

STATE OF IDAHO)
County of KOOTENAI)^{ss}

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AT _____ O'Clock _____ 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**

JAMES C. CARPENTER,)
)
)
 Plaintiff,)
)
 vs.)
)
 TIM TURRELL and PEGGY TURRELL,)
 husband and wife.)
)
 Defendants.)
 _____)

Case No. **CV 2007 5840**

**MEMORANDUM DECISION,
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

I. MEMORANDUM DECISION.

This matter came before the Court for a court trial on May 12, 2008. At the conclusion of trial, the Court requested post-trial briefing (plaintiff did not prepare such pre-trial), and post-trial proposed findings of fact and conclusions of law (defendant did not prepare such pre-trial), from all parties. Such submissions were due on May 23, 2008, were received and reviewed by the Court. Accordingly, the matter is now at issue.

Plaintiff James C. Carpenter (Carpenter) was a friend of Herbert Turrell (Herbert). Carpenter lived just down the road about a quarter-mile from Herbert. On May 23, 2003, Carpenter purchased two portable buildings from Building Technologies, one which could be used as office space or a classroom, one as a lunchroom. Exhibit 3. Carpenter testified

he paid \$20,000 in cash for these two buildings, and expected to sell one for \$15,000 and another for \$12,000. For about eighteen years, Carpenter had his own business, Quality Modular, in which he transported modular homes. Carpenter and others, including David Bodner, moved these two portable buildings and three others from their location at the time of purchase on Seltice and Corbin Road (per Carpenter, Seltice and Pleasant View according to Bodner) in Post Falls to Carpenter's property in Post Falls. Three of the portable buildings were placed on Carpenter's property. As Carpenter was attempting to move one of the bigger buildings onto his land, Herbert drove by, and since Carpenter was blocking the road, the two talked. Carpenter asked Herbert if Carpenter could borrow Herbert's loader, to which Herbert said "OK, but don't do that, leave it at my place as long as you'd like." Carpenter testified that Herbert never made any request for payment of storage fees. Because two of the buildings would not fit through Carpenter's gate, and because Herbert offered to let Carpenter use Herbert's land to store those two buildings, Carpenter drove those two buildings to and placed them on Herbert's land. This move occurred on Memorial Day weekend in 2003, just after Carpenter purchased the buildings. Herbert Turrell died in June 2005. Even though Carpenter knew Herbert had passed away, he made no arrangements to get these two buildings off Herbert's land. Herbert's wife, Marianne, continued to live on the property.

Carpenter testified that he went on Herbert and Marianne's property three times to show potential buyers these two portable buildings. Carpenter testified that the last of those three visits occurred in the fall of 2006, when he took Kim Anderson and Michael Williams onto Marianne's property. Later, Carpenter took Kurt Hall to show him the buildings. It was during this visit that Carpenter noticed the buildings were gone.

Defendant Tim Turrell (Tim) is Herbert's son. On November 29, 2006, Tim sold one of the buildings to Leonard Turpin for \$1,750 (Exhibit 5), and on December 8, 2006, Tim sold the other building to Dan Selder for \$1,750 (Exhibit 4). In each of the receipts to Turpin and Selder, Tim simply listed himself as the seller ("Tim R. Turrell" in Exhibit 4, and "T. Turrell" in Exhibit 5). On those receipts Tim Turrell did not list himself in any other capacity such as personal representative of the estate of Herbert Turrell or the trustee of Herbert's trust.

Defendant Tim Turrell claims: "The evidence established beyond doubt that Tim Turrell was at all times relevant to this case acting as the personal representative of his father's estate. Both his parents' living trust and his father's will are before the Court." Defendant's Post-Trial Brief, pp. 1-2. Tim Turrell's claim that his was "acting as the personal representative of his father's estate" is completely false, and Tim Turrell's claim that "his father's will [is] before the Court" is deceptive. Tim Turrell was **not** acting as personal representative of his father's estate because **no probate has ever been filed**. Tim Turrell's father's will is "before the Court" only in that it is an exhibit in this case, but that exhibit has absolutely no significance because it has not been admitted into probate. Tim Turrell then argues:

The claim is also one based upon a claim against the estate. Since Tim was acting in his representative capacity when the buildings were sold, any wrongful conduct on his part is on agency principals the responsibility of Herbert's estate. [In fact, unless the Court were somehow to find that Tim was guilty of intentional misconduct or bad faith, Tim would undoubtedly have indemnity rights back against the estate for his expenses in this action and any liability he is determined to have *vis-à-vis* plaintiff.] Again, one cannot avoid the application of § 9-202(3) simply by deciding not to name the estate. For example, in *Kolouch v. First Security Bank of Idaho, supra*, the Court held that the bar applied despite the fact no action against the estate was pending. In *Kolouch*, a personal

representative tried to justify her use of estate funds to pay for the defense of an action in which she had a personal interest by claiming she had an oral agreement with the decedent to fund that litigation. The Court held that even though there was technically no action pending against the estate, a proceeding against the estate would have been required had she (wearing two hats) first presented and then rejected her own claim.

No distinction exists in this case. Plaintiff's claim arises from a claim against the estate based on a contract plaintiff allegedly had with Herbert Turrell. The estate, through its representative, sold that property.

Id., p. 7. According to Tim Turrell, the magic of the dead-man's statute would cause any property held by a person at the time of death to apparently become the decedent's estate, because no one could argue otherwise, as Tim Turrell claims:

Section 9-202(3) and IRE 601(b) preclude testimony **by a party** as to the terms of "**any** communication or agreement, not in writing" in an action against the personal representative of a deceased person "upon a claim or demand against the estate". If the buildings had not been sold, plaintiff could not force Herbert's estate to return the buildings to him or to pay their fair value based solely on his testimony about his oral arrangement with Herbert. Herbert's personal representative, whether the executor of his estate or the trustee of the trust he created) would be duty bound to the estate to reject any such claim and required to deal with the buildings as any other estate property (Idaho Code §§ 15-3-703 and 15-7-302). Plaintiff thus would not have been entitled to possession of the buildings when Tim Turrell sold them in late 2006.

Id., pp. 7-8. (emphasis in original, footnotes omitted). This "black hole" argument finds no support in the law, and specifically, it is not supported by the dead-man's statute.

Tim Turrell testified Exhibit I is a copy of his father Herbert Turrell's will. Tim Turrell testified he took all actions in selling his father's property based upon his capacity as personal representative of his father's estate. Two problems arise with that claim of Tim Turrell. First, Tim Turrell isn't the personal representative. Tim Turrell is listed as the personal representative in his father's will only *after* Marianne and Terry Turrell. Exhibit I, p. 4. Second, no probate has been filed. Tim Turrell was asked at trial

if he had ever probated his father's estate, and it was clear Tim Turrell had no idea what probate was. Without filing a probate action (I.C. § 15-3-102) and without being appointed personal representative by the court (I.C. § 15-3-103), Tim Turrell had no power to do anything vis-à-vis his father's estate.

A similar result follows regarding any claim by Tim Turrell that his actions were as a successor co-trustee of the Herbert and Marianne Turrell Living Trust. That trust, Exhibit H, was admitted in evidence. But if Tim Turrell claims the trust is the tort-feasor in this particular matter, Carpenter correctly argues:

...the Defendant's Answer to the Plaintiff's Complaint did not plead the Plaintiff's failure to join an indispensable third party as an Affirmative Defense nor did the Defendant interplead the Turrell Living Trust as a Third Party Defendant. Additionally, the Plaintiff had no actual or constructive notice that the Defendant was acting as a Successor Trustee of the Turrell Living Trust upon his conversion of the Plaintiff's buildings.

Plaintiff's Post-Trial Brief, p. 7. On August 14, 2007, Carpenter filed this lawsuit against Tim Turrell and his wife Peggy Turrell. Nowhere in that complaint is there any allegation that Tim Turrell performed any of the acts in question as a personal representative of Herbert's estate *or* as trustee of the trust. Nowhere in the Answer filed by the Turrells is there a claim that Tim even was the personal representative of Herbert's estate or trustee of the trust. At any time, Turrells could have brought in or joined the trust if Turrells truly felt the trust was a reasonable or even an indispensable party. I.R.C.P. 19, 20, 21. Turrells have failed to do this. At any time, Turrells could have filed a motion that Carpenter failed to bring in an indispensable party. I.R.C.P. 12(b)(7). Turrells have made no such motion.

Turrells do claim in their Answer the Affirmative Defense of: "As and for a fourth

affirmative defense, Turrells allege Carpenter's claims are barred by Idaho Code § 9-202(3)." Answer, p. 2. However, that statute, Idaho's "dead man's statute", precludes testimony. The dead man's statute does not operate to "bar" claims.

