and provide updated and correct schedules; and otherwise misrepresenting the status of the project, all of which interfered with Roost's contractual rights and ability to pursue the insurance **[**41]** claim. (Dkt. 10 at ¶ 141.)

ACCO argues this claim should be dismissed as a matter of law, because it is predicated upon ACCO's alleged fraud. (Dkt. 39.) As discussed above, genuine issues of material fact preclude summary judgment on the fraud claim. For the same reasons, this claim also survives. There are material facts in dispute as to whether ACCO engaged in unfair or deceptive trade practices.

C. Breach of the Implied Warranty of Workmanship

Roost's fifth cause of action claims ACCO breached the implied warranty of workmanship by "failing to plan and prepare for anticipated snowfall, failing to place a tarp over The Fowler to prevent snow from accumulating inside the top floor of the building, and melting accumulating snow into the structure, rather than shoveling the snow from the area." (Dkt. 10 at ¶ 148.) In its initial brief and during oral argument, ACCO moved

[5] "OAC" meetings refers to Owner-Architect-Contractor meetings.

for summary judgment on this claim, arguing the express **[*828]** warranty provision in the Construction Agreement, Section 7.7, governs and supplants the common-law implied warranty claim. (Dkt. 39 at 9.) Roost did not respond to that portion of ACCO's motion for partial summary judgment in either its briefing or during the hearing. (Dkt. **[**42]** 43.)

A breach of the implied warranty of workmanship claim arises in contract. *Petrus Family Trust Dated May 1, 1991 v.* Kirk, 163 Idaho 490, 415 P.3d 358 369 (Idaho 2018); *see also* Employers Mut. Cas. Co. v. Donnelly, 154 Idaho 499, 300 P.3d 31 (Idaho 2013) (Breach of implied warranty of workmanship sounds in contract, rather than tort.). Much like ACCO's second counterclaim, discussed above, it is premature to dismiss Roost's fifth cause of action at this stage as a matter of law. It has not yet been determined whether the Construction Agreement or its terms, including the warranty provisions, are enforceable in this case. ACCO's motion for partial summary judgment will be denied at this time on this claim.

4. Plaintiff's Motion to Amend Complaint and Add Punitive Damages

Claims for punitive damages are substantive and Idaho law is therefore controlling in diversity cases. *See* Edmark Auto, Inc. v. Zurich American Insur. Co., No. 1:15-cv-00520-EJL-CWD, 2018 U.S. Dist. LEXIS 20205, 2018 WL 734654, at *12 (D. Idaho Feb. 6, 2018).

The standards governing claims for punitive damages are set forth in Idaho Code Section 6-1604 which provides that, after an appropriate pretrial motion and a hearing, the court must allow a party to amend the pleadings "if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient **[**43]** to support an award of punitive damages." Idaho Code § 6-1604(2). It is well established in Idaho that punitive damages are not favored and should be awarded only in the most unusual and compelling circumstances, and are to be awarded cautiously and within narrow limits. Manning v. Twin Falls Clinic & Hosp., Inc., 122 Idaho 47, 830 P.2d 1185, 1190 (Idaho 1992) (citing Jones v. Panhandle Distributors, Inc., 792 P.2d 315 (Idaho 1990). The decision whether to submit the punitive damages question to a jury rests within the sound discretion of the trial court. *Id.*

At the trial stage, an award of punitive damages is permissible where the party proves, "by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted." Idaho Code § 6-1604(1). At the motion stage, a plaintiff must show a "reasonable likelihood" that defendants "performed a bad act with a bad state of mind." Hall v. Farmers All. Mut. Ins. Co., 145 Idaho 313, 179 P.3d 276, 282 (Idaho 2008). "The determination of whether a party should be permitted to assert a claim for punitive damages is not based upon the type of case or claim [but instead]...revolves around whether the plaintiff is able to establish the requisite intersection of two factors: a bad act and a bad state of mind." Todd v. Sullivan Const. LLC., 191 P.3d 196, 201 (Idaho 2008) (citing Myers v. Workmen's Auto. Ins. Co., 140 Idaho 495, 95 P.3d 977, 985 (Idaho 2004)).

As to the first factor, punitive damages are an appropriate remedy only if the plaintiff establishes that "the defendant **[**44]** 'acted in a manner that was an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.'" Seiniger Law Office, P.A. v. North Pacific Ins. Co., 145 Idaho 241, 178 P.3d 606, 615 (Idaho 2008) (quoting Myers v. Workman's Auto Ins. Co., 95 P.3d 977, 985 ***[*829]*** (Idaho 2004)). As to the second factor, the mental state required to support an award of punitive damages is "'an extremely harmful state of mind, whether that be termed malice, oppression, fraud or gross negligence; malice, oppression, wantonness; or simply deliberate or willful.'" *Id.*

Here, Roost argues ACCO engaged in a continuing course of oppressive, fraudulent, malicious, and outrageous conduct amounting to a bad state of mind and bad acts, beginning with the original construction schedule that continued through the project's construction and after its completion. (Dkt. 34, 49.) Roost alleges the original construction schedule in the Construction Agreement was "unbuildable" from the outset, ACCO repeatedly misrepresented the project's status by reporting on-time completion and fabricating schedules, all the while knowing they could not finish the project by the completion date because of the problems and delays, and concealing the true status of the project from Roost by failing **[**45]** to give notice and provide accurate and truthful information as required under the Construction Agreement. (Dkt. 34 at

5-28) (Dkt. 49 at 3-9.)[6] Following the Project's completion, Roost argues ACCO threatened to lien the project and intentionally breach the contract in an effort to leverage Roost into settling its claims. (Dkt. 34 at 30) (Dkt. 49 at 10.) Roost alleges ACCO knew its misrepresentations and conduct would harm Roost and prevent Roost from exercising its contractual rights. (Dkt. 34 at 30-32.)

Having carefully reviewed the record, the Court finds Roost has not shown a reasonable likelihood that ACCO performed bad acts with a bad state of mind. *Hall, 179 P.3d at 282*. While punitive damages may be recovered in a contract action, *Cuddy Mtn. Concrete, Inc. v. Citadel Construction, Inc., 121 Idaho 220, 824 P.2d 151, 158 (Idaho Ct. App. 1992)*, breach of the underlying contract by itself is not sufficient to warrant an award of punitive damages, *General Auto Parts Co., Inc. v. Genuine Parts Co., 132 Idaho 849, 979 P.2d 1207, 1211 (Idaho 1999)*. In a contract action, an award of punitive damages generally is based on conduct which is unreasonable and irrational in the business context, and demonstrates a lack of professional regard for the consequences of the breach of the contractual agreement. *Cuddy Mtn. Concrete, Inc., 824 P.2d at 160*.

