STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

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

DONALD CRAIG FRIZZELL,

Plaintiff,

vs.

EDWIN DEYOUNG, Trustee of Clifton and Marjorie Frizzell Family Trust of June 30, 2009,

Defendant.

Case No. **CV 2013 3998**

MEMORANDUM DECISION AND ORDER: 1) DENYING DEFENDANT'S MOTION FOR CLARIFICATION; 2) DENYING DEFENDANT'S MOTION IN LIMINE TO PRECLUDE PLAINTIFF'S EXPERT WITNESS TESTIMONY AT TRIAL; AND 3) GRANTING PLAINTIFF'S MOTION FOR ORDER PROHIBITING DEFENDANT FROM USING TRUST ASSETS TO PAY LEGAL FEES AND REQUIRING REIMBURSEMENT OF FEES PAID TO DATE WITH TRUST ASSETS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on three motions: 1) plaintiff's Motion to Dismiss Counterclaim, 2) defendant's Motion for Clarification and Motion to Reconsider, and 3) defendant's Motion in Limine to Preclude Plaintiff's Expert Witness Testimony at Trial.

On May 8, 2014, plaintiff Donald Craig Frizzell (Frizzell) filed "Plaintiff's Motion to Dismiss Counterclaim" based on lack of standing and failure to state a claim upon which relief can be granted. Plaintiff's Motion to Dismiss Counterclaim, p. 1. Specifically, Frizzell alleged the Counterclaim sought damages against Frizzell for injury to the Trust. Memorandum in Support of Plaintiff's Motion to Dismiss Counterclaim, pp.

6-7. Frizzell claimed his Complaint was against DeYoung personally, and as such, DeYoung could not bring a counterclaim on behalf of the Trust. *Id*., p. 8. Oral argument on that motion was held on June 5, 2014. At the conclusion of the hearing this Court took the matter under advisement. On June 11, 2014, this Court issued its "Memorandum Decision and Order Granting Plaintiff's Motion to Dismiss Defendant' Counterclaim", in which it granted Frizzell's motion, finding DeYoung was sued personally and not in his capacity as Trustee of the Clifton and Majorie Frizzell Family Trust.

This matter is now before the Court on three motions. First, On July 15, 2014, DeYoung filed a "Motion for Clarification and/or Reconsideration," seeking clarification and/or reconsideration of this Court's "Memorandum Decision and Order Granting Plaintiff's Motion to Dismiss Defendant's Counterclaim". Specifically, DeYoung seeks clarification of the language, "Frizzell sued DeYoung personally, not in DeYoung's capacity as Trustee." Motion for Clarification and/or Reconsideration, p. 1 (citing Memorandum Decision and Order Granting Plaintiff's Motion to Dismiss Defendant's Counterclaim, p. 7). Frizzell responded to this motion on August 5, 2014, filing the "Response to Defendant's Motion for Clarification and/or Reconsideration", requesting the Court uphold its prior decision.

Second, on July, 16, 2014, DeYoung filed a "Motion in Limine to Preclude Plaintiff's Expert Witness Testimony at Trial." On August 5, 2014, Frizzell filed "Response to Defendant's Motion to Preclude Plaintiff's Expert Witness Testimony at Trial."

Third, on July 29, 2014, Frizzell filed a "Plaintiff's Motion For Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid to Date With Trust Assets," and "Memorandum in Support of Plaintiff's

Motion For Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid to Date With Trust Assets," in which Frizzell seeks to prohibit DeYoung from using trust assets to pay for legal fees and requesting reimbursement of fees already paid using trust assets. It is supported by the Declaration of Susan Moss. This motion was opposed by DeYoung on August 5, 2014, in DeYoung's "Defendant's Response Memorandum in Opposition to Plaintiff's Motion For Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid to Date With Trust Assets". On August 8, 2014, Frizzell filed a "Reply in Support of Plaintiff's Motion For Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid to Date With Trust Assets".