At the inception of the trial, and again in post-trial briefing, Turrells claim any statements attributed to Herbert Turrell should be excluded pursuant to Idaho's "dead man's statute", Idaho Code § 9-202(3). That statute reads:

9-202. Who may not testify. – The following persons cannot be witnesses:

* * *

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any communication or agreement, not in writing, occurring before the death of such deceased person.

The problem with Turrells' claim is Tim Turrell was not sued in his capacity as personal representative of the decedent's estate. Apparently, no probate has ever been filed on behalf of Herbert Turrell. There is no claim against the estate of Herbert Turrell.

The Idaho Dead Man's statute did not apply in an action by the widow and administratrix of the deceased against the former partner of the deceased where there was no claim or demand against the estate of the deceased. *Ridley v. VanderBoegh*, 95 Idaho 456, 462, 511 P.2d 273, 279 (1973). The objection needs to be made by the representative of the estate or a party having an interest in that estate. *Smith v. Smith*, 95 Idaho 477, 482, 511 P.2d 294, 299 (1974). As noted in *Rowan v. Riley*, 139 Idaho 49, 54, 72 P.3d 889, 894 (2003): "The dead man's statute does not apply where, as here, the action is not against the executor or administrator of an estate and the claim does not represent a demand against the estate."

Argyle v. Slemaker, 99 Idaho 544, 547, 585 P.2d 954, 957 (1978), sets out the

test used to determine whether testimony is barred. *Argyle* states the statute bars, “(1) certain persons from testifying (2) in specified actions (3) as to certain communications.” *Id.* *Argyle* goes on to state that all three portions of the test must be satisfied to bar the testimony in question. *Id.* And, further, *Argyle* holds that I.C. §9-202(3), while it does bar testimony concerning oral agreements in appropriate cases, does not bar testimony “concerning a state of affairs or matters of fact occurring before the decedent’s death.” *Id.* See also, *Quayle v. Mackert*, 92 Idaho 563, 447 P.2d 679 (1968).

In *Argyle*, the grantors of mineral rights brought an action against the grantees and their successors and assigns to cancel the deed and quiet title. *Argyle*, 99 Idaho at 545. The Idaho Supreme Court reversed summary judgment against appellant, holding that appellant’s testimony about delivering a blank deed to the now-deceased respondent (which blank nature makes the deed inoperative to convey any property) was not barred by the dead man’s statute and did present a genuine issue of material fact. *Id.* at 546-547. The Idaho Supreme Court in *Argyle* specifically states that, “[a]n additional reason for holding that the evidence is not barred is that I.C. § 9-202(3) prohibits testimony introduced against the estate of a deceased person; it does not prohibit the admissibility of this evidence as against respondent Wiser Oil Company, a corporation.”

According to *Rowan v. Riley*, the dead man’s statute does not apply where the action is not against the executor or administrator of an estate *and* the claim does not represent a demand against the estate. 139 Idaho 49, 54, 72 P.2d 889, 894. Here, Tim Turrell seeks to bar testimony regarding the oral communication or agreement of a now-deceased individual, Herbert Turrell. However, defendants cannot demonstrate that all

three portions of I.C. § 9-202(3) have been satisfied. Turrells challenge the admissibility of testimony by Carpenter about his agreement with the decedent Herbert. Arguably elements one (certain persons testifying) and three (as to certain communications) of the *Argyle* test above are met. However, the second element (that certain persons testify *in certain actions*) is not met. Carpenter has filed a claim or demand against individuals, Tim and Peggy Turrell, and one of those individuals, Tim Turrell, admits selling the modular office and lunchroom. Carpenter did not file a claim or demand against the estate of a deceased person. In applying the *Argyle* Court's reasoning to this case, although I.C. § 9-202(3) prohibits testimony against the estate of a deceased person, it does not prohibit the admissibility of this evidence as against the defendant in this case, Tim Turrell. Carpenter's action is not against the executor or administrator of Herbert Turrell's estate, and the claim does not represent a demand against the estate. Tim Turrell sold the modular buildings as an individual. He did not sign the receipts as the executor or administrator of Herbert Turrell's estate, or even as trustee of the Herbert and Marianne Turrell Trust. Carpenter's action is against Tim Turrell and his wife, not the estate or trust of Herbert Turrell.