When the moving party's claims are reasonably disputed and there is substantial evidence that supports the non-moving **[**46]** party's claims, a motion to amend to assert punitive damages will not be allowed. *Hardenbrook v. United Parcel Servs., Co., No. CV07-509-S-EJL-CWD, 2009 U.S. Dist. LEXIS 99596, 2009 WL 3530735, at *6 (D. Idaho Oct. 26, 2009)* (citing *Strong v. Unumprovident Corp., 393 F.Supp.2d 1012, 1026 (D. Idaho 2005)* (Plaintiff did not established reasonable likelihood of proving "the requisite 'extremely harmful state of mind' and 'extreme deviation from reasonable standards'" because of conflicting evidence)).

The facts comprising ACCO's bad acts and bad state of mind alleged here, do not rise to an extreme deviation from reasonable standards of conduct in the construction business or the requisite extremely harmful state of mind needed to pursue a claim for punitive damages. Further, Roost **[*830]** has not established a reasonable likelihood of proving that ACCO's actions or state of mind rise to the level required to allow a claim for punitive damages given the conflicting evidence and the many factual disputes in this case.

The Court will, therefore, deny the motion to amend to add punitive damages. However, if the evidence at trial is sufficient for a jury to find, by clear and convincing evidence, that ACCO committed bad acts and with the requisite bad state of mind, Roost may, at that time, seek leave to submit the issue to the jury.

ORDER

NOW THEREFORE IT [47] IS HEREBY ORDERED:**

1) Plaintiff's Motion to Amended Complaint & Add Punitive Damages (Dkt. 34) is **DENIED**.

2) Plaintiff's Motion for Partial Summary Judgment (Dkt. 35) is **DENIED**.

3) Defendant's Motion for Partial Summary Judgment (Dkt. 39) is **DENIED**.

4) Defendant's Motion to Strike (Dkt. 46) is **GRANTED IN PART AND DENIED IN PART**.

DATED: February 4, 2020

/s/ Candy W. Dale

Honorable Candy W. Dale

United States Magistrate Judge

End of Document

[6] In support of its reply brief on the motion to amend, Roost filed a supplemental report from Roost's expert, Stephen P. Warhoe, which addresses the functionality of the "look-ahead schedules" that ACCO provided to Roost during the months of October, November, and December 2016. (Dkt. 64, 65.) During oral argument, ACCO was given leave to file a response to Mr. Warhoe's supplemental report, if needed. Counsel for ACCO later notified the Court and opposing counsel that no response was needed.

Positive
As of: February 17, 2023 5:54 PM Z

Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC

United States District Court for the District of Idaho

July 12, 2018, Decided; July 12, 2018, Filed

Case No. 4:16-cv-00427-DCN

Reporter
331 F. Supp. 3d 1131 *; 2018 U.S. Dist. LEXIS 117345 **

NELSON-RICKS CHEESE COMPANY, INC., an Idaho corporation, Plaintiff, v. LAKEVIEW CHEESE COMPANY, LLC, a Nevada limited liability company, Defendant.

Subsequent History: Affirmed by *Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC, 775 Fed. Appx. 350, 2019 U.S. App. LEXIS 24927, 2019 WL 3945943 (9th Cir. Idaho, Aug. 21, 2019)*

Prior History: *Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., 2017 U.S. Dist. LEXIS 150430 (D. Idaho, Sept. 14, 2017)*

Core Terms

webpage, damages, summary judgment, trademark, trademark infringement, website, infringement, commerce, Sheet, customers, likelihood of confusion, summary judgment motion, factors, cheese, internet, brand, Acquisition, confused, mislead, unfair competition, unjust enrichment, sophisticated, products, deceive, no indication, wholesalers, purchasers, buyers, expert testimony, internet search

Counsel: **[**1]** For Nelson-Ricks Cheese Company, Inc., an Idaho corporation, Plaintiff: Jared Wayne Allen, LEAD ATTORNEY, Idaho Falls, ID; John Michael Avondet, Beard St. Clair P.A., Idaho Falls, ID.

For Lakeview Cheese Company LLC, a Nevada limited liability company, Defendant: Christopher C McCurdy, LEAD ATTORNEY, Holland & Hart, Boise, ID; Teague Ian Donahey, LEAD ATTORNEY, Holland & Hart LLP, Boise, ID.

Judges: David C. Nye, United States District Judge.

Opinion by: David C. Nye

Opinion

[*1136] MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

Pending before the Court is Defendant Lakeview Cheese Company LLC's ("Lakeview") Motion for Summary Judgment. Dkt. 70. Lakeview has also filed a motion seeking to exclude the testimony of two of Plaintiff Nelson-Ricks Cheese Company's ("NRCC") experts from the Court's consideration in deciding the Motion for Summary Judgment. Dkt. 79. After holding oral argument on the motions, the Court took the matters under advisement. Also after oral argument, NRCC filed a Motion to Supplement the record with additional material in support of its opposition to **[*1137]** summary judgment. Dkt. 89. Upon review, the Court now issues the following decision GRANTING the Motion to Supplement, DENYING the Motion to Exclude, and GRANTING **[**2]** the Motion for Summary Judgment.

II. BACKGROUND

This is a trademark infringement case. The trademark at issue is the word mark "Nelson-Ricks Creamery Company" ("the Mark"). The two parties in this case own and operate various assets that formerly belonged to Nelson-Ricks Creamery Company ("Creamery"), a now defunct business entity.

Prior to 2012, Creamery owned facilities in Salt Lake City, Utah, and Rexburg, Idaho. Creamery also owned certain intellectual property including both the "Banquet" and "Nelson Ricks Creamery" brand names of cheese. In 2012, Lakeview purchased both the Salt Lake City facility and the Banquet brand from Creamery. The sale included the transfer of Creamery's www.banquetcheese.com website to Lakeview.

Importantly, the sale also included a limited license allowing Lakeview to make use of the Nelson Ricks Creamery brand name. In 2014, Creamery sold the Rexburg facility and the Nelson Ricks Creamery brand to NRCC Asset Acquisition LLC, an affiliate of NRCC.

