STATE OF IDAHO)
County of KOOTENAI)ss
FILED 5/23/2022
AT 12:55 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

RAYMOND FERNANDES,

Plaintiff,

vs.

BONNIE MASSON ET AL,

Defendant.

Case No. **CV28-20-7760**

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

This case is an example of what can go wrong when family members fail to communicate. Eventually, plaintiff Raymond Fernandes and defendant Bonnie Masson became co-tenants in property. Over the course of a few years, defendant Masson took unilateral action to benefit herself without her co-tenants (Patricia Marengo first, and plaintiff Fernandes second) input or agreement. However, over that same period of time, Patricia Marengo and the plaintiff Fernandes sought to give no input or agreement to defendant Masson, until shortly after Patricia Marengo passed away in October 2019. This Court finds that as between the two co-tenants, the onus of communication rested with the party occupying the property, the party selling portions of the property (the dock) and the party making improvements to the property (the drainfield), defendant Masson.

On March 24, 2022, this Court entered its Memorandum Decision and Order Granting Defendant's Motion for Partial Summary Judgment as to Count II (Ouster), and Granting Plaintiff's Motion for Partial Summary Judgment as to Defendant's Counterclaim for Contribution Prior to June 5, 2020. As that title implies, this Court granted summary

judgment as to defendant Masson's counterclaim for contribution (for advancements of homeowner's insurance premiums, for maintenance, repairs, improvements utilities and homeowner association dues) incurred by defendant Masson prior to June 5, 2020, the date that plaintiff Fernandes acquired his ownership interest. Mem. Decision and Order Granting Def.'s Mot. for Partial Summ. J. as to Count II (Ouster), and Granting Pl.'s Mot. for Partial Summ. J. as to Def.'s Countercl. for Contribution Prior to June 5, 2020, 29. This was entered due to defendant Masson's failure to make a claim against the Estate of Patricia A. Marengo. *Id.* at 18-29.

I. FINDINGS OF FACT

1. This action concerns a parcel of real property located in Kootenai County and which is more particularly described as:

> Lot 22, Carroll's Cave Bay Homesite, Second Addition, according to the Plat recorded in Book "E" of Plats, Page 39, records of Kootenai County, Idaho.

The Subject Property is more commonly known as 22304 S. Candlelight Drive, Worley, Idaho 83876. *Am. Verified Complaint*, ¶ 6; *Answer to Am. Verified Complaint*, ¶ 6.

2. The Subject Property is improved with a single-family residence. *Am. Verified Complaint*, ¶ 7; *Answer to Am. Verified Complaint*, ¶ 7.

3. Thelma J. Nelson owned the Subject Property for many years and used the same as her primary residence. *Am. Verified Complaint*, ¶ 9; *Answer to Am. Verified Complaint*, ¶ 9.

4. On October 15, 2008, Thelma J. Nelson conveyed her interest in the Subject Property to her two daughters, Bonnie Y. Masson (defendant) and Patricia A. Marengo. The Quitclaim Deed was recorded with the Kootenai County Recorder on October 15, 2008 as Instrument No. 2181936000. *Am. Verified Complaint*, ¶ 10, Ex. A; *Answer to Am. Verified Complaint*, ¶ 10.

5. Raymond Fernandes (plaintiff) is the son of Patricia A. Marengo.

6. Thelma Nelson passed away on November 26, 2008. *Verified Complaint*, ¶ 11; *Answer to Am. Verified Complaint*, ¶ 11.

7. Upon Thelma Nelson's death, defendant Masson and Patricia Marengo became co-tenants.

8. At all times since Thelma Nelson's death, defendant Masson has resided on the Subject Property. *Verified Complaint*, ¶ 17; *Answer to Am. Verified Complaint*, ¶ 17.

9. The Subject Property had rights to a certain boat slip, known as D-14, in the Cave Bay Community Services community docks. *Am. Verified Complaint*, ¶ 8; *Answer to Am. Verified Complaint*, ¶ 8.

10. Defendant Masson sold the D-14 boat slip for which she received the sum of $25,000.00. *Verified Complaint*, ¶¶ 29-30; *Answer to Am. Verified Complaint*, ¶¶ 29-30. This transaction took place in July, 2019.

11. According to defendant Masson, she was forced to sell the boat slip because her car broke down and she could not pay the bills.

12. Defendant Masson did not give any of the proceeds of this sale to her co-tenant at the time, Patricia Marengo. Plaintiff Fernandes in his personal capacity and alternatively as Personal Representative of Patricia Marengo's Estate, has not received any of the proceeds from the sale of boat slip D-14.

13. Patricia A. Marengo passed away in about April 2019. Following her death, a probate of her estate was filed in Kootenai County, Idaho. *Verified Complaint*, ¶ 13; *Answer to Am. Verified Complaint*, ¶ 13; *Am. Answer to Verified Complaint and Counterclaim* 6, ¶ 9.