For the reasons stated above, I.C. § 9-202(3) does not bar testimony by Carpenter or others as to communications or agreements that occurred before the death of Herbert Turrell, due to the fact that the action or proceeding is not being prosecuted against an executor or administrator of the estate of a deceased person.

It is understandable how these events transpired. Carpenter, being in the business of moving, owning, buying and selling modular homes, probably was no particular hurry to sell these two modular homes he had stored on his friend, Herbert Turrell's land. It is easy

to see how after Herbert Turrell's death, his wife, Marianne, and his son Tim Turrell, might not be worried about these two additional modular homes remaining on what was now Marianne Turrell's property, as the property contained **a lot** of items. The Court can understand why Carpenter, even after knowing Herbert Turrell had passed away, kept these two modular homes on Marianne Turrell's property, as Carpenter had no information that they were no longer welcome there. The Court finds credible the testimony of Jim Carpenter, David Bonder, and Marianne Turrell. The Court finds Tim Turrell to be credible on almost all issues, but mistaken on a few critical issues. Likewise, Tim Turrell's brother Tom Turrell is credible, but mistaken on a critical issue.

The actions of Carpenter, who is in the business of moving, buying and selling these mobile or modular homes/buildings, are consistent with his continued ownership of these two buildings. Why would Carpenter buy five buildings, store two at Herbert's only because Carpenter couldn't get them through his gate (Carpenter had the land to store them upon), show those two to prospective buyers on at least three occasions, only to later claim he "gave" them or "traded" them to Herbert? There is no evidence of that. Carpenter's actions would be completely inconsistent with that proposition urged by Turrells. Carpenter's actions are completely consistent with his continuous ownership of these two buildings. The mistake comes from Tom Turrell thinking Carpenter was talking about the two modular buildings at issue in this lawsuit, when instead Carpenter was talking about moving for Herbert some other cabins stored on Herbert's property; cabins that Carpenter *did* want to move for Herbert and that Herbert wanted moved.

The mistake is evidenced by Tom Turrell's testimony. Tom recalls Carpenter coming up to Herbert Turrell's land on a four-wheeler. Tom recalls Carpenter saying

“When are we going to move your father’s buildings up to Terry’s ranch?” Yet another brother, Terry Turrell, had some property up by Bayview. Tom Turrell thought Carpenter was talking about the two modular buildings Carpenter had brought in, and thus, thought his father must have bought or traded for these buildings. Three days later, Tom Turrell recalls seeing Carpenter, saying hello, and Carpenter wanting to know what Tom’s dad Herbert had to say about “moving these up to the ranch.” Later that summer Tom Turrell recalls a third conversation where Carpenter again arrived on a four-wheeler, and asked Tom if he had talked to his brother Terry about “when we could move the buildings”, then Tom Turrell testified “my dad’s buildings” in response to a leading question. Finally, according to Tom Turrell, there was one more instance in August during Herbert’s birthday party (which didn’t happen because Herbert had to be taken to the hospital), where, on the phone to Tom, Carpenter said: “Have you had time to talk to your brother Terry about putting these buildings up on the ranch?” Carpenter recalls at least some of the conversations, but Carpenter testified that when he said “these buildings”, he was referring to some cabins Herbert had brought up from Chatcolet (Tim Turrell testified Corbin Park) which Herbert wanted moved to Terry’s land, and not the buildings Carpenter bought in May 2003 and placed on Herbert Turrell’s land. Carpenter testified as to the first of these four conversations, when Herbert was present along with Carpenter and Tom Turrell, that Herbert was talking about “his” cabins, meaning the cabins Herbert owned and brought up from Chatcolet. Carpenter testified the reason he kept asking was since he was in the business of moving buildings such as these (both the modular buildings and the cabins), he wanted to be able to plan ahead if Carpenter was going to be the one to move Herbert’s cabins to his son’s (Terry’s) property.

Tom Turrell testified that he knew his brother Terry was involved in purchasing the cabins Herbert had on his property from Corbin Park, and that Tom thought Terry wanted those cabins on his property in Bayview. This testimony lends credibility to Carpenter's explanation.