NRCC's claims in this matter center on the "About Us" webpage from Creamery's original www.banquetcheese.com website. The "About Us" webpage detailed Creamery's history, story, and the historical affiliation of **[**3]** Nelson-Ricks Creamery Company and the Banquet brand. In 2014, contemporaneously with Creamery's sale to NRCC Asset Acquisition, Creamery terminated Lakeview's limited license agreement to use the Mark. As a result, Lakeview updated Creamery's website to remove the "About Us" webpage, making it no longer accessible via www.banquetcheese.com.

Approximately one year later, in April 2015, NRCC obtained trademark registration for "Nelson-Ricks Creamery Company." One year after that, NRCC became aware that, even though the "About Us" webpage was no longer linked to the www.banquetcheese.com website, if manually typed into a web-browser, a person could still access the page, in the same form as when it was created by Creamery, and containing the trademarked "Nelson-Ricks Creamery Company" Mark. NRCC sent Lakeview a cease and desist letter demanding that the information be changed or taken down. Lakeview altered the "About Us" page and removed any reference to Nelson Ricks Creamery. Those actions aside, this lawsuit ensued. NRCC alleges six trademark related claims against Lakeview: (1) trademark infringement under the Lanham act; (2) common law trademark infringement; (3) unfair competition; **[**4]** (4) unfair methods and practices; (5) unjust enrichment; and (6) tortious interference with prospective economic advantage.

Lakeview now moves for summary judgment on all counts. Additionally, in evaluating summary judgment, Lakeview asks the Court to exclude from consideration the testimony of two of NRCC's experts. The Court will address each matter in turn.

During oral argument, the Court requested that the parties supplement the record with more accurate pictures of the webpages at issue (as those provided in the record were out of focus or otherwise difficult to read). The parties prepared a joint submission, which the Court now accepts. Dkt. 93.

Additionally, NRCC filed a Motion to Supplement the record, dkt. 89, in support **[*1138]** of its opposition to summary judgement. The Court will also address this motion.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. This Court's role at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th Cir. 2017)* (citation **[**5]** omitted). In considering a motion for summary judgment, this Court must "view[] the facts in the non-moving party's favor." *Id.* To defeat a motion for summary judgment, the respondent need only present evidence upon which "a reasonable juror drawing all inferences in favor of the respondent could return a verdict in [his or her] favor." *Id.* (citation omitted). Accordingly, this Court must enter summary judgment if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The respondent cannot simply rely on an unsworn affidavit or the pleadings to defeat a motion for summary judgment; rather the respondent must set forth the "specific facts," supported by evidence, with "reasonable particularity" that precludes summary judgment. *Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001)*.

B. Exclusion of Expert Testimony

Even though this case is not at the trial stage, the extent to which experts may render an opinion is addressed under the well-known standard first enunciated in *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and its progeny, and now set forth in *Rule 702 of the Federal Rules of Evidence.* *See* *Moore v. Deer Valley Trucking, Inc., No. 4:13-CV-00046-BLW, 2014 U.S. Dist. LEXIS 141589, 2014 WL 4956241, at *1 (D. Idaho Oct. 2, 2014)*.

Rule 702 establishes several requirements for

admitting **[**6]** an expert opinion. First, the evidence offered by the expert must assist the trier of fact either to understand the evidence or to determine a fact in issue. *Primiano v. Cook, 598 F.3d 558, 563 (9th Cir. 2010)*; Fed. R. Evid. 702. "The requirement that the opinion testimony assist the trier of fact goes primarily to relevance." *Id.* (Internal quotations and citation omitted).

Additionally, the witness must be sufficiently qualified to render the opinion. *Id.* If specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified by knowledge, skill, experience, training or education may offer expert testimony where: (1) the opinion is based upon sufficient facts or data, (2) the opinion is the product of reliable principles and methods; and (3) the witness has applied those principles and methods reliably to the facts of the case. Fed. R. Evid. 702; Daubert, 509 U.S. at 592-93; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The inquiry is a flexible one. *Primiano, 598 F.3d at 564*. Ultimately, a trial court must "assure that the expert testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* (internal quotation marks and citation omitted).

IV. ANALYSIS

A. Motion for Summary Judgment

Lakeview argues that all of NRCC's claims fail as a matter of law and because **[*1139]** there are no **[**7]** disputed facts in this case. The Court will address each cause of action in turn. However, the Court will place extra emphasis on the first claim, as the analysis there is relevant to later claims.

1. Trademark Infringement Under the Lanham Act

In order to prevail on a claim for trademark infringement, NRCC must establish that: (1) it is the owner of a valid and protectable trademark; (2) the defendant used the mark in commerce; (3) the defendant's use of the mark is likely to cause confusion; and (4) NRCC has suffered damages. 15 U.S.C. § 1125(a); Adobe Sys. Inc. v. Christenson, 809 F.3d 1071, 1081 (9th Cir. 2015) (citing Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1030 (9th Cir. 2010)).

Commercial use of the mark is a jurisdictional predicate. Bosley Med Inst., Inc. v. Kremer, 403 F.3d 672, 676 (9th Cir. 2005). If a defendant does not use the mark in commerce, a plaintiff's claim for trademark infringement fails as a matter of law. *Id.* If commercial use is established, then the "core element of trademark infringement" is "[p]rotecting against a likelihood of confusion," which helps to "ensur[e] that owners of trademarks can benefit from the goodwill associated with their marks" and "that consumers can distinguish among competing producers." Adobe Sys. Inc., 809 F.3d at 1081 (quoting Brookfield Communs., Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1053 (9th Cir. 1999); *Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894, 901 (9th Cir. 2002)*).

a. Owner of a Valid Trademark

As stated previously, in 2012, when Lakeview purchased some of Creamery's assets, it also entered into a Limited License **[**8]** Agreement that allowed it to use the name "Nelson-Ricks Creamery Company." In March of 2014, when NRCC Asset Acquisition bought Creamery's remaining assets, Creamery—in anticipation of the pending sale—revoked this agreement with Lakeview. Lakeview immediately disconnected the "About Us" webpage that had the Mark's language. Creamery, however, retained the right to collect royalties from Lakeview, and the Mark did not officially become NRCC Asset Acquisition's until an escrow period of 180 days had closed. The Mark, therefore, could not become NRCC's until sometime after August 24, 2014.[1] On August 11, 2014, NRCC filed its application to register the Mark with the United States Patent and Trademark Office ("USPTO"), and on April 21, 2015, NRCC registered the Mark with the USPTO.

