

IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFRI DAVIS and DEBBIE DAVIS,

Plaintiffs/Appellants,

vs.

DONALD McCANLIES, CHARLES TUMA,
and JOHNSON HOUSE COMPANY,

Defendants/Respondents.

Supreme Court No. 46721-2019

Bonner County No. CV09-18-0672

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Bonner

Honorable Barbara A. Buchanan, Presiding

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I. STATEMENT OF THE CASE

On September 14, 2009, the Plaintiffs/Appellents Jeffri and Debbie Davis, executed a Buyer's Representation Agreement with Defendants/Respondents Don McCanlies of Johnson House Company doing business as Coldwell Banker Resort Realty (hereinafter the "Broker"). (R. Vol. I, p, 363, ¶ 1). The Davises worked with Idaho licensed real estate agent, Defendant Charles John ("CJ") Tuma, who was an agent for Broker. Id. at ¶ 2.

To this end, Mr. Tuma worked with the Davises toward the purchase of a parcel of improved real property located at 984 Gray Wolf Road, Moyie Springs, Idaho, (hereinafter the "Subject Property"). Id. at p. 364, ¶ 3. In so doing, Mr. Tuma mistakenly believed, and so informed the Davises, that the legal access to the Subject Property was provided via a road by the name of Gray Wolf Road which enters the Subject Property near its northwest corner. It is undisputed, however, that the legal access is identified on two surveys, one of which was in the chain of title to the Subject Property as an attachment to covenants recorded against the property, which clearly identify the access being through an easement which enters the Subject Property near its southwest corner. Id. at pp. 364-365, ¶¶ 6-10.

Jessica Fairchild, on behalf of Community Title, LLC, acted as the closing agent for the Davises' purchase of the Subject Property. Id. at p. 364, ¶ 5. On December 7, 2009, Ms. Fairchild sent an email to the Davises through their daughter Terah Davis, who assisted her parents in the purchase of the Subject Property. Id. at p. 365, ¶ 11. Attached to this email was attached to the the Boundary Line Survey which depicts the legal access to the property. Id. at ¶ 10. This survey also

shows that Gray Wolf Road does not extend to the Subject Property, and that access to the Subject Property is through an easement from Highway 2 over the southwest corner of Tract 3A. Id.

On May 10, 2018, the Davises brought suit against the Broker and Mr. Tuma asserting claims of fraud and constructive fraud regarding the representations allegedly made by Mr. Tuma in the course of his representation of the Davises as their real estate agent leading up to the purchase of the Subject Property. Id. at pp. 7-18. The Respondents subsequently moved for the summary judgment dismissal of the Davises claims on various grounds, a motion the District Court granted on the basis that the Davises claims were barred by the statute of limitations as the underlying causes of action began to accrue no later than 2010. Id. at p. 369.

A week before the summary judgment hearing, the Davises filed a Motion to Amend Complaint and a Motion for Relief from Pretrial Order, seeking to add claims for breach of contract and illegal practice of law, abstracting, and surveying. The District Court denied the Davises' Motions. Id. at p. 373.

This appeal followed.

II. ISSUES PRESENTED ON APPEAL

The Davises' Opening Brief raises two basic issues: (1) whether the District Court erred when it denied the Davises' Motion to Amend their Complaint, and (2) whether the Davises had actual or constructive knowledge of the fact that Gray Wolf Road did not provide legal access to their property in 2009.

The Davises' Opening Brief also raises the issue of whether the fraud allegedly committed by Tuma prevented the District Court from finding that the Davises had constructive knowledge

that they did not have legal access over Gray Wolf Road. One of the grounds on which Tuma sought summary judgment from the District Court was whether the Davises would be able to prove each element of their fraud claim, and specifically the element that Tuma knew his statements to the Davises to be false. The District Court did not rule on this issue. Because this Court exercises free review of motions for summary judgment and may affirm the decisions of a lower court on alternative grounds, Tuma asks this Court to consider whether the Davises' fraud claims would have survived summary judgment. Either way, the Davises' argument that they did not have constructive knowledge fails and the District Court's ruling should be affirmed.

III. ATTORNEYS FEES ON APPEAL

The Davises are not entitled to attorney's fees on appeal. They claim that the Buyer's Representation Agreement (R. Vol. I, p. 110, ¶ 12) provides for attorney's fees in "any suit or other proceeding arising out of this Agreement." This appeal, and the claims before the District Court, did not arise out of the Buyer's Representation Agreement. Seven days before the hearing on Tuma's Motion for Summary Judgment, the Davises moved the District Court for leave to amend their Complaint to add a claim that Tuma breached the Buyer's Representation Agreement. *Id.* at pp. 276-277. That motion was denied. *Id.* pp. at 373. Consequently, this appeal, and the claims that were before the District Court, did not arise out of a breach of the Buyer's Representation Agreement, and the Davises may not seek attorney's fees thereunder.

IV. ARGUMENT

A. The District Court's Denial of The Davises' Motion to Amend Their Complaint Should Be Affirmed.

Fifty-three days after the deadline to file amended pleadings imposed by the District Court's Pretrial Scheduling Order, and seven days before the time set for hearing on Tuma's Motion for Summary Judgment, the Davises filed a Motion for Relief from the Pretrial Order and a Motion for Leave to File an Amended Complaint. (R. Vol. I, pp. 259-289; 292-294). To their original claims of fraud and misrepresentation, the Davises sought to add claims for breach of contract and for the unlicensed practice of law, surveying, or abstracting. *Id.* at pp. 276-277. The District Court considered and denied the Davises' Motion for Relief from the Pretrial Order and the Motion for Leave to File an Amended Complaint. *Id.* at p. 373. The Davises now appeal the District Court's decision denying their Motion for Leave to Amend. For the reasons set forth below, this Court should affirm the District Court.

1. The Davises Make No Attempt to Address the Factors this Court Considers When Evaluating a Claimed Abuse of Discretion.

