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Idaho Supreme Court
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Docket No. 48799-2021

In the Supreme Court of the State of Idaho

BLAINE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO; ARCH COMMUNITY HOUSING TRUST, INC., AN IDAHO CORPORATION; BLAINE COUNTY HOUSING AUTHORITY, A PUBLIC AGENCY OF THE STATE OF IDAHO; AND JOHN DOES 1-5,

Appellants/Cross-Respondents.

v.

KIKI LESLIE A. TIDWELL, AN INDIVIDUAL; AND THE MADISON JEAN TIDWELL QUALIFIED SUBCHAPTER S TRUST, A LEGAL ENTITY ORGANIZED UNDER THE LAWS OF THE STATE OF IDAHO,

Respondents/Cross-Appellants.

OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS

Appeal from the District Court of the Fifth Judicial District of
The State of Idaho, in and for the County of Blaine
Honorable Michael P. Tribe, District Judge, Presiding

Gary G. Allen [ISB No. 4366]
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701
garyallen@givenspursley.com

Counsel for Respondents/Cross-Appellants

James R. Laski [ISB No. 5429]
Heather E. O'Leary [ISB No. 8693]
LAWSON LASKI CLARK, PLLC
675 Sun Valley Road, Suite A
Ketchum, ID 83340
efiling@lawsonlaski.com

Matthew Fredback [ISB No. 7262]
Timothy King Graves [ISB No. 5556]
Blaine County Prosecuting Attorney
219 1st Avenue South, Suite 201
Hailey, Idaho 83333
blainecountyprosecutor@co.blaine.id.us

Counsel for Appellants/Cross-Respondents

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STATEMENT OF THE CASE

A. Nature of the Case

In 2015, Blaine County was approached by ARCH Community Housing Trust ("ARCH") with a request to build community housing on Parcel C of the Valley Club West Nine PUD. Another part of the West Nine PUD had been set aside for community housing in 2005, but the community housing restrictions on those units had lapsed. Thus, the County and ARCH were both interested in finding a place for new construction. ARCH had zeroed in on Parcel C, but was aware that it had been designated for "public use" in the Final Plat for the PUD. So, ARCH asked the County to overlook the documentary evidence behind Parcel C and the Final Plat so that "public use" could be construed broadly enough to allow community housing. (R. at 23 ¶ 21.)

The County was met with resistance from multiple groups, all of which claimed either that Parcel C must be left for open space or recreational use, or that it simply lacked the necessary water and sewer capacity to support residential units. (R. at 23 ¶ 24.) Yet, the County pressed onward, relying not on the documentary evidence behind the Final Plat, but on interpretations of "public use" taken from other contexts to support its belief that it was free to do what it pleased with Parcel C. (R. at 24 ¶¶ 25-26.) Ignoring even further the documentary evidence behind the Final Plat, the County claimed that there were no applicable plat notes that needed to be considered with regards to the proposed construction. (R. at 25 ¶ 30.)

In the face of continued protest, the County transferred Parcel C to the Blaine County Housing Authority ("BCHA"), which in turn issued a building permit to ARCH. Plaintiff Tidwell, a local landowner and member of the golf club associated with the PUD, expressed similar concerns to the County about its authority to build on Parcel C, but her concerns and requests for more information were ignored or dismissed. Tidwell appealed the issuance of the

building permit, but was presented with a biased review where ARCH's counsel was allowed to argue against her appeal without providing her with the written argument. At the appeal hearing, without being made aware of ARCH's opposing arguments, Tidwell's counsel was allowed to make an argument while ARCH's attorney offered a rebuttal.

The evidence surrounding the Final Plat and the dedication of Parcel C is unequivocal—the parties always intended for it to be used for open space or recreation. The County created the restriction itself, meaning it was clearly aware of it, which awareness was only reinforced by the numerous public comments regarding its decision to permit construction on Parcel C. But ultimately, the County relied on irrelevant authority and baseless arguments to support its belief that it could unilaterally, and well after the fact, amend the restrictions placed on dedicated property. Such arbitrary and overreaching conduct on the part of any governmental entity is worthy of scrutiny under 42 USC § 1983.