Lakeview contends that because NRCC did not have a valid and enforceable trademark prior to August 24, 2014, (when NRCC Assets Acquisition actually acquired the rights to the Nelson-Ricks Creamery Company Mark) any use by Lakeview prior to that date is irrelevant and NRCC only had a valid trademark after August 24, 2014.

NRCC asserts that it had a common law trademark prior

[1] There is nothing in the record proving a valid assignment of assets, including the Mark, from NRCC Asset Acquisition to NRCC, which brings into doubt NRCC's standing to bring this lawsuit. However, the first element of a trademark infringement claim is proof of ownership of the trademark. It appears undisputed that NRCC owns the trademark at issue.

to registration. Even assuming this **[**9]** is true, the earliest date NRCC could claim a common law trademark is March 24, 2014—the date of NRCC Assets Acquisition's purchase of **[*1140]** Creamery assets. Construing all possible inferences in NRCC's favor, the period of infringement would at most be from March 24, 2014, to August 2016 (when, following NRCC's cease and desist letter, Lakeview removed all references to Nelson-Ricks Creamery Company from the "About Us" webpage).

It is not completely clear if NRCC had a valid and enforceable trademark during the time in question, but construing the facts in NRCC's favor, the Court will assume that it did. However, even assuming the Mark's validity, this is only the first step of the inquiry.

b. Use in Commerce

The second section of the *Lanham Act* states that any person who "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive" can be held liable for such use. *15 U.S.C. § 1114(1)(a); see also Bosley, 403 F.3d at 676*. Courts do not consider there to be infringement under the Lanham Act if **[**10]** a website contains another's trademark if the website does not offer any product for sale or contain any paid advertisements. *Bosley, 403 F.3d at 678*.

Here, the mention of Nelson-Ricks Creamery Company on the "About Us" webpage was mostly historical in nature. The "About Us" section of the website told the story of the Banquet cheese brand and the Mark was included to describe when the company was founded and what kind of products are offered. While the website originally contained an online store link (which the Court would have interpreted as offering products for sale), Lakeview removed that function prior to NRCC's accusation and its prior existence is irrelevant to the Court's determination. Simply put, there is no indication that Lakeview used the Mark in commerce.

NRCC makes a tenuous argument in its reply brief that because the website contains information about a business, it necessarily is an advertisement and is commercial in nature. NRCC does not cite to any court that has made such a finding and this Court declines to do so now.

c. Confusion

Although the Court does not find that Lakeview used the Mark in commerce, the Court will nonetheless address confusion, as this is the crux of any trademark **[**11]** claim. *See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992)* (determining that it is "undisputed that liability under *§ 43(a)* requires proof of the likelihood of confusion"); *Fortune Dynamic, Inc., 618 F.3d at 1030* (finding that "the likelihood of confusion is the core element of trademark infringement"). Additionally, in this case specifically, confusion and damages are the two elements that weigh most heavily in favor of summary judgment, as NRCC cannot provide a single example of confusion or point to a single dollar in damages.

To establish a likelihood of confusion, a plaintiff must establish that confusion is *probable* rather than merely *possible. HMH Pub. Co. v. Brincat, 504 F.2d 713, 717 (9th Cir. 1974)*. Both sides agree that the Court should utilize the long-recognized factors set forth in *AMF Inc. v. Sleekcraft Boats, 599 F. 2d 341 (9th Cir. 1979)*, to determine if a likelihood of confusion exists in this case.

In applying the *Sleekcraft* factors, a court is to consider: (1) the similarity of the marks; (2) the relatedness of the two companies' services; (3) the marketing channel used; (4) the strength of **[*1141]** plaintiff's mark; (5) the defendant's intent in selecting its mark; (6) evidence of actual confusion; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers. *See GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 (9th Cir. 2000)*. The *Sleekcraft* factors are not mandatory or an exhaustive list **[**12]** but rather "helpful guideposts" for the Court to use. *Fortune Dynamic, Inc., 618 F.3d at 1030*. The Court need not give the factors equal weight, or even utilize each factor, as some may not be relevant or applicable. *Marketquest Grp., Inc. v. BIC Corp., 862 F.3d 927, 938 (9th Cir. 2017)*. The purpose of a "factor" list such as this is simply to "facilitate a court's analysis, to the degree [the factors] are relevant in a given case." *Id.*

The first four factors are not as relevant to the Court because: the use in question here is not just of a similar mark, but is the use of the actual Mark itself (factor 1); the two companies services are closely related (factor 2); both use the internet as a marketing channel (factor 3); and the strength of the Mark is not in question (factor

4).[2] Additionally, because Lakeview and NRCC are already competitors in a niche market, the likelihood of expansion (factor 7) is not particularly relevant in this case. *See* Brookfield, 174 F.3d at 1060. The remaining three factors (factor 5, 6, and 8) are relevant under the circumstances, and the Court will address each in turn to determine if there was a likelihood of confusion.

1. Defendant's Intent

Under factor 5, a defendant's intent to deceive or mislead by using a Mark is strong evidence of a likelihood of confusion. Here, there is no indication **[**13]** that Lakeview intended to use the Mark *at all*, let alone for any purpose that would harm NRCC or cause confusion to the public and potential customers.

When Lakeview had the Limited License Agreement with Creamery following its purchase of certain Creamery assets, the website remained intact and Creamery collected a royalty from Lakeview in connection with its use of the website. When NRCC Asset Acquisition bought Creamery's remaining assets (and Lakeview's Limited License ended), Lakeview terminated the webpage containing the Nelson-Ricks Creamery Company Mark. When NRCC discovered that this webpage could still be viewed by manually typing the web address into an internet search browser—and sent Lakeview a cease and desist order—Lakeview immediately removed all references to Nelson-Ricks Creamery Company so that even if a person somehow got to that webpage, the Mark would not be there. All the evidence indicates Lakeview thought the webpage had been deleted altogether, and when NRCC brought to Lakeview's attention that this was not the case, it swiftly remedied any "infringement" that remained.