14. Plaintiff Fernandes was appointed as the Personal Representative of his mother

Patricia Marengo's Estate.

15. Plaintiff Fernandes, as Personal Representative of his mother's estate, assigned the Estate' claim for conversion against Defendant for the sale of the boat slip to himself in his personal capacity. This was done for the purposes of collection to conserve costs of litigation. *Am. Answer to Verified Complaint and Counterclaim* 6, ¶ 9.

16. A *Personal Representative's Deed* ("P.R.'s Deed") was recorded with the Kootenai County Recorder on June 15, 2020 as Instrument No. 2757692000. *Verified Complaint*, ¶ 13, Ex. B; *Answer to Am. Verified Complaint*, ¶ 13.

17. Pursuant to the P.R.'s Deed, plaintiff Fernandes was granted his mother's one-half interest in the Subject Property. *Counterclaim*, ¶ 10; *Answer to Counterclaim*, ¶ 7.

18. At all times thereafter, plaintiff Fernandes and defendant Masson were cotenants of the Subject Property. Counterclaim, ¶ 22; Answer to Counterclaim, ¶ 17.

19. Plaintiff Fernandes did not transfer his interest in the Subject Property until the parties' sold it to a third party (described in ¶ 20 immediately below), which transaction closed on March 11, 2022. Ex. K.

20. By the Order Granting Defendant's Motion for Partial Summary Judgment Pursuant to I.R.C.P. 56 as to Counts 1 and 2 and Denying as to Count 3, entered November 9, 2021, this Court ordered that the parties sale the Subject Property with the net proceeds to be disbursed 40% to plaintiff Fernandes, 40% to defendant Masson, and 20% to be deposited with the Court pending final adjudication of the outstanding issues between the parties. *Order Granting Defendant's Motion for Partial Summary Judgment Pursuant to I.R.C.P. 56 as to Counts I and 2 and Denying as to Count 3.*

21. On March 14, 2022, the sum of $79,161.18 was deposited with the Court pursuant to the Order. *Notice of Deposit of Funds*, Ex. A.

22. Since Thelma Nelson's passing in 2008, defendant Masson has used the Subject Property as her personal residence under the belief that she had the right to stay until such time as both she and Patricia Marengo decided to sell. Ex. 6, Dec. ¶ 4. The basis for this belief was the provision in Thelma Nelson's last will.

23. During the time that defendant Masson utilized the Subject Property as her personal residence, she understood that it was her obligation "to maintain the house, lot and boat slip." Additionally, she understood it was her obligation to "pay all taxes, fees, insurance and utilities."

24. For this reason, she did not make demand upon her cotenant plaintiff Fernandes for contributions for these expenses.

25. During the period of time the parties jointly owned the Subject Property [June 5, 2020 and March 11, 2022], plaintiff Fernandes did not consent to any improvements to the Subject Property by the defendant Masson.

26. During the period of time the parties jointly owned the Subject Property [June 5, 2020 and March 11, 2022], plaintiff Fernandes did not consent to any repairs to the Subject Property by the defendant Masson.

27. Plaintiff Fernandes and defendant Masson did not have a formal tenant in common agreement relating to the Subject Property. Further, there was no formal or informal agreement between the parties regarding shared expenses and/or maintenance.

28. Prior to commencing this action, defendant Masson did not provide plaintiff Fernandes with notice of the any the expenses she incurred relating to the Subject Property or receipts relating to the same.

29. Between June 5, 2020 and March 11 2022, defendant Masson paid for all of the property taxes owed in the amount of $1,665.09. Exs. B and J.

30. Between June 5, 2020 and March 11, 2022, the defendant Masson paid for

homeowner's insurance payments in the amount of $962.35. Ex. J. There was no requirement that she maintain a policy of homeowner's insurance on the Subject Property or her personal property contents during this time period.

31. Between June 5, 2020 and March 11, 2022, defendant Masson paid the total of $2,135.00 to the Cave Bay Community Services, Inc. Ex. D, MASSON101.

32. This sum is broken down as follows:

General association dues:	$300.00
Annual sewer service charge:	$250.00
Annual water service charge:	$250.00
Water improvement fund:	$400.00
Sewer improvement fund:	$75.00
DEQ lagoon loan payment:	$360.00
Invoice 6322	$500.00
	$2,135.00

Ex. D, MASSON101; Ex. D-1, ¶ 4. (the Court notes the discrepancy in that Exhibit vs. Plaintiff's/Counter-Claimant's Proposed Findings of Fact 5-6, ¶ 33, and finds the Exhibit controls).

33. All charges assessed by Cave Bay are billed annual for a fiscal year beginning July 1 through June 30 of the following calendar year. Ex. D-1, ¶ 3.