B. Statement of Facts and Course of Proceedings

The facts relevant to the issues filed in Plaintiffs' cross-appeal are discussed where needed herein. Such is the case also with the procedural history of the case. For a detailed statement of facts and course of proceedings, please refer to Plaintiffs' Response Brief.

ISSUES PRESENTED

1. Did the District Court Err in Dismissing Plaintiffs' Procedural Due Process Violation Claim Under 42 U.S.C. § 1983; and

2. Did the District Court Abuse its Discretion By Denying Plaintiffs Their Attorneys' Fees Under Idaho Code § 12-117?

ARGUMENT

I. STANDARD OF REVIEW

This Brief addresses two primary issues. The first issue is whether the District Court erred when it dismissed Plaintiffs' § 1983 claim. Plaintiffs' claim was dismissed under Idaho Rule of Civil Procedure 12(b)(6), which means this Court reviews the dismissal de novo. *Bedke v. Ellsworth*, 168 Idaho 83, __, 480 P.3d 121, 128 (2021). "When considering a 12(b)(6) motion, [this Court] look[s] only to the pleadings to determine whether a claim for relief has been stated." *Colafranceschi v. Briley*, 159 Idaho 31, 34, 355 P.3d 1261, 1264 (2015). "[T]he complaint must be viewed in the light most favorable to the plaintiff, it must be given the benefit of every reasonable intendment, and every doubt must be resolved in its favor." *Gardner v. Hollifield*, 96 Idaho 609, 610–11, 533 P.2d 730, 731–32 (1975). In other words, "[a] motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle the plaintiff to relief." *Bedke*, 480 P.3d at 128 (2021) (quoting *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005)) (internal punctuation omitted).

The second issue is whether the District Court abused its discretion when it denied Plaintiffs their attorneys' fees. Plaintiffs sought recovery of their attorneys' fees under I.C. § 12-117. (R. at 979.) This Court reviews appeals from a district court's decision applying I.C. § 12-117 under an abuse of discretion standard. *Hobson Fabricating Corp. v. SE/Z Const., LLC*, 154 Idaho 45, 49, 294 P.3d 171, 175 (2012). Review of a trial court's decision on attorney fees for an abuse of discretion involves three questions. First, whether the trial court correctly perceived the issue as one of discretion. *Id*. Next, whether the trial court acted "within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it." *Id*. Finally, "whether the district court reached its conclusion by an exercise of reason." *Id*.

II. THE DISTRICT COURT ERRED WHEN IT DISMISSED PLAINTIFFS' PROCEDURAL DUE PROCESS VIOLATION CLAIM.

Plaintiffs pled a § 1983 claim against Blaine County, alleging, among other things, that Blaine County's denial of Tidwell's appeal of the building permit issued for Parcel C deprived Plaintiffs of their rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution. (R. at 31-32.) The claim was dismissed on a Rule 12(b)(6) motion when the District Court concluded that Plaintiffs had no constitutionally protected property interest to support the claim. (R. at 358-65.) This conclusion was error.

The Due Process Clause of the Fourteenth Amendment guarantees that "[n]o State . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). In particular, Plaintiffs alleged the deprivation of a property interest. (R. at 31.) Thus, the requirements for Plaintiffs' § 1983 claim are: (1) an action under color of state law that (2) deprives Plaintiffs of a constitutionally protected property interest. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008). The Complaint in this case established both.

A. Plaintiffs pled an action taken under color of state law.

The County acted under color of state law when it, directly and in concert with ARCH and BCHA, issued a building permit for construction of a duplex on Parcel C. A cause of action does not lie under § 1983 unless the harm to Plaintiffs results from an action taken under color of state law. *Shanks*, 540 F.3d at 1088. Notably, however, an action may be taken under color of state law even when the state actor is not the main or only actor.