NRCC takes a completely different approach and contends that Lakeview knew about the infringement **[**14]** the whole time and intended to confuse people and steal **[*1142]** NRCC customers all along. NRCC alleges that by deleting the webpage from the Banquet website, but not deleting it from its web-hosting server, Lakeview reaped the benefit of anyone who searched for "Nelson-Ricks Creamery Company", clicked on the metadata in the search queries, and was subsequently taken to the "About Us" webpage. The basis for this assertion comes from NRCC's expert witness Laura Thieme. Thieme's opinions and testimony are the subject of Lakeview's motion to exclude, which the Court will discuss in detail below.[3]

Thieme opines that because Lakeview unlinked the page, but did not delete if from its web-hosting server, it was manipulating the system. She reasons that when a lay person searched for Nelson-Ricks Creamery Company, there was a high probability that banquetcheese.com would appear on the first page of results because that Mark ("NelsonRicks Creamery Company") appeared in the content of an active, although unconnected, webpage of that website (the "About Us" webpage of Banquet Cheese). So, even though that webpage was not physically linked to Lakeview's or Banquet's websites, Lakeview would still reap the **[**15]** benefits of any initial internet searches.

As the Court will explain below regarding the Motion to Exclude, it will not exclude Thieme's testimony because, while relevant, it does not affect the Court's decision on the Motion for Summary Judgement. The same is true for this *Sleekcraft* factor. Even taking Thieme's testimony as true, her opinion does not speak to Lakeview's intent, i.e. whether Lakeview intended to mislead or deceive the public. This issue represents a classic causation vs. correlation situation. Thieme's testimony concerns search internet optimization and internet search results from end-users. Nevertheless, her testimony does not necessary connect any actions by Lakeview to those search results. Although internet searchers may have found Lakeview's About Us webpage, that does not mean that Lakeview was nefariously striving to make that happen.

Lakeview explains that it directed someone to remove the webpage, it was removed, and Lakeview thought that was the end of the "About Us" webpage. There is

[2] NRCC focuses mostly on the first three factors. In an internet case, the first three factors, known as the "internet troika" or "internet trinity" are of greatest importance. *See* Internet Specialties W., Inc. v. Milon-DiGiorgio Enters., Inc., 559 F.3d 985, 989 (9th Cir. 2009). Here, the Court chooses not to address them in depth because Lakeview essentially agrees with NRCC on these elements. NRCC postures that because these factors are met, there is confusion; however, NRCC recognizes that such a conclusion is not automatic and the Court must consider other factors as well. Because the Court finds that the other factors weigh heavily in favor of Lakeview, there is no inconsistency in declining to decide this issue based only on the first three factors.

[3] Simply put, Thieme is a search engine optimization ("SEO") expert who researches and diagnosis search queries and metadata to determine how, and to what degree, a company is reaching the public and if the public's searches are finding the target company.

no information before the Court to disprove this explanation or show that Lakeview was trying to mislead or confuse the public. The fact that NRCC later found out the webpage **[**16]** was still active is not indicative of bad behavior on Lakeview's part. When alerted, Lakeview immediately took additional measures to ensure that the Nelson-Ricks Creamery Company Mark was no longer on the webpage.

Ultimately, under factor 5, there is no evidence that Lakeview had any intent to deceive or mislead the public by using the Mark. This factor weighs against a finding of confusion.

2. Evidence of Actual Confusion

Under factor 6, evidence of actual confusion is a strong indication that there is a likelihood of confusion, although the absence of specific examples is not dispositive. *See* *Official Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1393 (9th Cir. 1993)*. Furthermore, it is insufficient that confusion is merely possible under the circumstances; a plaintiff must show that it is probable that the use of the Mark is likely to lead to confusion. *HMH Pub. Co., 504 F.2d at 717*. Here, NRCC cannot show that confusion is even possible, let alone **[*1143]** probable. NRCC has not provided even a single example of the Mark on the defunct webpage misleading someone. NRCC claims that this is not surprising considering it does not have a relationship with end users. This argument misses the appropriate audience for the Court's analysis as will be addressed in the next section.

While not dispositive, **[**17]** the fact is that NRCC has not produced a single example of anyone being confused, mislead, or deceived by Lakeview's actions. This is further indication that confusion—and therefore—trademark infringement, did not occur.

Although NRCC cannot show there was any actual confusion, it asserts that there has been "initial interest confusion" in this case. Initial interest confusion occurs when a company uses a competitor's mark to direct people to its own website. *See* *Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1146 (9th Cir. 2011)*. This argument fails for two reasons. First, as with confusion in general, this is little more than a hypothetical as NRCC cannot provide a single example of initial interest confusion happening.[4] Second, and more importantly, the case that NRCC relies upon for this proposition makes clear that intent is relevant. *See* *Brookfield, 174 F.3d at 1065* (finding that the defendant "acted *affirmatively* in placing [the trademark] in the metatags of its web site, thereby *creating* the initial interest confusion" (emphasis added)).

As discussed above, there is no evidence to support an argument that Lakeview took affirmative or purposeful actions to cause confusion. By all accounts, it was a mistake. Without intent or examples of initial interest confusion, the Court **[**18]** must dismiss this theory in support of confusion.

3. Purchasers Sophistication

Under factor 8, the Court looks at the degree of care likely to be exercised by purchasers. This factor looks at purchasers' sophistication in the particular industry, because a professional or wholesaler purchaser would usually not be as confused as a layperson when buying products.

Here, it is undisputed that both Lakeview and NRCC sell their products to companies such as supermarkets, restaurants, and to other wholesaler distributors, but do not sell directly to retail customers or end users.

Lakeview contends that wholesalers are sophisticated professionals who exercise a high degree of care in their business dealings and would not be confused by a Mark on a defunct website.

NRCC contends that Lakeview is applying this factor to the wrong group of purchasers. Rather than using Lakeview's (in reality, Banquet's) immediate customer base of wholesalers and retail businesses, NRCC argues the Court should look at the end user, i.e. the "ordinary people who are likely to be confused by misleading use of trademarks on the internet." Dkt. 82, at 9. NRCC's argument is flawed and inconsistent with case law on point. **[**19]** Although end users in a retail environment eventually purchase the product at issue here, the relevant purchasers are the wholesalers and professional buyers with whom Lakeview primarily does business. The sophistication of Lakeview's client base weighs against confusion, as they are mostly professional retailing businesses or other wholesale distributors. "When the relevant **[*1144]** customers are professional buyers, they are less likely to be confused

[4] As will be discussed in regards to Thieme's testimony, NRCC also cannot conclusively say that a search engine's "first page" results were because of Lakeview's use of the Mark on the About Us site, or from original content developed when Creamery owned the Mark.

by similar marks than are ordinary customers." *Moose Creek, Inc. v. Abercrombie & Fitch Co., 331 F. Supp. 2d 1214, 1231 (C.D. Cal.)*, *aff'd* *114 F. App'x 921 (9th Cir. 2004)*.