Oral argument on these three motions was held on August 12, 2014. At the conclusion of the hearing, the Court took the motions under advisement.

For the reasons set forth below, the Court: 1) upholds its prior decision and denies DeYoung's "Motion for Clarification and/or Reconsideration", while giving some additional analysis; 2) denies DeYoung's "Motion in Limine to Preclude Plaintiff's Expert witness Testimony at Trial"; and 3) grants Frizzell's "Motion for Order Prohibiting Defendant from Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid with Trust Assets to Date".

III. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks,* 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(a)(2)(B). A party making a motion for

reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros,* 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006). A district court must consider new evidence or authority bearing on the correctness of a summary judgment order if the motion to reconsider is timely filed under Idaho Rule of Civil Procedure 11(a)(2)(B). *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 210-11, 268 P.3d 1159, 1162-63 (2012).

When deciding a motion for reconsideration, the district court must apply the same standard of review that it applied when deciding the original order being reconsidered. *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). Since the motion sought to be reconsidered in the present case is Frizzell's Motion to Dismiss Counterclaim, the standard of review under Idaho Rule of Civil Procedure 12(b)(6) applies. "A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing I.R.C.P. 8(a)(1), (2)). In considering a motion to dismiss under Idaho Rule of Civil Procedure 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

The standard for reviewing a dismissal for failure to state a cause of action pursuant to Idaho Rule of Civil Procedure 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *See Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water*

Resources., 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). Complaints should not be dismissed under Idaho Rule of Civil Procedure 12(b) unless the non-moving party can prove no set of facts which would entitle him to relief. *Dumas v. Ropp*, 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). The non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *See Idaho Schs. for Equal Educ*., 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co*., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield*, 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975).

The grant of a Rule12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *See Moss v. Mid-American Fire and Marine Ins. Co*., 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App.1996). When reviewing an order of the district court dismissing a case pursuant to Idaho Rule of Civil Procedure 12(b)(6), "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co*., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (*quoting Greenfield v. Suzuki Motor Co. Ltd*., 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

When ruling on a motion in limine, broad discretion is given to the trial court. *Gunter v. Murphy's Lounge, LLC,* 141 Idaho 16, 25, 105 P.3d 676, 685 (2005) (citing *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.,* 139 Idaho 761, 767, 86 P.3d 475, 481 (2004)). The decision of the trial court to grant or deny a motion in limine is reviewed for an abuse of discretion. *Id.* (citing *Sun Valley Potato Growers,* 139 Idaho

at 768, 86 P.3d at 482. "The trial court may deny the motion and wait until trial to determine if the evidence should be admitted or excluded." *Id.* (citing *Lanham v. Idaho Power Co.,* 130 Idaho 486, 492, 943 P.2d 912, 918 (1997)). If the trial court denies the motion to make a ruling at a later time, the moving "party must reassert an objection at the time of the offer in order to preserve the issue." *Id.* (citing *State v. Hester,* 114 Idaho 688, 760 P.2d 27 (1988)).

III. ANALYSIS.

A. The Court Affirms Its Previous Decision that DeYoung is Being Sued in his Personal Capacity and Not in his Capacity as Trustee.

In his Complaint, Frizzell alleges DeYoung has failed to perform his duties as a trustee. Complaint, p. 2. Specifically, he alleges:

> 2. The current trustee of the trust is Edwin DeYoung, a resident of Coeur d'Alene, Idaho. . . .
> 4. Plaintiff has repeatedly asked Defendant for an accounting and other financial details concerning the trust, but Defendant has refused to provide that information. Defendants failure to provide this information violates I.C. § 15-7-503.
> 5. Defendant has neglected his duties as trustee by delegating much of the management of the trust to another person; namely Darlene DeYoung.
> 6. Defendant, or his surrogate Darlene DeYoung, violated the terms of the trust by seizing personal property of the late Marjorie Frizzell without following the trust-mandated procedures of dividing such personal property.
> 7. Defendant has failed to perform his duties as trustee by mismanaging the trust assets by allowing trust real estate to remain vacant for prolonged periods of time without securing a tenant.
> 8. Defendant has failed to make any distributions as required by the trust.
> 9. Defendant, and/or his surrogate Darlene DeYoung, abused his position as trustee by directing the Operating Engineers union to pay a $5,000 death benefit to the trust instead of to the Plaintiff as was legally required.
> 10. Defendant has failed to perform his duties as trustee with regard to the Twin Oaks development trust properties in North Carolina. The rentals for those units are not being paid to the trust. Meanwhile, the trust continues to pay taxes and utilities on these properties.
> 11. Defendant has failed to perform his duties as trustee with regard to the trust properties in Arizona. The trustee, or his surrogate,

> accepted an offer to purchase the property at a below-market value. To compound this mismanagement, the trustee is now being sued by the prospective buyer, thereby incurring attorney fees and expenses that the trust is paying.
>
> 12. The above referenced actions and omissions of Defendant violate I.C § 15-7-302 as well as common law fiduciary duties.
>
> 13. The above referenced actions and omissions of Defendant constitute negligence.
>
> WHEREFORE Plaintiff prays for the following relief:
>
> A. That Defendant be removed as trustee for failure to fulfill his statutory and fiduciary obligations to the trust, pursuant to I.C. § 15-7-308.
>
> B. That Defendant be ordered to provide a complete accounting of all financial activity regarding the trust and trust property from the time he became trustee until the present. . . .

Complaint, pp. 1-3.

Since Frizzell is seeking an order removing DeYoung as Trustee and an order compelling him to provide an accounting of financial activity during the time he served as Trustee, DeYoung contends he has been sued in his capacity as trustee, not personally. Memorandum in Support of Motion for Clarification and/or Reconsideration, pp. 3-4.

Idaho Code § 15-7-306 governs the personal liability of trustees to third parties. It provides in pertinent part: "A trustee is **personally liable** for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault." I.C § 15-7-306(b) (emphasis added). According to the comments to this section, "[t]he purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative." I.C § 15-7-306, Uniform Law Comments. Idaho Code § 15-3-712 governs the breach of a fiduciary duty by a personal representative of an estate. It provides in pertinent part: "If the exercise of power concerning the estate is improper, the personal representative is liable to

interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. . . ."

In *Kolouch v. First Sec. Bank of Idaho,* 128 Idaho 186, 911 P.2d 779 (Ct. App.1996), contrary to the provisions of the will, the personal representative conveyed the decedent's interest in three pieces of real property to the decedent's siblings, who were not heirs of the estate. *Kolouch,* 128 Idaho 186, 190, 911 P.2d 779, 783. The personal representative claimed to "have mistakenly believed that the properties were all held as joint tenancies with a right of survivorship, and that the estate therefore had no further interest in the properties." *Id*. One of the pieces of real property was sold by the family to third parties and the estate received none of the proceeds. *Id.* After the initiation of proceedings against her by the heirs, the personal representative reimbursed the estate for the decedent's share of the proceeds from the sale of that property. *Id.* The personal representative and the decedent's siblings also reconveyed to the estate the decedent's interest in the other two pieces of real property. *Id.* The personal representative also took funds from the estate to pay fees she incurred during a separate litigation, which neither the decedent personally, nor the estate, were parties to that litigation. 128 Idaho 186, 191, 911 P.2d 779, 784. After the personal representative was removed from her position as personal representative, the trustee and heirs brought an action to recover funds from the personal representative in order to reimburse the estate for all losses caused by her misconduct. *Id.* Affirming the decision of the magistrate court, the Idaho Court of Appeals held "[i]n light of the fiduciary duties upon a personal representative, it was proper for the magistrate to order [the personal representative] to pay interest at the statutory rate on the proceeds of the sale of real property. [Her] control of the property of the estate caused the trustee to

accrue fees which were beyond those associated with the usual duties of a trustee. As a fiduciary she is liable to interested parties, such as the trustee, for obligations which arise due to her personal fault." 128 Idaho 186,198, 911 P.2d 779, 791.