34. Because of defendant Masson's full time use of the Subject Property, it was invoiced for $250.00 per year for the respective use of the water and sewer system. Had the Subject Property been utilized on a weekend only basis it would been invoiced $125.00 per year for these respective services; a savings of $250.00 a year.

35. On March 18, 2022, Cave Bay Community Services, Inc. received a second check in the amount of $1,650.00 for the Subject Property. Ex. D, ¶ 6 and MASSON 101. This was paid out of the proceeds received from the sale of the Subject Property. Ex. K.

36. In the fall of 2020, there were some reported issues with the drain field connected to the septic tank on the Subject Property.

37. Rather than repair the drain field, defendant Masson elected to connect into the Cave Bay Community sewer system. To do so, she hired McPeak Electric, LLC and MT Morris to excavate and install the sewer lift station. These entities invoiced the respective sums of $7,532.00 and $1,000.00. Ex. E, MASSON022-023.

38. According to the defendant Masson, she obtained a USDA grant to complete the work. For this reason, her out of pocket expenses for this work were limited to $1,000.00. There was no testimony that defendant Masson has any liability to reimburse the USDA for the grant monies it paid out for this work.

39. At some point, defendant Masson acknowledged that she learned that she could have just replaced the drain field.

40. In addition, Cave Bay Community Services, Inc. assessed a one-time fee of $500.00 for the right to connect to the community sewer system. Ex. D, MASSON101; Ex. D-1, ¶ 8

41. Connection to Cave Bay's sewer system is voluntary. Currently, there remains approximately 14-15 homes that still rely upon personal septic systems to handle domestic waste water. Until a connection is made, the member property is not assessed an annual fee for use of the sewer system or the connection fee. Ex. D-1, ¶ 8.

42. But for defendant Masson's decision to connect into the Cay Bay community sewer system, the connection fee of $500.00 and annual use fee of $250.00 would not have been assessed.

43. Sod was installed by King Sod to replace grass which was removed during the excavation of the septic system. Defendant Masson was invoiced $148.82 for these materials. There was no evidence presented that this was a necessary repair or that the area could not have been replanted with grass seed as opposed to sod.

44. The parties' closed on the sale of the Subject Property on March 11, 2022. Ex. K.

Prior to closing, plaintiff Fernandes agreed that the Defendant should receive any credits due from the buyer for garbage or association dues to the extent she had paid the same.

45. As of closing, the 2021-2022 Cave Bay Community Services, Inc. assessment in the amount of $1,650.00 remained outstanding. Ex. D, MASSON101. This amount was deducted from the gross purchase price jointly received by plaintiff Fernandes and defendant Masson and tendered by the escrow agent, North Idaho Title, to the Cave Bay Community Services, Inc. Exs. D, ¶ 6, and K.

46. At time of closing, credits were collected from the Buyer of the Subject Property for their pro-rata share of the annual solid waste and Cave Bay Community Services, Inc. assessments. These credits were $708.89 and $504.17, respectively. Ex. K.

47. After closing, the parties were distributed net proceeds in the respective amounts:

Plaintiff Fernandes:	$157,747.31
Defendant Masson:	$158,897.43
Difference:	$ 1,150.12

48. Plaintiff Fernandes concedes that the defendant Masson should have been allocated the entire credit for the prepaid garbage in the amount of $70.89. Any offset beyond that amount for the Cave Bay Community Services, Inc. assessments was incorrectly calculated and improperly allocated to the defendant Masson as it was deducted from the gross sale proceeds jointly tendered to the parties and not prepaid by one party.

49. This amount overpaid to defendant Masson totals $1,079.23. Therefore, plaintiff Fernandes is entitled to an offset this sum from the amounts deposited with the Court.

50. At trial, defendant Masson withdrew the portion of her contribution claim as it related to labor claimed to have been performed by Robert Taufen, Penny Taufen, Ashley Fenton, and Calvin Powell. Defendant Masson narrowed her claim for contribution to expenses necessary to maintain the Subject Property, payment of taxes, Homeowners

Association dues, and homeowner's insurance. Defendant Masson concedes, "The sole remaining issue at trial is the amount of contribution to which Masson is entitled for repairs and maintenance to the Property from June 5, 2020 to present." Def./Counter-Claimant's (Proposed) Revised Findings of Fact and Conclusions of Law 8.