In sum, even assuming the internet troika is present, the other *Sleekcraft* factors weigh heavily in favor of Lakeview and a finding that its use of the Mark did not cause any confusion. First, there is no indication that Lakeview intended to use the mark at all, let alone to deceive anyone; second, NRCC has not produced a single example of confusion; and third, Lakeview's buyers are sophisticated and it is unlikely that the unauthorized use of the Mark caused them any confusion.

d. Damages

Finally, in order to prevail on a claim for trademark infringement, a plaintiff must prove that there were damages, i.e. sales that would have occurred had it not been for the infringing conduct. *See, e.g.,* ***[**20]*** *Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1408 (9th Cir. 1993)*, *abrogated on other grounds by* *SunEarth, Inc. v. Sun Earth Solar Power Co., 839 F.3d 1179 (9th Cir. 2016)*. When seeking damages, a plaintiff must prove both that it actually incurred damages and the amount of those damages. *Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 620-21 (9th Cir. 1993)*. "Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement." *Id.*

Here, NRCC cannot prove even a single dollar in damages. All NRCC relies upon for its damages claim is its CEO, Michael Greenberg's, unsubstantiated statement that "I'll just make the claim that half the sales of any Banquet label product, I would have had if he wouldn't have mislead people maybe." Dkt. 71-3, at 14. "Just mak[ing] a claim" that "maybe" "half the sales" "would have" been NRCC's is a far cry from proving an accurate amount of damages, let alone that any even exist. NRCC has not met the standard required for damages as it has not produced any admissible evidence regarding lost sales or established that it has incurred any other damages and the amount of those damages.

In conclusion, NRCC's claim for trademark infringement fails because, even construing all facts in the light most favorable to Plaintiff concerning the validity of the Mark, the evidence **[**21]** shows the Mark was not used in commerce, did not cause confusion, and did not cause any damages. Summary judgment is therefore appropriate as to this claim.

2. Common Law Trademark Infringement

The analysis under this section is the same as above. To prove trademark infringement under *Idaho Code section 48-512*, the plaintiff must prove the defendant's use of a trademark creates a likelihood of confusion. *Cohn v. Petsmart, Inc., 281 F.3d 837, 841 (9th Cir. 2002)*. When interpreting *Idaho Code section 48-501 et seq.*, courts look to the federal system of trademark registration and protection under the *Trademark Act of 1946*. *Idaho Code § 48-518*; *Cohn, 281 F. 3d at 841*.

Here, the Court has already concluded that Lakeview's use of the Mark did not cause confusion. Therefore, this claim suffers from the same fate as NRCC's trademark claim and summary judgment on this claim is appropriate.

3. Unfair Competition

The analysis for a claim of trademark infringement and for unfair competition are identical. *See* **[*1145]** *Brookfield, 174 F.3d at 1048 n. 8* (reviewing trademark infringement and unfair competition claims under the same governing standard and noting that the claims can be analyzed jointly). As discussed above, NRCC cannot provide evidence to support a prima facie trademark infringement claim. Therefore, its claim for unfair competition necessarily must fail. Summary judgment is appropriate **[**22]** on this claim.

4. Unfair Methods and Practices

The *Idaho Consumer Protection Act ("ICPA")* protects both consumers and businesses against unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce. *Idaho Code § 48-603*. The ICPA requires that the offending party know, or in the exercise of due care should know, that he has in the past or is currently committing an act or practice declared unlawful by *Idaho Code section 48-603*. *Swafford v. Huntsman Springs, Inc., 409 P.3d 789, 2017 WL 6347031, at *4 (Idaho 2017)*.

Here, NRCC has failed to establish the requisite knowledge requirement. All the evidence before the

Court indicates that Lakeview, and all of its representatives, were completely unaware that the unlinked, orphan webpage was still accessible. Without the requisite scienter, this claim fails. Summary judgment is therefore appropriate on this claim.

5. Unjust enrichment

To establish a claim for unjust enrichment under Idaho law a plaintiff must prove: (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit. ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 326 (Idaho 2016)*** (citing *Teton Peaks Inv. Co. LLC v. Ohme, 146 Idaho 394, 195 P.3d 1207, 1211 (Idaho 2008)*). "The essence of the quasi-contractual theory of unjust enrichment is that the defendant **[**23]** has received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention is unjust." *Beco Const. Co. v. Bannock Paving Co., 118 Idaho 463, 797 P.2d 863, 866 (Idaho 1990)*.

Here, NRCC has failed to allege any specific benefit that the unauthorized use of the Mark conferred upon Lakeview. Rather, NRCC merely alleges that, "as a result of Lakeview's trademark infringement and unfair competition, NRCC has been damaged and Lakeview has been unjustly enriched." Dkt. 44, at 9. Not only does this assertion lack sufficient basis, but by its own definition, NRCC's unjust enrichment claim hinges on the success of its trademark infringement and unfair competition claims. Because those claims fail, NRCC's claim for unjust enrichment must likewise fail as a matter of law. Summary judgment is therefore appropriate as to this claim.

6. Tortious Interference with Prospective Economic Advantage

To establish a claim for tortious interference with a prospective economic advantage, a plaintiff must prove: (1) the existence of a valid economic expectancy; (2) the defendant's knowledge of the expectancy; (3) an intentional interference inducing termination of the expectancy; (4) that the interference was wrongful by some measure beyond **[**24]** the fact of the interference itself; and (5) plaintiff's resulting damages. *Mitchell Enterprises, Inc. v. Mr. Elec. Corp., No. CV 11-0537-REB, 2014 U.S. Dist. LEXIS 48494, 2014 WL 1365903, at *11 (D. Idaho Apr. 7, 2014)*; *Cantwell v. City of Boise, 146 Idaho 127, 191 P.3d 205, 216 (Idaho 2008)*.