For example, if the government and a private party "act in concert" to deprive a party of a constitutionally protected right, both are liable under § 1983. "A private party may be considered to have acted under color of state law when it . . . acts in concert with state agents to deprive one's constitutional rights." *Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983). Such was the case in *Howerton v. Gabica* when the defendants were found to have acted under color of state law by directly engaging the police to aid them in evicting a tenant. 708 F.2d 380 (1983).

That is precisely what Plaintiffs' Complaint alleged. The Valley Club deeded Parcel C to the County subject to the open space and recreational use restriction. (R. at 23 ¶¶ 15-18.) Ten years later, ARCH approached the County about building community housing on Parcels B & C. (R. at 23 ¶¶ 19-20.) The County then determined, *post hoc* and unilaterally, that the Final Plat's "public use" label included community housing, and arranged to give Parcel C to the BCHA to facilitate the lease to ARCH. (R. at 23-24 ¶¶ 21-27.) As it so happened, ARCH had already begun development on Parcel C before even being awarded the contract. (R. at 26-27 ¶ 41.) Later, the BCHA issued a building permit to ARCH for construction of a nonconforming duplex on Parcel C. (R. at 27-28 ¶ 47.)

When Tidwell filed an appeal regarding the issuance of the building permit, ARCH and its attorney were present to challenge Tidwell's argument. (R. at 28 ¶¶ 48-50.) In fact, ARCH had been granted the opportunity to submit written materials to the Blaine County Board in opposition to Tidwell's appeal, which materials were never served on Tidwell or her attorney. (R. at 28 ¶ 50.) Moreover, ARCH's attorney was given the opportunity to orally rebut Tidwell's argument at the hearing, again, without any notice to Tidwell or her attorney that such rebuttal would occur or what the content of that rebuttal would be. (R. at 28 ¶ 50.)

According to these allegations, the County's transfer of Parcel C to the BCHA, the BCHA's issuance of a building permit, and the denial of Tidwell's appeal of the building permit

were all actions taken either directly by the County or in concert with the other Appellants, all under color of state law.

B. Plaintiffs sufficiently pled a deprivation of a constitutionally protected right, privilege, or immunity.

To dismiss Plaintiffs' § 1983 claim, the District Court had to determine that, ***beyond doubt***, Plaintiffs "[could] prove no set of facts" that could establish the County's actions deprived her of a constitutional right. *Gardner*, 96 Idaho at 610–11, 533 P.2d at 731–32. Because Plaintiffs' § 1983 claim surpassed this minimal bar, the District Court's decision to grant the dismissal of Plaintiffs' claim was error.

"A constitutionally protected property interest in a land use permit exists where state law gives rise to a 'legitimate claim of entitlement' to the permit." *Burch v. Smathers*, 990 F. Supp. 2d 1063, 1071 (D. Idaho 2014). This rule of law envisions, of course, the typical § 1983 case where the applicant for the land use permit is the same party bringing the § 1983 claim. Here, the scenario is unique because Plaintiffs do not have a "legitimate claim of entitlement" to any building permit in particular, but rather, they have a "legitimate claim of entitlement" to the *denial* of a certain building permit—the one issued to ARCH. But the uniqueness of the present case is of no moment. "[D]ue process is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the particular situation." *Maresh v. State, Dep't of Health & Welfare ex rel. Caballero*, 132 Idaho 221, 226, 970 P.2d 14, 19 (1998) (quoting *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996)).

Beyond Plaintiffs' legitimate claim of entitlement to the denial of ARCH's requested building permit, Plaintiffs alleged multiple substantive property interests here. "[D]etermination of whether a particular right or privilege is a property interest is a matter of state law." *Maresh v.*

State, Dep't of Health & Welfare ex rel. Caballero, 132 Idaho 221, 226, 970 P.2d 14, 19 (1998). This means that if Idaho statutes, rules, or common law establish a property interest, then that interest is sufficiently valid to implicate due process. *Id.* Idaho law establishes several property interests held by Plaintiffs.