II. CONCLUSIONS OF LAW.

A. DEFENDANT MASSON'S CLAIM OF OFFSET AND PLAINTIFF FERNANDES' CLAIM OF CONVERSION.

1. Defendant Masson argues that she is entitled to an offset against the amount she owes plaintiff Fernandes for the boat slip's proceeds. Defendant/Counterclaimant's Trial Brief 2-3. In doing so, defendant Masson concedes she owes plaintiff Fernandes one-half of the $25,000.00 defendant Masson received for the boat slip. Counsel for defendant Masson writes:

> Masson admits that she sold the boat slip for $25,000.00. See *Answer* to *the Amended Verified Compliant*, ¶¶ 29-30, filed January 26, 2022. Masson was willing to agree to an offset for one-half of the compensation she received for the sale of the boat slip (i.e., $12,500.00) on the condition shat she receives a concomitant offset for expenses she paid to maintain the subject property.
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> . . . .
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> To the extent Plaintiff proves at trial that he, rather than Ms. Marengo or her estate, is the real party in interest to prosecute the claim for conversion, Masson asserts a setoff for the full amount sought thereby.

Id. Because this Court finds defendant Masson owes plaintiff Fernandes $12,500.00 for converting the dock, this Court will not deal with this issue in terms of a set off.

2. Even though counsel for defendant Masson concedes that his client owes $12,500.00, counsel for defendant Masson makes legal arguments that defendant Masson cannot owe such as a conversion claim. Counsel for defendant Masson writes:

> Here, Plaintiff has not presented evidence to show that he is the real party in interest to prosecute his conversion claim. "'[T]hree elements which are required for a claim of conversion to be valid: (1) that the charged party wrongfully gained dominion of property; (2) that property is owned or possessed by plaintiff at the time of possession; and (3) the property in question is personal property.'" *Med.*

> *Recovery Servs., LLC v. Bonneville Billings and Collections, Inc.*, 157 Idaho 395, 400, 336 P.3d 802, 807 (2014) (quoting *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010)). Plaintiff did not possess the boat slip at the time of the conversion and he does not bring such claim as the executor of Ms. Marengo's estate. Therefore, he does not have the requisite standing to prevail on such claim.

Id. at 3. If this argument had any validity when made, just prior to the court trial, such argument was put to rest when the plaintiff Fernandes testified at the court trial that he had assigned the claim of conversion for the dock from his mother's estate to himself. That testimony was uncontradicted. This is certainly something plaintiff Fernandes can do as the personal representative of his mother's estate.

3. Additionally, this Court finds defendant Masson is barred from offsetting here due to the doctrine of unclean hands. Under the equitable doctrine of "unclean hands," the Court has the discretion to evaluate the relative conduct of both parties and to determine whether the party seeking equitable relief should in the light of all the circumstances be precluded from such relief. *Curtis v. Becker*, 130 Idaho 378 (1997); *see also Schmidt v. Huston*, 167 Idaho 320, 324 (2016) ("the court may act *sua sponte* or of its own motion."). More specifically, a litigant may be denied equitable relief by a court on the ground that his conduct "has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Gilbert v. Nampa School District No. 131*, 104 Idaho 137, 145 (1983); *Hobbs v. First Interstate Bank of Idaho*, N.A., 109 Idaho 990, 992 (Ct.App.1985).

4. The Court appreciates that this is a matter committed to its discretion. Four years ago the Idaho Supreme Court clarified the standard of review regarding the trial judge's use of his or her discretion:

> When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. 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. *See Hull,* 163 Idaho at ___, 409 P.3d at 830.
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> This discretionary standard has frequently been cited as a "multi-tiered inquiry," *e.g., State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) or even as a "three prong" standard, *see Blackmore v. Re/Max Tri-Cities, LLC,* 149 Idaho 558, 563, 237 P.3d 655, 660 (2010), which judges and lawyers alike can likely recite by heart. It appears to have originated in *Assocs. Nw., Inc. v. Beets,* 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987), based upon language taken from the Idaho Appellate Handbook, *Standards of Appellate Review in State and Federal Courts,* § 3.4, (Idaho Law Foundation, Inc., 1985). We take this occasion to clarify that even though this test has been enumerated in three subparts for over thirty years, it is 195*195 actually a *four-part standard,* requiring trial courts to do the *four* things set forth above in exercising their discretion. By making this correction we are not altering the substance of the test; we simply take this opportunity to clarify what has previously been a compound second sentence—which actually requires two separate things, that a trial judge act both 1) within the boundaries of her or his discretion; and 2) consistently with the legal standards applicable to the specific choices available to the judge.

Lunneborg v. My Fun Life, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018).

5. This Court finds defendant Masson's conduct was clearly inequitable, unfair, dishonest, and deceitful as she effectively stole the right to use the boat slip from her co-tenant Patricia Marengo (and subsequently plaintiff Fernandes). Allowing defendant Masson to claim an offset against the amount she owes plaintiff Fernandes to right her previous wrong would be inequitable. In making that decision, this Court appreciates that it is a matter committed to this Court's discretion, determines that it is acting within the bounds of that discretion, and is acting within the legal standards applicable to the specific choices available to the Court, and has reached its decision by an exercise in reason.