[*1146] Similar to the deficiencies identified with the above claims, NRCC has failed to prove interference, or even intent to interfere, by Lakeview. Additionally, NRCC cannot prove damages. When asked if NRCC had any evidence that Lakeview's actions interfered with any agreements NRCC had with its customers, NRCC CEO Michael Greenberg responded, "I don't know." Dkt. 71-3, at 16. Summary judgment is therefore appropriate on this claim as well.

B. Motion to Exclude Witnesses

In connection with its Motion for Summary Judgment, Lakeview filed a motion asking the court to exclude two of Plaintiff's witnesses, Laura Thieme and Michael Greenburg, from its considerations regarding summary judgment. The Court will address each witness in turn.

1. Michael Greenberg

Michael Greenberg is the CEO of Plaintiff NRCC. Greenberg has been in the cheese industry for over 40 years and NRCC has listed him as an expert witness in this case. His expert opinions are based upon his extensive experience in the industry. Greenberg, however, is also a fact (or lay) witness who will **[**25]** testify concerning his business—NRCC.

In opposition to Lakeview's Motion for Summary Judgment, Greenberg submitted an affidavit regarding customer confusion and damages. NRCC has also quoted extensively from Greenberg's deposition on these two topics in support of its propositions that Lakeview's infringement created confusion and damages. Both of these are subjects that Greenberg would know extensively about as CEO of NRCC, but this testimony does not involve any expertize, beyond the fact that NRCC is his company. Lakeview seeks to exclude his opinion and testimony based upon *Federal Rule of Evidence 702*, claiming Greenberg does not base his expert testimony upon sufficient facts or data.

In its response to the motion, NRCC clarifies that Greenberg is not—at least with these comments at this time—acting as an expert, but that they have submitted his testimony and affidavit as simply a fact witness.

It is a well-settled concept that an individual may serve

the dual role of both an expert witness and a fact witness in a case. *See* U.S. v Gadson, 763 F.3d 1189, 1212-13 (9th Cir. 2014). Here, NRCC has listed Greenberg as an expert witness, but it has also listed him as a lay witness. The statements Greenberg has given are from his perspective as CEO of NRCC. The Court, **[**26]** therefore, will allow Greenberg's testimony as a fact witness on summary judgment and will not exclude his opinions.

2. Laura Thieme

Laura Thieme is the President and Owner of Business Research International dba Bizresearch, a boutique online search marketing agency. Thieme is also the CEO of SMI Analytics dba Bizwatch, an auditing and reporting software company. Thieme specializes in search engine optimization ("SEO"), which is a marketing discipline focused of the visibility of search engine results. In layman's terms, it is the study and application of what appears when an individual searches for something on a search engine (on Google for example), the order in which the results appear, and why.[5]

[*1147] Here, Thieme's expert opinion concerns SEO and the results or likely results of a person searching for Nelson-Ricks Creamery Company. Although the Court does have some reservations about the methodology used, the margin of error, and the data criteria involved, these issues do not concern the Court as must as the applicability of Thieme's conclusions. The Court has reviewed Thieme's testimony and while some of the material is helpful and relevant as background or foundation, her opinions do **[**27]** not go far enough to prove any of the elements of trademark infringement. As noted in the previous section discussing intent, Thieme's opinion concerning SEO and the results of search queries is not indicative of Lakeview's intent. Even if search prioritization was happening, NRCC has failed to show that Lakeview intended for that to happen. The opinion in this area thus does not aid the Court in its analysis.

Similarly, Thieme's claimed opinion regarding the likelihood of confusion is not truly an opinion about the likelihood of confusion, but rather an opinion about internet search data and visibility. Even assuming all of Thieme's statements are true, her opinion does not establish that there was any actual confusion or the risk of confusion. Thieme herself states that "I cannot sit here and . . . for sure [] tell you whether or not [customers are] going to be confused." Dkt. 79-3, at 5. Additionally, Thieme clarified numerous times that she was only looking at internet usage, internet searchers, and visibility. Dkt. 79-3, at 6-7, Dkt. 79-4, at 2. Importantly, these are the only metrics Thieme can quantify. Thieme can only speculate as to whether or not any of those metrics translates **[**28]** into a customer, let alone is indicative of customer confusion.[6]

Importantly, although Thieme testified that the improper use of the Mark could cause Lakeview to reap the benefits of higher search optimization, she is unable to distinguish what events or conduct could have caused that to occur, when, and whether results diminish over time.[7] In other words, there is a history of the Mark on the internet that predates the current dispute and any search results could be affected by that history as well. Banquet was a Creamery product before Lakeview purchased it and NelsonRicks Creamery Company and Banquet cheese have been closely associated for years

[5] By way of brief explanation, numerous factors and parameters affect SEO. Some of these factors are commonplace, such as the search criteria, specific language used, or the location of the searcher. Others factors are more technical, such as the metadata and information collected behind the scenes when a person uses the internet, which is then is taken into account in that person's future internet use to produce the most applicable results.

[6] Q. . . . [Y]ou don't know if any customer of Nelson-Ricks Cheese Company ever got on Google to search for Nelson-Ricks Creamery?

A. I have no proof without Analytics data. Dkt. 79-3, at 13.

* * *

Q. As far as who viewed Banquetcheese.com, you don't know if it was potential clients, customers, individuals, people who might be looking for a job? You don't know who was looking at the website; is that fair?

A. That is correct, not without the analytics data requested. Dkt. 79-3, at 1-2

* * *

Q. And [Plaintiff] never said we have customers who we believe were confused, you could go interview them directly to see if they were confused?

A. That is correct. I was looking at Internet data.

Q. Without regard to how sales may or may not occur; correct?

A. That is not my focus. Dkt. 79-3, at 3.

[7] *See generally* Dkt. 79-3, at 10-12.

prior to Lakeview's acquisition and subsequent "infringement." When asked if it was possible to segregate the impact of Lakeview's actions from prior internet use and association between Creamery and Banquet, Thieme said that she did not have the ability to do that. So even though Lakeview, or the Banquet brand, shows up on **[*1148]** the first page of results when a person searches for Nelson-Ricks Creamery Company, that might not be the result of Lakeview's use of the Mark at all, but years of prior association between the two companies and brands. **[**29]** Frankly, the reason for Lakeview's priority in internet search results is an unknown.

Thieme's ultimate opinion is that there is the potential for confusion based upon her analysis of visibility. Importantly, the latter is not necessarily a direct result of the former and mere speculation is insufficient to support an expert opinion. *Pierson v. Ford Motor Co., 445 F. App'x 966, 968 (9th Cir. 2011)* (finding that "an expert's opinions and conclusions which are based on nothing more than speculation cannot constitute substantial evidence"); *see also Daubert, 509 U.S. at 590* (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible).