The Davises' argument that the District Court abused its discretion in denying the Motion to Amend is conclusory and fatally deficient. This Court has often stated: "We will not consider assignments of error not supported by argument and authority in the opening brief." See e.g., *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). "In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief." Idaho Appellate Rule (I.A.R.) 35.

In this case, the Davises note in their Appeal Brief that a decision to allow an amendment to the pleadings is reviewed for an abuse of discretion but failed to set forth or apply the factors this Court considers when reviewing such a decision.¹ *Appellant's Brief*, p. 6. For the reasons set forth below, these failures are fatal to the Davises' appeal.

In State v. Kralovec, 161 Idaho 569, 575 n.2, 388 P.3d 583, 589 n.2 (2017), this Court found dispositive on appeal the appellant's failure to explain its theory as to how the District Court abused its discretion. Id. at 575, 388 P.3d at 589. This Court emphasized that when a party:

[D]oes not contend that the district court failed to perceive the issue as one of discretion, that the district court failed to act within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it or that the district court did not reach its decision by an exercise of reason, such a conclusory argument is "fatally deficient" to the party's case.

Id. at 575 n.2, 388 P.3d at 589 n.2 (internal quotation marks omitted) (quoting Cummings v. Stephens, 160 Idaho 847, 853, 380 P.3d 168, 174 (2016)).

In Cummings, this Court held that the defendant did "not identify the applicable standard of review, much less attempt to apply it." Cummings, 160 Idaho at 853, 380 P.3d at 174. This Court further noted:

Cummings makes no attempt to address the matters we consider when evaluating a claimed abuse of discretion. He does not contend that the district court failed to perceive the issue as one of discretion, that the district court failed to act within the boundaries of this discretion and consistent with the legal standards applicable to the

¹ When reviewing a lower court's decision for an abuse of discretion, this Court must analyze "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 v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

specific choices available to it or that the district court did not reach its decision by an exercise of reason.

Id. (citations omitted).

In both *Cummings* and *Kralovec*, this Court held that where a party completely fails to address the abuse of discretion factors, the assignment of error is conclusory and therefore fatally deficient to the party's case. Like the appellants in *Cummings* and *Kralovec*, the Davises do not argue that the District Court failed to perceive the issue as one of discretion, that the District Court failed to act within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it or that the District Court did not reach its decision by an exercise of reason.

It should be noted that this Court has clarified that *Cummings* and *Kralovec* do not “require a formalistic recitation of the standard of review.” *State v. Jeske*, 164 Idaho 862, 869–70, 436 P.3d 683, 690–91 (2019). In *Jeske*, this Court stated that its “main concerns are the use of conclusory arguments, lack of authority to support those arguments, or failure to make any attempt to address the factors this Court considers.” Id. Although the appellant in *Jeske* failed to set forth the standard of review in his opening brief, this Court nevertheless considered his argument because:

...he clearly argued regarding “whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it.” He identified the legal standard that was applicable to the choices before the district court by citing I.C.R. 7(e), Idaho Code section 19-1420, and relevant case law. Next, *Jeske* presented an analysis of how the above stated authority was not followed by the district court. Therefore, his was not merely a conclusory argument, as was this

Court's concern in *Cummings* and *Kralovec*. Rather, Jeske argued that the district court failed to comply with the second and third prongs of the abuse of discretion standard.

Jeske, 164 Idaho at 870, 436 P.3d at 691 (citations omitted).

Thus, while *Jeske* provides that the Davises' failure to recite the four prongs of the abuse of discretion standard is not fatal in and of itself, the Davises' failure to make any attempt to address the factors this Court considers when reviewing a decision for an abuse of discretion distinguishes this case from *Jeske*. Like *Cummings* and *Kralovec*, the Davises' argument that the District Court abused its discretion is conclusory and fatally deficient to their case. Therefore, this Court should not consider the Davises' assignment of error.

2. *The Davises Failed to Appeal the Denial of their Motion for Relief from the Pretrial Order.*

Although the Davises have appealed the District Court's denial of their Motion to Amend Complaint, they did not appeal the District Court's denial of their Motion for Relief from the Pretrial Order. This, also, is fatal to their appeal.

The question of whether to grant a motion to amend the pleadings is separate and distinct from the question of whether to grant a motion for relief from a pretrial order. In general, a motion to amend seeks to add or remove facts, claims, or defenses to the pleadings, while a motion for relief from a pretrial order asks the court for permission to deviate from deadlines or other requirements imposed by the Court and Idaho Rules of Civil Procedure (I.R.C.P.) 16.

The factors a court must consider for each motion are also distinct. A motion to amend a pleading should be freely granted "when justice so requires." I.R.C.P. 15(a). "A trial court may

consider whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim.” Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A., 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). Other factors include undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendment, and futility of amendment. Smith v. Great Basin Grain Co., 98 Idaho 266, 272, 561 P.2d 1299, 1305 (1977).

The standard for considering a motion for relief from a pretrial order, and specifically a motion to extend the deadline to file amended pleadings, is set forth in I.R.C.P. 16(a)(3). That rule provides that the deadline to file amended pleadings “must not be modified except by leave of the court on a showing of good cause or by stipulation and approval of the court.” Id.

A district court's decision regarding whether to consider a late-filed motion for relief under Rule 16 is reviewed for an abuse of discretion. Prehn v. Hodge, 161 Idaho 321, 326, 385 P.3d 876, 881 (2016). Although it does not appear that this Court has provided guidance as to what constitutes good cause under Rule 16, it has been held in relation to other rules of civil procedure to mean something more than excusable neglect. *See, e.g.,* Taylor v. Chamberlain, 154 Idaho 695, 699, 302 P.3d 35, 39 (2013) (good cause for untimely service of process requires more than excusable neglect).