Like the personal representative in *Kolouch*, mismanagement of a trust estate or wrongdoing by a trustee can subject the trustee to personal liability. In this case, DeYoung is the trustee of the Clifton and Marjorie Frizzell Estate. He is being sued by a beneficiary of the trust for alleged wrongdoings he committed while acting as trustee. Specifically, Frizzell is alleging DeYoung improperly managed the trust, and as such, DeYoung personally breached his fiduciary duties. Under Frizzell's theory, DeYoung is personally liable to Frizzell for any damages that resulted from that breach pursuant to I.C. § 15-7-206(b). Like the personal representative in *Kolouch,* "[a]s a fiduciary [he] is liable to interested parties . . . for obligations which arise due to [his] personal fault." 128 Idaho 186, 198, 911 P.2d 779, 791. Here, Frizzell is properly seeking damages from DeYoung personally, not from the Trust itself. As such, DeYoung is being sued in his personal capacity, not on behalf of the trust.

B. Frizzell's Motion for Reimbursement of Legal Fees Paid and Order Prohibiting Use of Trust Assets In This Action Must Be Granted.

Frizzell argues that the Court should: "(1) hold that DeYoung needs to (and needed to but did not) seek and obtain the court's authorization for using trust money for legal fees; (2) deny DeYoung that authorization for all future legal fees and costs in this matter; *and* (3) order that DeYoung repay to the trust all legal fees he paid out of the Trust's accounts (at least $5,880.00)." Memorandum in Support of Plaintiff's Motion for Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid With Trust Assets to Date, p. 3 (emphasis in original). He asserts a trustee must seek court approval for the use of trust funds when

there is a conflict of interest and that such a conflict is present in this action. *Id.,* pp. 3-4. As such, Frizzell argues that DeYoung may only use trust funds to reimburse himself if he prevails in this action. *Id.,* p. 4. Finally, Frizzell maintains Idaho law governs disputes involving administration of the trust while California law applies to disputes involving the terms of the trust. Reply in Support of Plaintiff's Motion for Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid With Trust Assets to Date, p. 2. However, the laws from both states support Frizzell's position that a trustee may not use trust funds for legal fees until he is successful in his defense against a beneficiary. *Id.*

In response, DeYoung argues that the present motion should be denied because it is based on Idaho law while California law governs the trust itself. Defendant's Response Memorandum in Opposition to Plaintiff's Motion for Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid With Trust Assets to Date, p. 2. DeYoung asserts that, under California law, a trustee is able to use trust assets to pay legal fees. *Id.* Further, DeYoung argues that the trust agreement itself grants an implicit power to use trust assets for his legal defense. *Id.*, p. 3.

As stated above, the Court finds that DeYoung is being sued in his personal capacity. DeYoung relies on the California case *Wells Fargo, N.A. v. Superior Court of Los Angeles County*, 22 Cal. 4th 201, 990 P.2d 591 (2000), for the proposition that a trustee may use trust assets to fund his legal defense against claims by a beneficiary. Defendant's Response Memorandum in Opposition to Plaintiff's Motion for Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid With Trust Assets to Date, p. 2. Specifically, DeYoung

cites the following language from the California Supreme Court: "A trustee may use trust funds to pay for legal advice regarding trust administration . . . and may recover attorney fees and costs incurred in **successfully** defending against claims by beneficiaries." *Id.* (citing *Wells Fargo, N.A.*, 22 Cal. 4th at 213, 990 P.2d at ___) (emphasis added). The basis for the present action does not regard trust administration; as this Court has previously found, DeYoung is being sued individually for an alleged breach of fiduciary duty by a beneficiary. Thus, even under California law, DeYoung must first successfully defend against claims brought by Frizzell before seeking reimbursement from trust assets for his defense.