B. DEFENDANT MASSON'S CLAIM FOR CONTRIBUTION.

6. There is no dispute that the parties were co-tenants during the period of time that they contemporaneously owned their interests in the subject property. At the outset of trial, defendant Masson chose not to call four witnesses and instead voluntarily

narrowed down her claims to just claims for necessary repairs, property taxes, homeowner's association dues, and homeowner's insurance. Defendant Masson concedes, "The sole remaining issue at trial is the amount of contribution to which Masson is entitled for repairs and maintenance to the Property from June 5, 2020 to present." Def./Counter-Claimant's (Proposed) Revised Findings of Fact and Conclusions of Law 8. Defendant Masson argues she is entitled to $6,921.63 in contribution from plaintiff Fernandes, for expenses she incurred after plaintiff Fernandes took title to the property. *Id.* at 9. Plaintiff Fernandes argues defendant Masson's claims for contribution be denied in full, and that he should receive $12,500.00 on his contribution claim and that he should be awarded a further offset from the funds held on depositi with the court in the amount of $1,079.23, to correct an error in the escrow agent's distribution of his 40% share of the net sale proceeds. Plaintiff's/Counter-Defendant's Closing Argument 14.

1. Defendant Masson Failed to Establish That Necessary Repairs Were Made During Plaintiff Fernandes' Period of Co-Tenancy.

7. Defendant Masson could have repaired the existing septic system, but instead took the opportunity to improve the sewer system, without the consent of her co-tenant, and paid relatively little out-of-pocket for the improvement.

8. Defendant Masson testified that at some point in time, she observed that raw sewage was leaking up to the surface in her septic drainage field. She testified that she did not investigate whether the leak was caused by a particular failed part or the entire septic system prior to deciding to replace the entire system. She testified that after replacing the septic system, she has since learned that she could have just repaired the drain field. She testified that she hired St. Maries Septic Service to pump and clear her septic system in preparation of her replacing the existing septic system and connecting to the Cave Bay sewage system. She also said that she paid the $400.00 reflected in the

invoice marked as MASSON022 in cash. However, defendant Masson did not present clear testimony on when exactly the service was performed. The invoice is dated September 2, 2020, but there is no testimony explaining the document regarding when services were performed or what the listed date is for.

9. Defendant Masson testified that McPeak Electric performed electrical services for the installation of the pump which pumps sewage uphill to connect with the Cave Bay sewage system. She testified that the $7,532.00 bill for these services was paid for by a U.S.D.A. grant. No evidence was presented that defendant Masson is obligated to repay this grant in any way, and she testified that this was **not an out-of-pocket expense for her**. On that basis alone, the $7,532 paid by the U.S.D.A. grant here should not be an amount plaintiff Fernandes is required to contribute to defendant Masson.

10. Defendant Masson testified that Michael Morris excavated the Subject Property's septic system and invoiced her $1,000.00. She testified that the only out-of-pocket expense she paid was $1,000 in cash but was unclear about to whom exactly she paid this money. Her testimony was never clarified, and it remains unclear who she paid the money to or who ultimately received that money. Defendant Masson has failed to prove who she paid that to, and therefore there is insufficient evidence to assess which service so the $1,000 should not be assessed against plaintiff Fernandes.

11. Finally, defendant Masson testified that King Sod, LLC, billed her $148.82 for sod used to replace grass damaged by excavating the septic system. Again, no clear testimony was presented for when this occurred or what the date on the document marked as MASSON025 means. There is no evidence about the current condition of the sod or whether it in turn needs to be replaced. There was also no testimony which would allow a reasonable fact finder to find that $148.82 of sod was **necessary** for the Subject Property. In fact, it is more similar to a coat of paint and as such, constitutes

maintenance rather than an improvement.

12. The above expenses were not necessary repairs and instead are improvements unilaterally made by defendant Masson to the Subject Property. Defendant Masson testified that she could have just repaired the drainage field. The Supplemental Declaration of Fred Robohn establishes that connecting to the HOA sewage system was voluntary. Exhibit D-1, ¶ 8. Defendant Masson also went out of the way to comment on her personal belief on the environmental virtue of her upgrade from a septic system, indicating her preference for a complete system overhaul.

13. It is reasonable to infer based on the evidence admitted that connecting to the Cave Bay sewage system was an improvement from the previous septic system. Therefore, defendant Masson did not conduct a reasonable investigation into what was wrong with her sewage system and instead chose to take the opportunity to improve her system. Plaintiff Fernandes and defendant Masson both testified that no permission from plaintiff Fernandes was sought or given for any of this work to be performed. Absent agreement, a cotenant is generally not liable for contribution for improvements made to common property by their cotenant. *Bahnmiller v. Bahnmiller*, 145 Idaho 517, 521, 181 P.3d 443, 447 (2008). "With respect to the cost of the improvements, [i]f there be authority by agreement or otherwise to improve the property at the expense of the cotenants therein, then the cotenant so improving will be entitled to contribution from his cotenants if he act prudently and in good faith." *Id.*; quoting *Keyser v. Morehead*, 23 Idaho 501, 506, 130 P. 992, 994 (1913). Defendant Fernandes testified he never gave any agreement or consent for the above improvements, and therefore, he should not be required to contribute towards them. Counsel for defendant Masson cites case law which omits the requirement of "good faith" and "agreement among the cotenants" in order for contribution to lie. Def./Counter-Claimant's (Proposed) Revised Findings of Fact and