In this case, the Davises filed their motion for leave to amend the complaint fifty-three days after the expiration of the deadline to submit amended pleadings provided by the District Court's Pretrial Order. (R. Vol. I, pp. 259; 50-51). Clearly, the Davises recognized that, regardless of the merits of the new claims set forth in their Proposed Amended Complaint, they would need to

demonstrate good cause for submitting it to the Court after the expiration of the deadline to file amended pleadings. Consequently, they filed a separate motion to extend the pretrial deadlines under Rule 16. (R. Vol. I, pp. 292-294). After oral argument, the District Court issued a written decision denying both motions. (R. Vol. I, p. 373).

In their opening brief on appeal, the Davises have limited their argument solely to the question of whether the District Court abused its discretion in denying the Motion to Amend. *Appellant's Brief*, pp. 6-7. (“It was an abuse of discretion for the District Court to deny the Davis’s (sic) Motion to Amend...”). They do not contend that the District Court abused its discretion in denying their Motion for Relief from the Pretrial Order nor do they ask this Court to provide any relief from that ruling.

“Where a lower court makes a ruling based on two alternative grounds and only one of those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis.” *Taylor v. Riley*, 162 Idaho 692, 702, 403 P.3d 636, 646 (2017) (*emphasis added*) (citing *State v. Grazian*, 144 Idaho 510, 517–18, 164 P.3d 790, 797–98 (2007); *MacLeod v. Reed*, 126 Idaho 669, 671, 889 P.2d 103, 105 (Ct.App.1995). (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”). *Taylor* requires this Court to affirm the District Court, because the ruling is based on two alternative grounds and the Davises only challenge one of those grounds in this appeal. The Davises could not have amended their Complaint without also obtaining relief from the Pretrial Order by showing that good cause existed for the untimely motion and that justice required the amended complaint to be heard. This remains

true regardless of the merits of the additional claims sought to be added or any error committed by the District Court with respect to its ruling on the Motion to Amend. Consequently, this Court should affirm the District Court ruling.

3. *It is Obvious from the Record that the District Court Found the Statute of Limitations had Expired on the Proposed Amended Claims.*

The Davises argue that the District Court abused its discretion in denying their Motion to Amend their Complaint. Specifically, they argue that the District Court “failed to analyze whether the proposed additional statutory or contractual claims were time barred...” *Appellant’s Brief*, p. 6. They ask this Court to remand the issue back to the District Court with instructions to determine whether the claims set forth in the Plaintiff’s Proposed Amended Complaint are time barred.

This Court need not grant such relief, because the reasons that the District Court denied the motion to amend are obvious from the record. “If a district court fails to enumerate its reasons for a discretionary decision, *and the reasons are not obvious from the record*, the Court will remand the case.” *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 756, 331 P.3d 491, 498 (2014) (*emphasis added*) (citing *Quick v. Crane*, 111 Idaho 759, 772–73, 727 P.2d 1187, 1200–01 (1986)). By negative inference, the Court will not remand the case if the reasons are obvious from the record. This Court has further held that a court’s recitation of its reasons for a decision need not be lengthy and may consist of brief remarks in open court. *Bailey v. Bailey*, 107 Idaho 324, 329, 689 P.2d 216, 221 (Ct. App. 1984); *see also Cummings, supra*.

The record demonstrates that the District Court was clearly of the opinion that all of the Davises’ claims were barred by the statute of limitations, including the proposed claims set forth

in its Motion to Amend Complaint. At the outset of the December 7, 2018 hearing on the Davises' Motions to Amend and for Relief from the Pretrial Order the judge stated:

...

THE COURT: And we also have a motion by the plaintiffs asking to shorten time and to grant leave to file an amended complaint to add a couple of additional clients.

And I think what I need to say in this case, in looking at it is, I looked at the file, I asked my staff attorney to go through the file and we met and talked about it. And, Mr. Bauer, what I need to hear, I think, from you is I can't see any way that we get around the statute of limitations.

We're talking about a sale that occurred in 2009 and we're nine years out, and I don't know of any – I know of two-year statute of limitations, three years, a five year – but we're beyond any statute of limitations. So I just don't see any way that we get around that.

So, Mr. Bauer, I don't think Mr. McLaughlin needs to waste a lot of time telling me that because I'm very familiar with the statute of limitations and their absolute bar, and I don't know how we get around them.

MR. BAUER: Yes, Your Honor. May I speak to that?

THE COURT: You May.

(Tr. Vol. I, pp. 5-6).

Mr. Bauer then went on to argue that the doctrine of equitable estoppel provided an exception to the statute of limitations. Id. at p. 6, L. 10-19. He outlined the elements of equitable estoppel and attempted to apply them to the facts of the case and referred the court to Ferro v. Soc'y of Saint Pius X, 143 Idaho 538, 149 P.3d 813 (2006). (Tr. Vol. I, p. 8, L. 2-9). Finally, Mr. Bauer argued that if *Ferro can* provide relief from the statute of limitations with regard to claims for fraud and constructive fraud, it should also provide relief from the statute of limitations as to the proposed amended claims of breach of contract or unlicensed practices. Id. at p. 10, L. 11-21.

Aside from the argument that equitable estoppel provided his clients relief from the statutes of limitations, Mr. Bauer offered no other reason why the court should allow the proposed amended claims. The court then allowed counsel for Tuma to respond. Counsel for Tuma began by directing the court's attention to Knudsen v. Agee, 128 Idaho 776, 918 P.2d 1221 (1996). (Tr. Vol. I, p. 13, L. 3-11). In that case, this Court held that "[e]quitable estoppel is available to a plaintiff when the defendants, by their representations or conduct, kept the plaintiff from pursuing a cause of action during the limitation period." Knudsen, 128 Idaho at 779, 918 P.2d 1224. Counsel for Tuma argued that there is no evidence that Tuma's conduct prevented the Davises from pursuing their claims during the limitation period. (Tr. Vol. I, p. 13, L. 23-25). When Mr. Bauer was given an opportunity to respond, he presented no evidence in support of equitable estoppel.