Other courts have interpreted the authority relied on by DeYoung as contradicting the position he now takes. *See Swendsen v. Corey*, CV 09-229-E-BLW, 2010 WL 1418394 (D. Idaho Apr. 6, 2010). In an unpublished opinion from the United States District Court for the District of Idaho, Chief Judge Winmill wrote:

> Defendant argues that the Court should authorize him to expend Trust assets in defending this action because his conduct as trustee has been prudent and in keeping with his fiduciary duties. Whether Defendant acted prudently and in accordance with fiduciary duties is an issue for a jury to resolve at trial; it is not an issue for the Court to determine, as a basis for allowing the use of Trust assets before or during trial.
>
> * * *
>
> Neither party here has cited any legal authority definitively addressing the right of a trustee to defend an action using trust assets. Courts have held that trustees are entitled to be reimbursed for legal fees incurred in successfully defending against claims by beneficiaries. *Stepp v. Foster,* 259 Va. 210, 524 S.E.2d 866 (2000); *Wells Fargo Bank v. Superior Court,* 22 Cal.4th 201, 91 Cal.Rptr.2d 716, 990 P.2d 591 (2000). However, a trustee found to have breached his fiduciary duty, or to be indebted to the trust, is not entitled to costs or expenses of his defense. *Ellis v. King,* 336 Ill.App. 298, 307, 83 N.E.2d 367 (Ill.App. 2 Dist.1949); *Ralston v. Easter,* 43 App.D.C. 513, 521–22 (C.A.D.C.1915); *In re Howell,* 215 N.Y. 466, 109 N.E. 572 (1915).

Swendsen, 2010 WL 1418394 at **2-3. It is significant that other courts have required a trustee to first prevail at trial against claims by a beneficiary before any trust assets may be used for legal fees and have refused the use of the same funds when the trustee is found to have breached his fiduciary duty.

Additionally, Idaho law prevents a trustee from using trust assets during litigation when he has been sued in his personal capacity. *See Kolouch v. First Sec. Bank of Idaho*, 128 Idaho 186, 193, 911 P.2d 779, 786 (Ct. App. 1996). In *Kolouch*, the Idaho Court of Appeals stated that for a personal representative to receive legal expenses from the estate, "[t]he services rendered . . . must benefit the estate and cannot be incurred to protect personal interests." *Id.* The Court of Appeals found that the personal representative was not entitled to receive legal expenses from the estate because "[s]he benefitted from the legal defense . . . while the estate did not." *Id.* As stated above, liability of a trustee and trust are treated the same as a personal representative and decedent's estate. *See* I.C. § 15-7-306, Uniform Law Comments. Thus, Idaho law will treat trustees the same as personal representatives when determining whether estate or trust assets may be used for litigation.

Moreover, a trustee must seek court approval for actions in which a conflict of interest exists between his individual interest and that of his fiduciary duty. *See* I.C. § 68-108(b). Specifically, I.C. § 68-108(b) provides:

> (b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization, except as provided in sections 68-106(c)(1), (4), (6), (18), and (24) upon petition of the trustee.

Id. Idaho Code § 68-106(c)(25) provides that a trustee has power "[t]o prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties . . . ." I.C. § 68-106(c)(25). That section,

however, is not excepted from the requirement that the trustee seek court approval when there is a conflict of interest.

In *Swendsen*, the United States District Judge for the District of Idaho, Lynn Winmill, found a conflict of interest to exist in a situation similar to the instant action:

> Plaintiff is suing Defendant for breach of Trust and fiduciary duty. Plaintiff's requested relief includes Defendant's removal as trustee, and recovery of Trust assets allegedly displaced as a result of the breach. A verdict against Defendant could require Defendant to reimburse funds to the Trust, thus Defendant's individual interest in defending this action inherently invites disregard for the interests of the Trust.