Recording or acknowledging a plat that designates areas for public use provides the public with a "determinable fee" in those areas. *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 549, 553 (1930); *see* Idaho Code § 50-1312 ("The acknowledgement and recording of [a] plat is the equivalent of a deed in fee simple of such portion of the premises platted as is on said plat set apart for public streets or other public use."). Therefore, because the Final Plat designates Parcels B and C for "public use," Plaintiffs have a vested real property interest in those parcels as they are among the holders of a determinable fee in the parcels. Because this property interest is well grounded in Idaho's laws, it is a sufficient property interest to form the basis of a § 1983 claim. *Maresh*, 132 Idaho at 226, 970 P.2d at 19.

The District Court shied away from this alleged property interest, claiming that it would "open the flood gates of litigation." (R. at 363.) But this concern is unwarranted for two reasons. First, the determinable-fee precedent set forth in *Mochel* is nothing new. It was originally set forth in 1930. If the floodgates of litigation could be torn open based on that decision, that would have happened by now. Second, a claimant asserting a property interest under *Mochel's* determinable-fee precedent would still be limited by the restrictions on a § 1983 claim in this context, which restrictions themselves serve to curb meritless lawsuits.

Plaintiffs hold other property interests as well. Idaho Code § 6-401 provides that Plaintiffs could have brought an action to quiet title as to Parcels B and C, as the Final Plat gives them an interest and/or estate in those parcels that is adverse to the interest allegedly held by ARCH, BCHA, or the County. Because § 6-401 provides Plaintiffs a "legitimate claim of

entitlement to property", *id.*, they have pled a property interest sufficient to form the basis of a § 1983 claim.

Furthermore, the County has admitted that the zoning compliance portion of its building permit review is a zoning proceeding covered by the County's zoning appeal ordinance, *see* Blaine County Code § 9-32-3, and Plaintiffs have a property interest in the outcome of the decision to grant the building permit to ARCH.[1] (R. at 318-321.) For the County to now claim that Plaintiffs possess no substantive property interests in the outcome of its decision is in direct contradiction to its own prior ruling.

Apart from those property interests established by state law, Plaintiffs have other property interests that could be affected by the County's decision to deny Plaintiffs' appeal and grant the building permit to ARCH. As nearby landowners, Plaintiffs' property values could be negatively affected by a nonconforming use that conflicts with the rural character of the area. Plaintiffs' Response Brief at pp. 12-14. As a member of the Valley Club, Tidwell's property interest in that membership could also be negatively affected by the County's proposed misuse of Parcel C. Plaintiffs' Response Brief at p. 15.

All of Plaintiffs' property interests described above are deprived or harmed by the County's actions. By granting the permit and denying Plaintiffs' appeal, the County approved development on Parcel C contrary to the restrictions in the Final Plat, and the parcel would have become unavailable to Plaintiffs for public open space or recreation. And, by the same action, the County has diminished the value of the real property owned by Plaintiffs.

[1] While the Trust was not a named party to that process, it was referenced, its property rights were implicated, and its presence was not necessary as Ms. Tidwell was actively advocating for and protecting its interests.

The County's arguments about Plaintiffs' property interests are confused. The County cites case law stating that a § 1983 action lies only if "there is an entitlement to the relief sought by the property owner." *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994). Here, Plaintiffs allege that they were entitled to a ruling on appeal denying the building permit. And the District Court's ruling on the declaratory judgment claims demonstrates they were. The County had no authority to overwrite the protections in the deed and plat or to issue a building permit in violation of those protections. Blaine County has adopted the 2018 International Building Code ("IBC"). Blaine County Code § 7-1-2(A). The IBC, in turn, provides that permits issued in contradiction of other laws of the relevant jurisdiction "shall not be valid." International Code Council, International Building Code (2018) § 105.4 "Validity of Permit". Therefore, the County plainly deprived Plaintiffs of their property rights by approving a building permit where the recorded plat prohibited the structure approved. *See Mochel*, 51 Idaho 468, 5 P.2d at 553 (the public has a "determinable fee" in a public use parcel on a plat); *see* Idaho Code § 50-1312.