It is obvious from the record that the District Court was not persuaded by the Davises' equitable estoppel argument:

THE COURT: The problem I'm having there though is then to do that, you have to get beyond the statute of limitations. And I'm not seeing for your equitable estoppel claims as Mr. McLaughlin – there has to be some action that the person is taking to try to – to have you sit on your rights, to try to kind of conceal it from you. And I don't see that we have that here.

(Tr. Vol. I, p. 34, L. 22-25; p. 35, L. 1-4).

And:

THE COURT: Again, I will issue a written decision, but I believe that this action is barred by the statute of limitations. I don't see any way we get beyond it.

Id. at p. 36, L. 17-20.

And finally:

THE COURT: But there's no use unnecessarily prolonging an action that appears to be clearly barred by the statute of limitations.

So that's the Court's thinking. And I'll issue a written decision.

Id. at p. 9, L. 2-9.

Although the District Court's Memorandum Decision did not specifically address its reasons for denying the Davises' Motion to Amend or the Motion for Relief from the Pretrial Order, it is obvious from the record that the court found that the statute of limitations barred all of the Davises' claims, including those sought to be added in the amended complaint. It is also obvious that the court did not find that equitable estoppel applied in this case, which was the only exception to the statute of limitations put forward by the Davises in support of their proposed

amended claims. *Bailey* instructs that the District Court's remarks at the December 7, 2018 hearing satisfy the requirement that the reasoning behind a discretionary decision should be disclosed and for this reason the District Court's ruling should be affirmed.

B. The District Court Properly Found that the Statutes of Limitations Had Run on the Davises' Claims.

The only remaining issues raised by the Davises in this appeal are whether they had actual or constructive notice of the facts giving rise to their claims for fraud, constructive fraud, and negligence. *Appellant's Brief*, pp. 7-12. The District Court found that there were no genuinely disputed issues of material fact for trial as to whether the Davises had constructive knowledge that Gray Wolf Road did not provide access to their property as of October 1, 2009, the date they acquired title to the property. (R. Vol. I, p. 373). Consequently, the District Court ruled that the Davises' claims for fraud and constructive fraud (hereafter, collectively referred to as 'the fraud claims') were barred by Idaho Code (I.C.) § 5-218(4). (R. Vol. I, p. 369).

The District Court also found that the Davises had actual knowledge of the facts giving rise to the fraud claims on December 7, 2009. *Id.*

Finally, the District Court found that the Davises' claims for negligence, to the extent they may have been implicitly pled, were barred by I.C. § 5-224. *Id.* at pp. 371-372.

For the reasons set forth below, this Court should affirm the grant of summary judgment.

1. *The District Court Properly Found that any Negligence Claims, to the Extent they were Implicitly Pled by the Davises, were Barred by the Statute of Limitations.*

The Davises argue in Section D of their opening brief that the District Court erred in dismissing the negligence claims because they did not have actual or constructive notice that there was a problem with their access when they purchased the home or thereafter. *Appellant's Brief*, p. 12. With regard to the statute of limitations on negligence claims, this Court has held “[b]ecause there is no statute of limitations specifically governing negligence actions that do not involve personal injury or malpractice, we apply the four-year statute of limitations found in I.C. § 5-224.” Jones v. Runft, Leroy, Coffin & Matthews, Chartered, 125 Idaho 607, 613, 873 P.2d 861, 867 (1994).

The Davises’ negligence claims do not involve personal injury or malpractice. In fact, as the District Court noted, the Davises did not set forth in their Complaint a claim for negligence at all. (R. Vol. I, p. 371). The District Court properly found that, to the extent the Davises implicitly pled a claim that Tuma was negligent in the performance of his duties as their real estate agent, such claim was barred by I.C. § 5-224. *Id.* The District Court observed that under Idaho law:

“[In order t]o determine whether this statute of limitations bars the claim, [the Court] must determine when the first negligent act occurred. This analysis focuses upon the acts complained of and does not require an analysis of when the plaintiff discovered either the acts complained of or the damage resulting from those acts.”

Id., (citing Jones, 125 Idaho at 613, 873 P.2d at 867 (citations omitted)).

The District Court then found that it was undisputed that any negligent act by Tuma in reviewing and interpreting the title commitment, CCRs, and surveys must have occurred no later

than October 1, 2009, which is the date the Davises acquired the Subject Property. Id. The District Court concluded, therefore, that any negligence claims began accruing on October 1, 2009 and, pursuant to I.C. § 5-224, lapsed four years later, on October 1, 2013, nearly five years before the Complaint was filed. Id. at pp. 371-372.

In this appeal, the Davises appear to be asking this Court to apply the discovery rule set forth in I.C. § 5-219 to their implicitly pled claims for ordinary negligence. Unlike I.C. § 5-219, which governs personal injury and malpractice claims, I.C. § 5-224 does not accrue when the facts giving rise to the claim become known. Jones, 125 Idaho at 613, 873 P.2d at 867. Rather, claims governed by § 5-224 accrue when the negligent act occurred. Id. Consequently, the date when the Davises obtained actual or constructive knowledge that Gray Wolf Road did not provide access to their property is irrelevant with regard to a claim for negligence, as there is no tolling of such claims under Idaho law. Any negligence claim accrued at the time of Tuma's alleged mistake as to the location of the legal access, not when truth of those representations was or could have been discovered. There is no dispute that Tuma's statements about access to the Subject Property occurred before October 1, 2009, the date of closing. Thus, the statute of limitations on these claims expired, at the latest, four years from that date, which was October 1, 2013.

The Davises put forward no argument or authority for applying the discovery rule applicable to personal injury and malpractice claims to a claim of ordinary negligence, to the extent any such claims were even pled. Consequently, this Court should affirm the District Court's ruling dismissing the Davises' negligence claims.

2. *The District Court correctly found that the Davises had actual knowledge that Gray Wolf Road did not provide access to their property on December 7, 2009.*

The District Court found that the Davises were provided with actual knowledge that Gray Wolf Road did not provide the legal access to their property when, on December 7, 2009, their title officer having emailed a copy of a survey showing exactly this. (R. Vol. I, pp. 369-370). This finding should not be disturbed on appeal, as it is supported by substantial undisputed evidence.