Swendsen, 2010 WL 1418394 at *1. The Court noted:

> Regarding fiduciary duty and conflict of interest, the Idaho courts have said, "[f]idelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." *Edwards v. Edwards,* 122 Idaho 963, 969, 842 P.2d 299 (Idaho App.1992) (quoting *Jensen v. Sidney Stevens Implement Co*., 36 Idaho 348, 353, 210 P. 1003 (1922)). Where a conflict of interest exists, "even if a trustee's actions are reasonable and prudent, ... the court must authorize the action before the trustee can exercise that power." *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (Idaho 2009).

Id.

Like the circumstances in *Swendsen*, a conflict of interest also exists here. It is axiomatic that when a beneficiary of a trust sues the trustee, even when the trustee is sued in his individual capacity, a conflict of interest is inherent in every such case. In this case, DeYoung is being sued individually for allegedly mishandling the trust of which Frizzell is a beneficiary. The moment that allegation is made they are adversaries; they are in a conflict of interest with each other. As such, DeYoung should have sought court approval to use trust funds to defend himself against a beneficiary. Because no approval was sought, the appropriate remedy is to repay all trust monies used personally by DeYoung in the litigation so far.

As such, the Court grants the motion to prevent trust funds from being used personally by DeYoung for his defense. Further, the Court grants the motion to reimburse the trust for funds used thus far in DeYoung's legal defense. In the future, DeYoung is required to make application to the Court for any disbursement of any trust funds for his legal defense.

C. DeYoung's Motion in Limine to Preclude Plaintiff's Expert Witness Testimony at Trial Must Be Granted.

"Motions in limine seeking advance rulings on the admissibility of evidence are fraught with problems because they are necessarily based upon an alleged set of facts rather than the actual testimony which the trial court would have before it at trial in order to make its ruling." *State v. Young*, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001) (quoting *State v. Young,* 133 Idaho 177, 179, 983 P.2d 831, 834 (1999)). In this case, DeYoung seeks an advance ruling not to prevent Frizzell from disclosing an expert, but instead an order preventing Frizzell "…from presenting expert witness teswtimony at the trial of this matter as a result of Plaintiff's failure to timely disclose expert witnesses as required by this Court's Scheduling Order." Defendant's Motion in Limine to Preclude Plaintiff's Expert Witness Testimony at Trial, p 1. disclosing an expert witness in this case, when Frizzell has yet to make a motion to this Court permitting the late disclosure of an expert witness. At this time, DeYoung is merely alleging that Frizzell *may* disclose an expert witness at a future date, and is seeking an advance ruling from this Court to prevent Frizzell from having any such unknown (at present) witness testify at trial, and doing so before it is clear whether Frizzell will make such a disclosure in the first place.

While it is understandable why DeYoung would desire such an advance ruling, it would be improper for this Court to do so. At this time, the Court does not have a controversy before it because while Frizzell on August 7, 2014, filed a "Motion to

Shorten Time for Motion for Extension of Time to Disclose Expert Witnesses", and a memorandum in support of that motion, Frizzell has not filed a separate "Notice of Hearing" (in violation of I.R.C.P. 7(b)(3)(A)) on that motion. Frizzell's motion itself "moves this Court pursuant to Idaho Rule of Civil Procedure 7(B)(3) and other applicable law for entry of an Order shortening time to hear his *Motion for Extension of Time to Disclose Expert Witnesses* on **Tuesday, August 12, 2014 at 11:00 AM**." Motion to Shorten Time for Motion for Extension of Time to Disclose Expert Witnesses, p. 1. (italics and bold in original). However, in making that statement, counsel for Frizzell ignores the fact she violates I.R.C.P. 7(b)(3)(A) by not filing a separate Notice of Hearing. Prior to August 12, 2014, counsel for Frizzell at no time asked the Court's Deputy Clerk for additional time on August 12, 2014, to hear this motion, and thus, this motion did not appear on the Court's docket for August 12, 2014. At oral argument on August 12, 2014, counsel for Frizzell did not notify the Court that she wished to have oral argument on this "Motion to Shorten Time for Motion for Extension of Time to Disclose Expert Witnesses." Instead, during oral argument on DeYoung's Motion in Limine, counsel for Frizzell obliquely asked for an extension of time to disclose an expert, stated she was not denying their strategy had changed, and the Court interrupted, and stated "I can't address an extension in this motion [motion in limine], am I correct?", to which counsel for Frizzell responded "Yes."