In sum, the Court does not necessarily find that the basis for Thieme's opinions is suspect, but that the results are of little consequence to the Motion for Summary Judgment. Therefore, at this time, the Court will not exclude the testimony of Thieme.

C. Motion to Supplement

Several weeks following the hearing on the Motion for Summary Judgment, NRCC filed a Motion to Supplement. In its motion, NRCC seeks leave of the Court to add additional material to the record in support of its argument against summary judgment. For its part, Lakeview does not oppose NRCC's motion. Lakeview does, **[**30]** however, contend that the additional material does little to help NRCC's position, raises no genuine issues of material fact, and that summary judgment is still appropriate in its (Lakeview's) favor. Under the circumstances, the Court agrees.

The substance of NRCC's motion to supplement is a recently discovered link on Lakeview's webpage to a PDF document. This PDF document appears to be a product information sheet[8] that lists the various Banquet brand cheese products and their dimensions: height, weight, and length—by the case and by the pallet. There are accompanying pictures of the various products. These pictures, however, are the old Banquet Cheese packages; thus, in very fine print at the bottom of some of the packages is the name "Nelson Ricks Creamery Company." NRCC claims that this is further evidence of Lakeview's infringement.[9]

The parties put forth ancillary arguments concerning the Pack Size Sheet, but the bottom line is that none of the additional information raises a genuine issue of material fact regarding trademark infringement. As discussed at length above, while NRCC does has a valid mark—the first component of a trademark infringement claim—NRCC has failed to prove **[**31]** (2) that Lakeview used the mark in commerce; (3) that Lakeview's use of the mark is likely to cause confusion; and (4) that it **[*1149]** (NRCC) suffered damages. *15 U.S.C. § 1125(a)*. The addition of the Pack Size Sheet does not change this analysis. The Court will not go through all the factors of each of the elements again, but will summarize the three key components just mentioned and how the Pack Size Sheet does not rise to the level of creating any material fact or support the denial of Lakeview's Motion for Summary Judgment.

First, in regard to use in commerce: just as the Court found the "About Us" page was not used in commerce, so too, the PDF Pack Size Sheet was not used in commerce. While a buyer might utilize this sheet to understand the size of products that he or she purchased (or intends to purchase), the Pack Size Sheet itself—and Lakeview's website for that matter—does not contain commercial links, paid advertising, or a way to purchase cheese. The mark here was not used in commerce.

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[8] Lakeview refers to this document as a "Pack Size Sheet" which is the title the Court will also utilize.

[9] NRCC also uses the phrase "bad faith" in its briefing to some extent, although this appears to be little more than a descriptive phrase. NRCC does not lay out the elements of a "bad faith" claim, or request a particular remedy (other than supplementing the record). Because neither side fully briefed this issue, the Court declines to entertain an argument regarding bad faith on Lakeview's part. More importantly, Lakeview's CEO has filed a sworn affidavit explaining that until the filing of the instant motion, Lakeview was unaware of the old picture's use on the Pack Size Sheet, and that once brought to its attention, Lakeview immediately removed the PDF document and link.

Second, addressing confusion, the Court's analysis concerning the "About Us" page is on point here as well. Looking again at the key factors of intent, actual confusion, and buyer sophistication—specifically in regards **[**32]** to the Pack Size Sheet—there is no indication that Lakeview intended to use the mark at all, let alone to deceive anyone;[10] NRCC has not produced a single example of customer confusion as a result of the Pack Size Sheet;[11] and Lakeview's buyers are sophisticated so it is unlikely that the unauthorized use of the Mark on this Pack Size Sheet in very small print caused any of them confusion.

Finally, NRCC does not discuss damages in reference to the recently discovered Pack Size Sheet. Presumably this is because NRCC has not had time to investigate whether damages occurred because of this webpage, but that is of little consequence here. NRCC's only evidence in support of damages up to this point was its CEO's *opinion* that it had sustained damages. There is no indication that knowledge of the Pack Size Sheet would have changed that statement; and, as already noted, that singular statement is insufficient to support an award of damages—regardless of what it is based upon.

In short, the Pack Size Sheet does not alter the Court's conclusion regarding infringement. Whether the "About Us" webpage is the subject of the analysis or the Pack Size Sheet—or both—neither can be the basis for a valid infringement **[**33]** claim. Looking at the totality of the circumstances, included the supplemental material, the Court does not find that Lakeview infringed on NRCC's Mark. The other claims likewise fail as outlined above.

V. CONCLUSION

Summary judgment is appropriate on NRCC's trademark claims because there is no indication that Lakeview used the Mark in commerce, and NRCC cannot produce any evidence of confusion (the linchpin of any trademark case), or damages. Even if NRCC had a valid and enforceable trademark, without these crucial elements, the Court cannot find as a matter **[*1150]** of law, or on the facts, that Lakeview infringed upon NRCC's Mark. All of NRCC's other claims fail for similar reasons.

The Court will not exclude the testimony of Michael Greenberg because in these circumstances he is testifying as a lay witness and not an expert. Likewise, the Court will not exclude Thieme's testimony as outlined above.

The Court will allow NRCC's supplemental material to be added to the record.

VI. ORDER

IT IS ORDERED:

1. Lakeview's Motion for Summary Judgment (Dkt. 70) is **GRANTED**.

2. Lakeview's Motion to Exclude Testimony of Laura Thieme and Michael Greenberg (Dkt. 79) is **DENIED**.

3. NRCC's Motion to Supplement (Dkt. **[**34]** 89) is **GRANTED**.

4. The Court will enter a separate Judgment in accordance with Fed. R. Civ.

DATED: July 12, 2018

/s/ David C. Nye

David C. Nye

U.S. District Court Judge

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[10] As noted in footnote 9, Lakeview was completely unaware of the use of the Mark in this fashion and immediately removed the offending Pack Size Sheet when NRCC filed this Motion.

[11] Arguably, no discovery relative to this Pack Size Sheet has been conducted as it was only recently discovered; however, the fact that during the pendency of this litigation the attorneys and experts (i.e. those who have a vested interest and are examining things closely) did not catch this "infringement" in the Pack Size Sheet PDF is a strong indication that it had no bearing on customers or business in general.