Conclusions of Law 8. For example, counsel for defendant Masson writes: "A cotenant is entitled to contribution from his fellow cotenants for the amount he or she spends to improve and maintain the property. See *Watts v. Krebs*, 131 Idaho 616, 622 (1998)." *Id.* While counsel for defendant Masson cites *Bahnmiller*, counsel for defendant completely omitted the requirement of "good faith" and "agreement among the cotenants" (as set forth by this Court immediately above) in order for contribution to lie. *Id.*

14. Plaintiff Fernandes admits that to the extent that necessary repair work was performed, he could be liable for that repair work. However, there was no evidence presented which may allow the Court to determine what amounts of payment were for work that could be considered *repair* work versus *improvement*. Therefore, the Court will not order half of the $9,080.82 paid by defendant Masson for her improvements to be awarded against plaintiff Fernandes. It is defendant Masson's burden of coming forth with evidence to support her counterclaim, and it is her burden of proof to convince this Court of the sufficiency of her counterclaims. Defendant Masson has failed in both her burden of production and her burden of proof.

2. The Homeowner's Insurance Payments

15. There is no evidence supporting a finding that homeowner's insurance payments were necessary to protect the co-tenants' ownership interests. The law of equity imposes a right to contribution for cotenants for advancements made on encumbrances, mortgages, taxes, and necessary repairs and improvements based on "the principal that conscience requires equality among parties equally responsible for a common burden." *Thurston v. Holden*, 45 Idaho 724, 265 P. 697, 697–98 (1928). However, a co-tenant is only entitled to contribution for expenditures that are "absolutely necessary for the preservation of the common property." *Keyser*, 23 Idaho 501. The

Idaho Supreme Court has held that mortgages and property taxes are necessary for the preservation of the common property and co-tenants are generally entitled to contribution for those expenses because they are not voluntary and because they protect the co-tenants' title to the property. *Bahnmiller*, 145 Idaho at 522, 181 P.3d 448.

16. Unlike payments which are required to prevent a lien, homeowner's insurance payments are completely voluntary in the absence of a restriction imposed by way of a secured creditor. There was no testimony or other evidence admitted proving that homeowner's insurance was *necessary* to preserve title as discussed in *Bahnmiller*. There was *no* testimony that the Subject Property is subject to a mortgage or any other instrument requiring homeowner's insurance as a condition, default of which could lead to foreclosure. All plaintiff Masson testified to was that she felt she needed the financial benefit of the insurance should the Subject Property be harmed, a benefit which primarily benefited her as she was the only person to live at the Subject Property and had her personal property there. Additionally, there was no evidence of agreement with plaintiff Fernandes to contribute to towards homeowner's insurance. Therefore, defendant Masson has failed to meet her burden for contribution of the homeowner's insurance payments plaintiff Fernandes is not be required to contribute half of the $962.35.

3. Cave Bay Dues

17. Defendant Masson testified that she paid all of the Cave Bay dues, except for the final payment, which she said may have come out of the Subject Property's sale's closing. The total amount of the dues claimed by defendant Masson, as reflected in Exhibit D for the time when plaintiff Fernandes was a co-tenant, was $2,135.00. However, defendant Masson should not receive contribution for any amount related to connecting to the Cave Bay sewage system, elevated water usage due to her living at the Subject Property year-round, or the final payment which *she did not actually pay*.

18. Fred Robohn testified that a member property is assessed a one-time connection fee. Exhibit D-1, ¶ 8. He further testified that member properties are assessed an annual fee for its sewer and water service based on the property owner's self-reporting. Exhibit D-1, ¶ 6. At all times since June 2020, the Subject Property has been invoiced $250.00 per year for sewer service. *Id.* Full time residents are assessed a $250 annual fee for sewer and water service, part time residents are assessed $180 annual fee, and weekend only users are assessed just a $125 annual fee. *Id.* The $250 annual fee assessed for the Subject Property is therefore the result of defendant Masson self-reporting being a full-time resident.