Furthermore, "[a] legitimate claim of entitlement can exist where state law significantly limits the decision maker's discretion or where the decision maker's policies and practices create a de facto property interest." *Burch v. Smathers*, 990 F. Supp. 2d 1063, 1072 (D. Idaho 2014). The cases that the District Court relied on, *Shanks* and *Gagliardi*, both turn on allegations that the municipalities failed to provide fair process and properly apply their ordinances. However, there was no evidence in either case that the municipality was obligated to rule as the plaintiffs wanted. Therefore, the plaintiffs lacked a property right to the outcome they desired. *Shanks*, 540 F.3d at 1091 (noting that the due process claim "fails because Spokane's historic preservation provisions do not 'contain[ ] mandatory language' that significantly constrains the decisionmaker's discretion." (quoting *Gagliardi*, 18 F.3d at 192)).

The same cannot be said here, and the District Court erred when it held that the Blaine County Code does not limit the County's discretion regarding the issuance of building permits. (R. at 364.) It goes without saying that the County, or any governmental entity, cannot issue a building permit to an applicant who does not own or have a legal right to build on the underlying property for which the permit is issued. In fact the International Building Code, which the Blaine County Code adopts with some amendments, makes clear the County lacks any authority to issue a building permit that permits or approves the violation of other legal requirements. International Code Council, International Building Code (2018) § 105.4 "Validity of Permit". Here, the discretion of the County in this particular context was circumscribed by the Final Plat. That recorded instrument precluded the County from exercising its discretion to issue a building permit to ARCH for building a duplex on Parcel C when Parcel C was designated for open space and recreational use. (*See generally* R. at 20-34.) The County simply lacked authority to authorize via permit a development that it had no right to pursue. Because the County's discretion was so limited, Plaintiffs had a "legitimate claim of entitlement" to the denial of ARCH's requested building permit.

The District Court relied on *Shanks* in dismissing Plaintiffs' 1983 claim, but *Shanks* does not support the District Court's conclusion. The context of the case is important. The only "property interest" claimed by the plaintiffs was their alleged right to have the City issue building permits in accordance with its statutory requirements. *Shanks*, 540 F.3d at 1086; *Opening Brief of Appellants*, 2006 WL 3890118 (alleging that the plaintiffs had "been deprived of substantive and procedural due process rights, e.g. 'property interests' because the City of Spokane and Dressel fail to follow statutory requirements"). The *Shanks* court explained: "Absent a substantive property interest in the outcome of procedure, Logan Neighborhood is not constitutionally entitled to insist on compliance with the procedure itself." 540 F.3d at 1091-92.

In other words, the plaintiffs in *Shanks* did not and could not argue the City of Spokane was obligated to rule in their favor on the building permit. The City's ordinances included several exceptions that would have allowed it to rule in the permittee's favor even if proper procedure was followed. *Shanks,* 540 F.3d at 1091. In stark contrast, Plaintiffs argue, and the District Court confirmed, the restrictions on Parcel C prohibit issuance of the building permit and therefore they had a property interest in its denial.

Gagliardi is very similar to *Shanks*, where the plaintiffs "contend[ed] that they have a property interest in the proper enforcement of the Code with regard to [Defendants'] property." *Gagliardi*, 18 F.3d at 191. A property right only arises "if there is an entitlement to the relief sought by the property owner." *Id.* at 192. Here, Plaintiffs are entitled to denial of the building permit to preserve the use of Parcel C as open space and recreation, and protection of the value of their real property, among other things. This is supported by *Gagliardi*. "A plaintiff has a 'legitimate claim of entitlement' to a particular benefit if, absent the alleged denial of due process, there is a certainty or a very strong likelihood that the benefit would have been granted." *Id.* Without the County's biased and illegal decision-making, the building permit would have been denied.

In *Gagliardi*, the city had broad discretion whether or not to enforce ordinances like noise prohibitions, etc. 18 F.3d at 191. Refusal to act does not implicate due process. *Id*. The only affirmative actions complained of were granting variances, which the city had discretion to do. The County had no such discretion here. It has no authority whatsoever to skirt the requirements imposed by the Final Plat.