“Where discovery of a cause of action for fraud commences the statute of limitations, the date of discovery is a fact question for the jury unless there is no evidence creating a question of fact.” DBSI/TRI v. Bender, 130 Idaho 796, 807, 948 P.2d 151, 162 (1997) (*emphasis added*).

“Where there is no dispute over any issue of material fact regarding when the cause of action accrues, the question is one of law for determination by the court.” Nerco Minerals Co. v. Morrison Knudsen Corp., 140 Idaho 144, 148, 90 P.3d 894, 898 (2004). “Summary judgment is proper when there is no genuine issue of material fact and the only remaining questions are questions of law.” Chandler v. Hayden, 147 Idaho 765, 768, 215 P.3d 485, 488 (2009).

“Actual knowledge of the fraud can be inferred if the aggrieved party could have discovered the fraud by reasonable diligence, although the Court will hesitate to infer such knowledge.” DBSI/TRI, 130 Idaho at 807, 948 P.2d at 162. In this case, the District Court found that there was no question of fact as to the date the Davises had actual knowledge of the fact that legal access to their property was over an easement from Highway 2, and not Gray Wolf Road. (R. Vol. I, p. 369). Specifically, the court found that there was no genuine dispute that Jessica

Fairchild emailed the Davises a copy of the Boundary Line Survey on December 7, 2009. *Id.* at p. 365, ¶ 11.

Based on this undisputed fact, the District Court found that the Davises had actual knowledge of the facts contained within the Boundary Line Survey on December 7, 2009. Because this fact was undisputed, the date the Davises' fraud claims accrued was a question of law for determination by the court, as permitted by *Nerco*. Because this was purely a question of law, summary judgment was appropriate despite the Davises' jury demand.

This Court exercises free review over questions of law. *Guzman v. Piercy*, 155 Idaho 928, 934, 318 P.3d 918, 924 (2014). In reviewing a motion for summary judgment, the Supreme Court liberally construes the record in favor of the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 273, 869 P.2d 1365, 1367 (1994).

On appeal, the Davises argue that it was error to grant summary judgment because “facts existed on summary judgment from which a reasonable person could conclude that the Davises did exercise proper due diligence when they did not open an attachment that had something to do with a transaction they had completed two months earlier.” *Appellant's Brief*, p. 10. They also argue that “[t]he facts on summary judgment could easily lead to the conclusion that the Davises acted with due diligence when they were sent the survey of the property two months after the purchase of their home. *Id.* at p. 11.

However, the Davises completely fail to provide any citations to evidence in the record to support their contention there is evidence that “could easily lead to the conclusion that the Davises”

acted with due diligence. Moreover, no such facts were submitted to the District Court in opposition to Tuma's Motion for Summary Judgment. Rather, the Davises asked the District Court, and in this appeal ask this Court, to draw a conflicting inference from the undisputed facts.

That the Davises do not dispute the District Court's findings of fact, but instead the inferences to be drawn from those facts, is evidenced by the arguments put forward in their opening brief. To this end, the Davises argue:

The facts on summary judgment could easily lead to the conclusion that the Davises did act with due diligence when they were sent the survey of the property two months after the purchase of their home.

...

A reasonable fact finder could conclude that it was not unreasonable [to] fail to open an attachment from a title company and examine its contents more than two months after you had purchased your property." *Appellant's Brief*, p. 10. (emphasis added). . . .

Furthermore, a reasonable person could conclude that a lay person would not be able to look at a survey and figure out that they did not have access on Gray Wolf Road. Even if the Davises had noticed that the road shown on the survey did not extend to their home, such would not necessarily lead a lay person to believe that they could not use the road that existed when they bought the property.

Id. at pp. 11 - 12. (emphasis added).

Clearly, the Davises do not dispute receiving the email showing that they did not have access to their property over Gray Wolf Road. That is a settled fact, and as such, when the statute of limitations accrued is a matter of law, for the trial Court, not the trier of fact, to decide. Rather, the sum of their argument is that reasonable people could reach different conclusions from the undisputed facts before the District Court. This argument is erroneous.

With regard to the argument that a reasonable person might not necessarily understand the Boundary Line Survey to mean the Davises did not have access over Gray Wolf Road, this position is inconsistent with arguments previously and repeatedly advanced by the Davises to the trial court. In their response to the motion for summary judgment, for example, they allege that the Boundary Line Survey “unmistakably” shows that access to the property was not off of Gray Wolf. (R. Vol. I, p. 178, ¶ II(1)(iii)).

When asked through discovery to provide the factual basis for their fraud claim, the Davises provided the following sworn testimony:

A review of Article IX of the Covenants would immediately indicate that all Roads and Easements were pursuant to the Exhibit A of the Covenants in accordance with the Record of Survey (ROS) filed on 5-3-95 as Instrument # 177454. All roads and easements shall be as shown on said Plat including utilities. Said ROS plainly shows that Gray Wolf road does not extend to Lot 2. Additionally Road Detail B plainly shows that access was almost directly off Highway 2. Had Tuma reviewed the CCRs as stated and assured the Davises that there was nothing to worry about in that regard he would have had to have reviewed the ROS attached to the CCRs and referenced explicitly in the CCRs and which plainly shows access of off (sic) Highway 2, per Road Detail B, and not via., Gray Wolf road as shown in Road Detail A of the ROS.

Id. at p. 68; 132.

The doctrine of judicial estoppel² prevents the Davises from taking the position at the district court level that the CCRs and Record of Survey “plainly” and “unmistakably” revealed the

² The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion. Sword v. Sweet, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004) (citing Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir.1996)).

alleged fraud but on appeal taking the position that a reasonable person might not understand the import of those documents.