19. The Cave Bay statement attached to Fred Robohn's Declaration shows a $500.00 connection fee. Exhibit D, Ex. A (bates stamped as MASSON101). As that connection represents a fee related to an improvement made without plaintiff Fernandes' consent or agreement, he should not be required to contribute half of that $500 payment. Likewise, invoices 6239 ($1,635.00) and 6624 ($1,650) each contain $250 charges for sewer service for which plaintiff Fernandes should not be required to contribute. Similarly, each of those invoices has a $250 charge for full-time water service. Since that $250 amount is based on defendant Masson's self-reported full-time use, it would be unfair to assess that amount against plaintiff Fernandes. Instead, Court finds plaintiff Fernandes is required to contribute towards this cost based on the lowest rate ($125) since he never lived at the Subject Property.

20. Importantly, Invoice 6624 (dated 7/14/2021) was paid by North Idaho Title on 3/18/2022. Exhibit D, ¶ 6, Ex. A (MASSON101); *see also* Exhibit K. As that was paid out of the closing process from the sale of the Subject Property, it should not be considered as part of defendant Masson's contribution claim. Alternatively, defendant Masson has not presented sufficient evidence. Instead of the $2,135.00 claimed by defendant

Masson, she should instead be entitled to only $505.00 ($817.50 – $312.50 ($250 sewage service + $62.5 half of the weekend-only water use)). This amount is offset from the remaining funds held by the Court.

C. THE COURT CORRECTS AN ERROR MADE BY THE ESCROW COMPANY, IN ORDER TO EQUITABLY DISBURSE THE REMAINING FUNDS.

21. Exhibit K, admitted via stipulation, shows the final closing statement from the sale of the Subject Property. This includes the disbursement of the net sales proceeds to the parties.

22. Plaintiff Fernandes and defendant Masson were ordered to each receive 40% from the sale of the Subject Property with the remaining 20% to be held by the Court.[1] Exhibit K reflects plaintiff Fernandes received $157,747.31 and defendant Masson received $158,897.43, a difference of $1,150.12. That amount is the sum of the two "credit" amounts added together and multiplied by two (2* ($70.89 + $504.17)). That has to be an error because defendant Masson was only entitled to a credit for the $70.89 amount, since that is the amount for solid waste service from 3/11/2022 through 2023. The $504.17 credit is listed as being for the Cave Bay dues for 2022, which testimony and other exhibits show was paid out of the gross sale price jointly paid to the parties. Therefore, plaintiff Fernandes is entitled to an offset in the amount of **$1,079.23** from the distribution of the remaining net sales proceeds on deposit with the Court. This will fully correct the Escrow Agent's erroneous division of sale proceeds and equitably distribute the funds in accord with the parties undivided equal ownership interests.

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[1] Order Granting Defendant's Motion for Partial Summary Judgment Pursuant to I.R.C.P. 56 as to Counts 1 and 2 and Denying as to Count 3.

D. DEFENDANT MASSON'S CLAIMS WERE WAIVED BY HER EARLIER RELIANCE ON THELMA J. NELSON'S WILL OR ALTERNATIVELY, UNCLEAN HANDS.

23. "A waiver is a voluntary, intentional relinquishment of a known right or advantage, and the party asserting the waiver must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment." *Fullerton v. Griswold*, 142 Idaho 820, 824, (2006). "Waiver is foremost a question of intent." *Knipe Land Co. v. Robertson*, 151 Idaho 449, 457-58 (2011). "Waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Id.*

24. Defendant Masson testified at trial that she believed that her mother's Will controlled her ability to live at the Subject Property. She testified in support of her *Motion for Partial Summary Judgment* that she believed the Will protected her ability to live at the Subject Property. Exhibit 6, ¶ 4. She made this same assertion over a year earlier when she responded to plaintiff Fernandes' demand letter to sale the Subject Property. Exhibit 4. These were clear and unequivocal acts on behalf of defendant Masson indicating her intent.

25. Thelma J. Nelson's Will stated, "*I direct* that while my daughter Bonnie Masson is living in the house, she is required to maintain the house, lot and boat slip as well as pay all taxes, fees, insurance's [sic] and utilities as long as she is living in the house." Exhibit 6, Ex. A, at 2 (emphasis original). At trial, defendant Masson conceded that she believed it was her obligation to make these expenses during the period of her exclusive use of the Subject Property. For this reason, she did not make demand for contribution.

26. To the extent it is suggested that the Will controls, plaintiff Fernandes is

correct that that Thelma J. Nelson did not own the Subject Property at time of her death. For that reason, her testamentary intent is of no legal effect. It is important nonetheless because the defendant Masson's reliance on it and her assertion that it controls manifests her intent to waive a contrary position—her intent to waive her claim for contribution.

27. Plaintiff Fernandes initially made demand upon defendant Masson to sell the Subject Property by way of letter dated August 7, 2021. Defendant Masson acknowledged to having received this letter around this time. At trial, defendant Masson stated she was initially in shock as she believed she had a right to stay in the residence as long as she wished. In fact, she responded to the letter by stating that plaintiff Fernandes could not force her to sell. In one instance, she emailed a copy of Thelma J. Nelson's will which included the corresponding obligation that defendant Masson solely cover all expenses and maintenance related to the Subject Property. Ex. 4. Ten months into the course of this case, defendant Masson submitted a Declaration again asserting her right to remain indefinitely by way of the Will. Decl. of Bonnie Y. Masson in Supp. of Def.'s Mot. for Partial Summ. J. 2, ¶ 4.