At this time, it is completely unknown if Frizzell has decided to not have an expert at trial and has abandoned this "Motion to Shorten Time for Motion for Extension of Time to Disclose Expert Witnesses", or if by oversight, counsel for Frizzell simply failed to properly file notice and failed to bring this motion up on August 12, 2014. At any rate, Frizzell's "Motion to Shorten Time for Motion for Extension of Time to Disclose Expert Witnesses" has not been heard, and until it has, it is premature for this Court to

issue a ruling on an issue that is not yet before it and which may not be before it in the future. In addition to being improper, such a ruling would make past Idaho Appellate Case law regarding I.R.C.P. 26(b)(4), specifically *Radmer v. Ford Motor Co.,* 120 Idaho 86, 813 P.2d 897 (1991), meaningless, and deprive any Idaho trial court of its ability to deal with neglect in more appropriate methods (short of the ultimate sanction, dismissal of a case), especially when the trial is still nearly four months in the future, as is the present status of the instant case.

Additionally, the Idaho Court of Appeals has held, "When the trial court sanctions a party by striking pleadings and entering judgment against that party, the court must make specific findings that less severe sanctions would be inadequate**."** *Fish Haven Resort, Inc. v. Arnold,* 121 Idaho 118, 122, 822 P.2d 1015, 1019 (Ct.App. 1991). "'[I]t seems especially fitting that courts should make the punishment fit the crime and should not impose a drastic sanction that will prevent adjudication of a case on its merits except on the clearest showing that this course is required.... The courts have ... exercised their discretion in a fashion intended to encourage discovery rather than simply to punish for failure to make discovery.'" *Id.,* quoting from *Astorquia,* 113 Idaho 526, 532, 746 P.2d 985, 991, in turn quoting 8 Wright & Miller, *Federal Practice and Procedure* 2284, pp. 767–72 (footnotes omitted). "Similarly, sanctions for pretrial order violations should both punish and encourage pretrial efficiency." *Id.* "Justice Donaldson also pointed out [in *Astorquia*], however, that an order of dismissal may be appropriate as the first sanction, but only if lesser sanctions have been considered by the trial judge and have been found to be ineffective." The Court was not presented with any argument of lesser sanctions at the August 12, 2014, hearing.

For all of the above reasons, DeYoung's motion in limine is denied.

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED defendant DeYoung's "Motion for Clarification and/or Reconsideration" is DENIED.

IT IS FURTHER ORDERED plaintiff Frizzell's "Plaintiff's Motion For Order Prohibiting Defendant From Using Trust Assets to Pay Legal Fees and Requiring Reimbursement of Fees Paid to Date With Trust Assets" is GRANTED.

IT IS FURTHER ORDERED the motion to reimburse the trust for funds used thus far in DeYoung's legal defense is GRANTED, and DeYoung must account to the Court and to Frizzell, all funds from the trust used for DeYoung's defense to date, and reimburse the trust for all funds expended by DeYoung in his defense by no later than August 31, 2014, and certify to the Court he has done so.

IT IS FURTHER ORDERED in the future, DeYoung is required to make application to the Court for any disbursement of any trust funds for his legal defense.

IT IS FURTHER ORDERED defendant DeYoung's "Motion in Limine to Preclude Plaintiff's Expert witness Testimony at Trial" is DENIED as it is premature.

Entered this 13th day of August, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Michelle R. Fulgham/ Susan M. Moss	664-4125	Joel P. Hazel/M. Gregory Embry	208 667-8470

_____
Jeanne Clausen, Deputy Clerk