Thus, the only question before this Court as to whether the Davises had actual knowledge of the contents of the survey is whether they exercised *reasonable* due diligence when they declined, failed, or neglected to open Jessica Fairchild's email with the attached record of survey.

The facts in the record demonstrate that the Davises exercised *no* diligence in this regard. The affidavit of Terah Davis demonstrates that she was acting on behalf of her parents, Debbie and Jefri Davis. (R. Vol. I, pp. 224-225, ¶ 2). She admits that she received and opened the email from Jessica Fairchild and the attachment thereto which was labeled "Record of Survey," but claims that her computer crashed before she could read the attachment. *Id.* at p. 228, ¶ 22. She then admits that she never attempted to download the attachment again. *Id.* at pp. 228-229, ¶ 23. She states that her mother was aware of this email. *Id.* at p. 229, ¶ 24. Her father, Jefri Davis also admits he was aware of the email, but makes no allegation that he took any steps to learn the contents of the survey. *Id.* at p. 251, ¶ 5.

The Davises merely had to read the email attachment that was sent to them by their closing agent. Moreover, if, as they contend, the computer crashed, then due diligence would require that they subsequently contact their closing agent and have her send another copy of the survey, either electronically or by mail, or that they order a copy from the local County Recorder's Office. *See, Kantola v. Hendrickson*, 52 Idaho 217, 12 P.2d 866, 869 (1932) (notice exists where the plaintiff "has knowledge of circumstances such as would put a prudent man upon inquiry and if prosecuted diligently would expose the fraud."); *Parish v. Page*, 50 Idaho 87, 293 P. 979, 982 (1930)

("[K]nowledge of facts that would put a reasonably prudent person on inquiry is equivalent to knowledge of the fraud, and will start the running of the statute.").

This concept has been eloquently explained by the Georgia Supreme Court in the case of Clarke v. Ingram, 107 Ga. 565, 33 S.E. 802 (1899). In *Clarke*, the Georgia Supreme Court was faced with interpreting a statute that held that all conveyances made during insolvency were "fraudulent or void, unless made to an innocent purchaser for value without notice or knowledge of the condition of the bank." *Id.* at 804. The *Clarke* Court found that the statute at issue in that case required actual notice, rather than constructive notice. *Id.* However, as explained by the *Clarke* Court, proving actual notice does not require proof of actual knowledge on the part of the opposing party, and one who receives information and simply ignores it, nevertheless has actual notice.

Looking to the evident purpose of this statute to afford protection to all persons justly entitled thereto, we have no doubt that it contemplates actual, rather than merely constructive, notice. But it by no means follows, as is insisted, that a person sought to be charged with such notice must be shown to have had actual knowledge that the bank with which he was dealing was insolvent. **The terms "knowledge" and "notice" are not synonymous or interchangeable, and should not, therefore, be confounded the one with the other. That which clearly does not amount to positive knowledge may often, in a legal sense, constitute actual notice.** Accordingly, in applying a statute which contemplates that only actual notice shall affect the rights of one acting in good faith, the language used expressly or by necessary implication negating the idea that he is chargeable with constructive notice as well, the mere fact that he did not have precise and definite knowledge concerning the matter in question cannot be regarded as having any real importance whatever.

On the contrary, the distinction to be drawn in a case calling for the application of such a statute is that “between actual and constructive notice, and not between actual knowledge and constructive notice. The difference in meaning between knowledge and notice must not be overlooked, for it is equally important with the distinction between the different kinds of notice. The fact to be established, when the case requires proof of actual notice, is that the party acquired his pretended rights with notice, and this may be true although the purchase may have been made in actual ignorance of the facts of which knowledge is imputed to the purchaser.” Wade, Notice (2d Ed.) § 36a.

“Notice is actual when one either has knowledge of a fact, or is conscious of having the means of knowledge, although he may not use them. Actual notice may be divided into express and implied. Express notice embraces, not only what may fairly be called knowledge, from the fact that it is derived from the highest evidence to be communicated by the human senses, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated. **The implication of notice arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to [have] knowledge of the principal fact.”** 16 Am. & Eng. Enc. Law, 790.

To the same effect, see Wade, Notice (2d Ed.) §§ 5–8; also, section 11, as follows: **“It is easy to understand how one may be [precluded] from denying actual notice when positive information has been traced directly to him. It is not necessary to invoke the doctrine of constructive notice in order to justify holding that he will not be heard to deny that he understood the import of what was clearly and plainly communicated. Whether the notice has been communicated cannot be determined by the standard of the recipient's stupidity or heedlessness.** For the reason, therefore, that ignorance of an important fact which has been placed within the easy reach of a party imports either fraud or gross negligence on his part, the law will never inquire further than is necessary to show the giving of the notice by such means as are sufficient to convey intelligence from one human being to another. **It has accordingly been held that ‘when a party, having**

knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making, such obvious inquiries, he must be taken to have notice of these facts which, if he had used such ordinary diligence, he would readily have ascertained,”—citing *Whitebread v. Jordan, I Younge & C. Exch.* 303, and numerous other cases in point. **It is clear, therefore, that in no case should the investigation be confined to an inquiry into the actual knowledge of the person sought to be charged with notice; the really important question to be determined in each instance being, not what he actually knew, but what, under the circumstances, he ought to have known.** Passive good faith will not serve to excuse ignorance which is unpardonable. . . .

He may honestly believe that the notice given him, although it comes apparently from a reliable source, is not in accord with the truth; yet, in venturing to disregard the same, he acts at his peril. **If the notice given him be legally sufficient, it matters not what excuse he has to offer for his failure to govern himself accordingly.** Nor is it always necessary that it be shown that he received due notice of the particular facts in ignorance of which he claims to have acted, if the circumstances were such that by the exercise of reasonable diligence he might have acquired knowledge thereof by pursuing the inquiry which would have suggested itself to an ordinarily cautious and prudent man.

Clarke, 33 S.E. at 804–05 (*emphasis added*).