28. Consistent with the Will's provision, defendant Masson has never sought contribution from Thelma J. Nelson or her Estate. Further, her conduct in living at the Subject Property and paying all the bills for all the time claimed in this lawsuit show that she acted in accordance with the Will.

29. Because of defendant Masson's adoptive admissions, plaintiff Fernandes was led to believe that the defendant Masson understood it was her sole obligation to "maintain the house, lot and boat slip as well as pay all taxes, fees, insurance's [sic] and utilities as long as she is living in the house." For this reason, he did not seek to compel the judicial sale of the Subject Property or entry of temporary orders governing use and joint expense. For what can only be described as a punitive response, over one year into

the course of litigation defendant Masson amended her pleading to assert a claim of contribution for expenses spanning both plaintiff Fernandes' and his mother's respective periods of ownership. This was done after defendant Masson gained the benefit of an additional year of exclusive possession of the Subject Property all the while avoiding judicial sale; all at the expense of her cotenant, plaintiff Fernandes.

30. Alternatively, defendant Masson's claim for contribution is barred by the alternative equitable principle of unclean hands. As outlined above, this doctrine may be employed *sua sponte* at the Court's discretion in situations where necessary to address conduct that "has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Gilbert v. Nampa School District No. 131*, 104 Idaho 137, 145 (1983).

31. In this instance, defendant Masson has acknowledged that she understood it was her mother's desire that she be solely responsible for all costs associated with the Subject Property during her exclusive use. For that reason, she never sought contribution from her co-tenants until well after this action was commenced.

32. Even after receiving plaintiff Fernandes' initial demand letter, the defendant Masson did not make any effort to confer with her cotenant regarding her unilateral decision to connect into the community sewer system. During this time, she was in communication with plaintiff Fernandes through his counsel, with regard to his demand to sell the Subject Property. The fact that she unilaterally made these unnecessary improvements after receiving plaintiff Fernandes' request to sale the Subject Property displays the disregard defendant Masson had for the rights, desires and interest of her cotenants.

33. There is only one logical explanation for her conduct; defendant Masson firmly believed she had the right stay as long as she wished on the condition that she be solely

responsible to maintain the house and lot." Having denied her cotenant the rights and privileges associated with his co-tenancy all the while without any subjective expectation of contribution, defendant Masson should not be permitted to now play fast and loose and request contribution for these unnecessary improvements.

34. Of further concern is defendant Masson's demand that plaintiff Fernandes pay for $7,532 in improvements for which she did not incur any out of pocket expenses. Ex. E, MASSON023. At trial, defendant Masson admitted that her only out of pocket expense to install the sewer pump lift station was $1,000; the balance of $7,532 was purportedly covered by a USDA grant she obtained due to her limited income. Despite this, she has cavalierly included this sum on her summary of claimed expenses. Ex. J.

35. Therefore, the Court finds that defendant Masson has waived her right to contribution for maintaining the house, lot, taxes, fees, and insurance payments by her reliance on the Will. Alternatively, the Court finds defendant Masson's claims are barred by the equitable doctrine of unclean hands.

III. CONCLUSION AND ORDER.

For the foregoing reasons, this Court finds and concludes that plaintiff Fernandes has proved his claim for contribution and is entitled to $12,500.00 without that amount being subject to set-off. This Court further finds and concludes that plaintiff Fernandes be awarded a further offset from the funds held on deposit in the amount of $1,079.23 to correct an error in the escrow agent's distribution of his 40% share of the net sale proceeds. Finally, this Court finds and concludes that defendant Masson's claim for contribution be denied in full.

IT IS HEREBY ORDERED plaintiff Fernandes has proved his claim for contribution and is entitled to $12,500.00 without that amount being subject to set-off.

IT IS FURTHER ORDERED plaintiff Fernandes is awarded a further offset from

the funds held on deposit in the amount of $1,079.23 to correct an error in the escrow agent's distribution of his 40% share of the net sale proceeds.

IT IS FURTHER ORDERED that defendant Masson's claim for contribution is denied in full.

IT IS FURTHER ORDERED counsel for plaintiff Fernandes prepare a judgment consistent with this Memorandum Decision, Findings of Fact, Conclusions of Law and Order Following Court Trial.

DATED this 23rd day of May, 2022.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 23rd day of May, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

Lawyer	Email	Lawyer	Email
Jonathon Hallin	jhallin@lukins.com ✓	Nathan Ohler	nohler@rmedlaw.com ✓

Jeanne Clausen, Deputy Clerk