In sum, neither *Shanks* nor *Gagliardi* stand for the proposition that issuance of building permits is discretionary, especially under the facts presented in this case. Ultimately, whether

created by state law, by a lack of discretion on the County's part, or by some other means, Plaintiffs had a legitimate property interest sufficient to support their § 1983 claim.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFFS THEIR ATTORNEYS' FEES UNDER IDAHO CODE § 12-117.

Idaho Code section 12-117 is the primary authority in Idaho for a citizen to recover attorneys' fees in an action against a governmental agency such as the County. Idaho Code § 12-117(1) states:

> 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 party acted without a reasonable basis in fact or law.

Section 12-117 has dual purposes: "(1) to deter groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne an unfair and unjustified financial burden attempting to correct mistakes agencies should never have made." *Galvin v. City of Middleton*, 164 Idaho 642, 647, 434 P.3d 817, 822 (2018).

Plaintiffs are entitled to attorneys' fees under this statute because the County knew all along what the original intent was in 2005 for Parcel C. The overwhelming documentary evidence regarding the intended use for Parcel C was always in the County's possession, and was brought to the County's attention by multiple interested parties when the County first considered building a nonconforming duplex on the parcel. (R. at 26, 211.) Despite powerful objections and significant evidence to the contrary, the County buried its head in the sand and insisted that no past agreement could prevent it from doing what it pleased with Parcel C.

The County further convinced itself, contrary to well-established law, that it was free to take an exaction like Parcel C and use it for whatever purpose it pleased. (R. at 84 ("'Public use'

is up to the BCC's determination").) This, of course, is a power the County does not have. *KMST, LLC v. Cty of Ada*, 138 Idaho 577, 67 P.3d 56 (2003) (discussing limits on exactions imposed by *Nollan* and *Dolan*). This litigation was initiated on the idea that no government authority should be permitted to act in such an arbitrary and capricious fashion. Plaintiffs have borne an unjustified financial burden enforcing this idea, and are therefore entitled to their attorneys' fees.

The District Court held that Plaintiffs were the prevailing party in the litigation. Order on Plaintiffs' Request for Costs and Fees, Case No. CV07-18-0551 (July 9, 2021, J. Tribe) at p. 3. It then concluded, however, that Appellants had not acted unreasonably because clarification of the proper use of Parcel C was necessary. *Id*. But this conclusion was unfounded. Ultimately, the entirety of Appellants' claim that they could construct a nonconforming duplex on Parcel C was based on the related notions that (a) the County could do with Parcel C as it deemed fit, regardless of any restrictions imposed on it by prior agreements or negotiations, or even well-established precedent regarding exactions, and (b) a County official's *post hoc* testimony as to what the parties intended when drafting the Final Plat should trump the litany of contemporaneous documentary evidence to the contrary. This case, from beginning to end, demonstrates the kind of abuses of power and governmental overreaches that a local government body "should never have made." *Galvin*, 164 Idaho at 647, 434 P.3d at 822. Accordingly, Plaintiffs are entitled to recover the fees and costs they incurred in correcting such errors.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the dismissal of Plaintiffs' § 1983 claim and remand it for further proceedings. Plaintiffs also request that the Court reverse the denial of Plaintiffs' fees and costs.

Respectfully submitted on November 2, 2021.

GIVENS PURSLEY LLP

/s/ *Gary G. Allen*
Gary G. Allen

Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2021, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

James R. Laski Heather E. O'Leary LAWSON LASKI CLARK, PLLC 675 Sun Valley Road, Suite A Ketchum, ID 83340	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile: 208-629-7559 iCourt Email efiling@lawsonlaski.com
Matthew Fredback Timothy King Graves Blaine County Prosecuting Attorney 219 1st Avenue South, Suite 201 Hailey, Idaho 83333	☐ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile: 208-629-7559 iCourt Email blainecountyprosecutor@co.blaine.id.us

Counsel for Appellants/Cross-Respondents

/s/ *Gary G. Allen*
Gary G. Allen