Idaho law has adopted the reasoning of the Georgia Supreme Court in the *Clarke* decision, in that Idaho Code § 5-218(4) has been interpreted by the Idaho Supreme Court to provide that fraud causes of action begin to run when the plaintiff knew, **or reasonably should have known, of the facts constituting the fraud.** *McCorkle v. Nw. Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005) (*emphasis added*). Based upon the undisputed facts in the record, only one conclusion can be reached – that the Davises could have discovered the fraud by the exercise of due diligence, which they failed to perform.

By their own admission, a simple review of the survey would have revealed exactly the information that they claim Tuma failed to disclose to them. (R. Vol. I, p. 68; 132). In fact, the Davises go to great lengths to argue that the lack of legal access to their property over Gray Wolf Road is obvious from a review of the surveys. *Id.* at 183-186. There is no dispute, therefore, that had the Davises simply read their email or followed up with the title company, they would have had actual knowledge of the legal access. Consequently, the Davises were on actual notice of the facts underlying the alleged fraud no later than December 7, 2009, whether or not they opened the survey attached to the email. At that point, the statute of limitations began to accrue, and the Davises' fraud claims expired no later than December 7, 2012. Whether they actually reviewed the survey that they admit to having received is immaterial to the question of whether the statute of limitations began to accrue and subsequently expired.

The District Court properly concluded that, upon these undisputed facts, the Davises failed to exercise reasonable diligence. Under these circumstances, and in accordance with the rule from *DBSI/TRI*, the District Court was permitted to infer that the Davises had actual or constructive knowledge of the facts that form the basis of their fraud claims sufficient for their claims to accrue under I.C. § 5-218(4) as of December 7, 2009. And while *DBSI/TRI* instructs the court to hesitate to infer such knowledge, it does not proscribe such an inference when appropriate. This is such a case. The Davises should not benefit from their willful failure and refusal to procure a copy of the Boundary Line Survey, particularly when they had the means of discovering those claims delivered directly to their email inbox.

There are sound policy reasons for the application of statutes of limitation in matters such as these. In Renner v. Edwards, 93 Idaho 836, 838–39, 475 P.2d 530, 532–33 (1969), it was stated:

It is eminently clear that statutes of limitation were intended to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard for want of reasonable prosecution. They are, to be sure, a bane to those who are neglectful or dilatory in the prosecution of their legal rights. As a statute of repose, they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has wilfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses.” To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance.

Id.

The Davises put forward no evidence or argument below or on appeal to support a reversal of the District Court’s finding that the Davises had actual or constructive knowledge of the facts constituting their fraud claims on the date they received the email from Jessica Fairchild, December 7, 2009. Consequently, this Court should affirm the District Court’s ruling that the statute of limitations expired on the Davises’ fraud claims three years later, on December 7, 2012.

3. *The District Court Properly Found that the Davises had Constructive Knowledge that Gray Wolf Road did not Provide Access to Their Property.*

This Court need not reach the issue of whether the Davises had constructive notice of the fraud claims, as it is obvious that they had actual notice sufficient for the statute of limitations to

have expired on December 7, 2012. However, in the event this Court finds that the Davises did not have actual notice, the District Court's ruling that they had constructive notice from the record should be upheld.

The parties do not dispute that the Davises received by email a copy of the Boundary Line Survey, and that the record of survey, the CCRs, and the Boundary Line Survey were all recorded documents in the public records of Boundary County as of October 1, 2009. (R. Vol. I, p. 365, ¶ 11). The parties also do not dispute that the surveys show that Gray Wolf Road does not provide legal access to the Davises' property. *Id.* at ¶ 10. From these undisputed facts, the District Court found that the Davises were on constructive notice of the facts contained within those recorded documents on the date they acquired the property, October 1, 2009.

The concept of constructive knowledge or constructive notice is not limited merely to documents that have been recorded. While it is true that I.C. § 55-811 imparts constructive notice of adverse recorded interests to a prospective buyer to protect holders of prior recorded interests, the concept of constructive notice is far broader.

Under binding Idaho precedent, the statute of limitations for a claim for fraud begins to run when the plaintiff knew, **or reasonably should have known, of the facts constituting the fraud.** *McCorkle*, 141 Idaho at 554, 112 P.3d at 842 (*emphasis added*). The question, therefore, is not whether the Davises actually reviewed the survey that was indisputably emailed to them, but whether under these circumstances, they reasonably should have known of the facts constituting the fraud.

The District Court's decision in this regard is sound. The documents that reveal the actual location of the legal access to the Davises property are recorded, and pursuant to Idaho law, "a purchaser is charged with every fact shown by the records and is presumed to know every other fact which an examination suggested by the records would have disclosed." W. Wood Investments, Inc. v. Acord, 141 Idaho 75, 86, 106 P.3d 401, 412 (2005). Additionally, in this case, the Davises actually received the survey which, by their own admission, clearly indicates the location of the legal access. These circumstances can be labeled actual knowledge, actual notice, constructive knowledge, or constructive notice, but in any case, these facts clearly support the Court's finding that the Davises reasonably should have known of the facts constituting the fraud. It is at that point that the statute of limitations began to run, and has, in this case, long since expired.

4. *The District Court Decision Must Be Upheld Due to the Appellant's Failure to Support the Elements of its Claim for Fraud in Response to Respondent's Motion for Summary Judgment.*

Alternatively, this Court can uphold the District Court's ruling on the grounds that the Davises failed to come forward with evidence supporting the elements of their fraud claims in response to Tuma's Motion for Summary Judgment. The District Court never reached this question because it found that the claims were barred by the statute of limitations.

It is well settled that this Court can affirm the decision of a lower court on alternative theories than those given below. Nampa & Meridian Irr. Dist. v. Mussell, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003). In this matter, Tuma filed a *Celotex*-style Motion for Summary Judgment on the Davises' fraud and constructive fraud claims. (R. Vol. I, p. 61). Relevant to this appeal, Tuma argued that there was no evidence that Tuma knew his statements were false, which is

generally considered the fourth element of a fraud claim. *Id.* at pp. 73-76. The Davises responded to the motion by arguing that this element may be proven either by evidence that the speaker knew the statement to be false or evidence that they were ignorant of its truth. *Id.* at pp. 186-187. They then argued to the District Court that the evidence in this case showed that Tuma was ignorant as to the truth of his statements concerning Gray Wolf Road. *Id.* at p. 190, ¶ 4 (“Tuma was ignorant of the truth of his...misstatements”).

Tuma responded that the Davises were applying a negligence standard to the scienter element of fraud. *Id.* at p. 305. Tuma noted that, under Idaho law, it is not fraud if a person is simply mistaken as to a fact if that person is unaware that he or she is mistaken. It is only fraud where the speaker claims that he or she knows something to be true, when the speaker is aware that he or she had no basis for claiming it to be true. This difference was explained by reference to this Court’s decision in *Holderman*:

To support an action based on a false representation, scienter must be proved; that is, the representation must have been false, to the knowledge of the person who made it, or ***must have been made, as a positive assertion calculated to convey the impression that he had actual knowledge of its truth, when in fact he was conscious he had no such knowledge. If the speaker honestly believed his representation to be true, he is not liable; an honest mistake, or error in judgment, being regarded as insufficient grounds on which to base a charge of fraud.*** 20 Cyc. 24. It is true that, if a representation is made recklessly, without any knowledge of its truth or falsity, an action will lie, but not where such representation is made in the belief that it is true, and such belief is founded upon reasonable grounds.

Id. at pp. 305-306 (citing Johnson v. Holderman, 30 Idaho 691, 167 P. 1030, 1031 (1917) (*emphasis added*)).

To withstand the dismissal of the Davises' fraud claims on summary judgment, the Davises would have had to submit admissible evidence demonstrating that Tuma was either aware his statements were false, or that he was aware that he did not know whether his representation regarding access was true or false, but nevertheless represented that he understood the location of the access. The record is devoid of any such evidence. At most, the record shows that Tuma misunderstood the location of the legal access to the property.

Nor is there evidence that Tuma made the statements about Gray Wolf Road recklessly, as there was substantial evidence indicating that this was the road access to the subject property. For instance, Gray Wolf Road does not physically end where the easement ceases." (R. Vol. I, pp. 84-85, ¶¶ 9-17). Rather it continues to the Subject Property, right to the Davises' property. *Id.* at p. 84, ¶ 12. There were no other roads built to the property. Boundary County aerial maps show Gray Wolf Road going to the property, and the property address for the Subject Property assigned by Boundary County is 984 Gray Wolf Road. *Id.* at pp. 84-85, ¶¶ 16, 11. Despite these facts, however, the Davises did not have legal access over Gray Wolf Road, but through a different easement. This evidence does not support a finding that Tuma was reckless in erroneously concluding that Gray Wolf Road was the legal access to the Davises' property.

At the hearing on Tuma's Motion for Summary Judgment, the Davises put forward no evidence supporting their allegation that Tuma made a positive assertion calculated to convey the impression that he had actual knowledge of its truth, when in fact he was conscious he had no such knowledge, sufficient to meet the standard set forth in *Holderman*. Rather, the facts in the record

support only a finding that Tuma honestly believed his representation to be true, when they were not. Consequently, *Holderman* instructs that Tuma is not liable; an honest mistake, or error in judgment, being regarded as insufficient grounds on which to base a charge of fraud. Holderman, 30 Idaho 691, 167 P. at 1031.

In fact, in the Davises' Appeal Brief, they admit several times that Tuma was simply mistaken in his belief of the location of the legal access:

Tuma failed to notice that the road that both he and the Davises believed to provide access to the home did not in fact do so. . . .

Tuma believed the property had access via Gray Wolf Road based on his investigation of the property. . . .

The information Tuma reviewed prior to closing shows that the access to the Davis's (sic) home is not from Grey (sic) Wolf Road but from another point off of the highway. Tuma failed to notice this fact as he readily admits."

Appellant's Brief, pp. 1-2. (emphasis in original) (citations omitted).

The record before the Court, and the arguments advanced by the Davises do not support their fraud claims. At most, the Davises had a claim against Tuma for negligence, but such a claim is now barred by the statute of limitations, as explained in Section B.1, above.

The Respondent respectfully submits that this Court should find that Tuma met his burden on summary judgment of showing an absence of evidence on the knowledge element of the Davises' fraud claim. Pursuant to *Celotex*, the burden then shifted to the Davises to come forward with evidence that Tuma knew his statements were false or that he made them with reckless disregard as to the truth of the matters. The record shows that the Davises were unable to meet

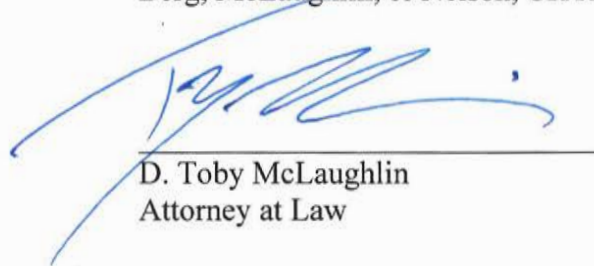
this burden, and this Court should affirm the District Court's dismissal of the claims for fraud on these alternative grounds. Additionally, because the record does not support a claim of fraud, the Davises' argument that Tuma's misrepresentations prohibits a finding of constructive notice also fails.

C. Conclusion

For the reasons set forth herein, the Defendants respectfully request that this Court affirm the District Court's denial of the Plaintiffs' motion to amend and the dismissal of their claims for fraud, constructive fraud, and negligence.

DATED this 9th day of August, 2019.

Berg, McLaughlin, & Nelson, CHTD



D. Toby McLaughlin
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2019, I served a true and correct copy of the foregoing RESPONDENT'S REPLY BRIEF by the method indicated below, and addressed to the following:

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