The mistake made by Tom Turrell is understandable. However, given the facts, Carpenter's explanation is more credible. Terry Turrell could have testified and did not. Had he testified that there was a plan to move buildings up to his property and that the buildings were unequivocally the modular buildings at issue, we would have a different set of facts. But Terry Turrell, the person who was to receive these buildings according to Tim and Tom Turrell, did not testify. Tom Turrell testified he had never spoken to his brother Terry about this issue. Other than this mistake by Tom Turrell, there is simply no proof that these buildings belonged to anyone other than Carpenter. Carpenter testified he never sold, gifted or traded these two buildings to Herbert Turrell, and Tim Turrell has no evidence to contradict that claim.

There is a dispute of fact and a credibility determination must be made. Carpenter testified that about a year before Carpenter found out that Tim Turrell had sold the buildings, he had a call from Tim Turrell on Carpenter's cell phone, Tim asking Carpenter whether the buildings were for sale, Carpenter explaining \$12,000 for one and \$15,000 for the other. Carpenter testified he believes Tim told him the name of the person that was interested in buying them, but Carpenter could not recall his name. On cross-examination Carpenter was asked if he told Tim Turrell in the conversation that Carpenter owned the buildings, to which Carpenter responded: "I didn't see a need to". That response makes sense if Tim Turrell was the one who placed the call, and Tim was the one asking for a

selling price. Tim Turrell would not have done either if he truly thought his father or his father's trust owned the buildings.

Tim Turrell testified that he had called and left a message with Carpenter because his nephew, Jeremy, told Tim Turrell that Carpenter had sent some people over to Herbert and Marianne's property to look at the buildings. Tim Turrell testified that on another occasion he found Carpenter's cell number written on some of his dad's records, made a call to that number, and left a message that "If you have any interest or any knowledge of these buildings, please call." Carpenter denies receiving such a message.

The testimony of Tim Turrell is telling. First of all, why would Tim Turrell call Carpenter and leave the message: "If you have any interest or any knowledge of these buildings, please call", if he didn't think Carpenter *owned* the two buildings? Second, these buildings are large items and they have a good bit of value. If indeed Tim Turrell left such a message on a phone he knew to be Carpenter's, it is not reasonable for Tim Turrell to just leave it at that, given the size and value of these two buildings. Had this been an old appliance Carpenter had placed three years earlier, certainly a message and if no response, haul it off or sell it. But two fairly large buildings in good shape with a fairly high value, simply one phone call is not reasonable. The bottom line is Tim Turrell's own testimony shows that he knew these buildings belonged at all times to Carpenter.

Carpenter testified that he had an individual named Kurt Hall who was interested in the buildings. Carpenter testified that the first time he noticed the buildings were gone from Herbert and Marianne Turrell's property (after Herbert had died), was when Carpenter took Kurt Hall to look at the buildings. Carpenter testified he contacted Tim Turrell by phone, and left a message with a woman Carpenter assumed was Tim Turrell's wife, requesting

that Tim Turrell call Carpenter. Since no call was returned, Carpenter testified he called Tim Turrell again, that Carpenter spoke to Tim Turrell at that time. Carpenter testified Carpenter asked about the buildings and Tim Turrell responded: "I gave the buildings away", to which Carpenter stated "They weren't yours to give away". Tim Turrell then said "We had to clean the property up", and Carpenter responded "I owned those buildings", to which Tim Turrell said "You'll have to do what you have to do" and then said "My son is here from Iraq and I don't want to talk any more." Tim Turrell denies getting a message from his wife, but admits a conversation occurred with Carpenter. Tim Turrell denies he said "I gave the buildings away", but instead claims he said "I had them hauled off", and admits his son was home from Iraq at the time. Tim Turrell admitted he did not tell Carpenter where the buildings were, and his reason for that was "I was angry with him because he told me I owed him \$27,000.00". Tim Turrell admitted he did not tell Carpenter he had sold them, and stated the reason for that was: "I thought they were my father's and Carpenter didn't have anything to do with them." Essentially, Tim Turrell corroborates all of Carpenter's testimony regarding this telephone conversation.

Tim Turrell makes an interesting argument in claiming that he is not liable for the tort of conversion:

The wrongful act of conversion can take place in two ways. A party can unlawfully take property from the possession of the person entitled possess the same or, in the absence of such an appropriation or taking, a party can refuse a demand to deliver possession of the property to a person entitled to immediate possession thereof (*Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732,743 (1998)). Where possession is obtained rightfully such as where property is entrusted by the owner to another, an unlawful taking does not occur until the rightful owner makes demand for the return of his property, is entitled to immediate possession and the demand for possession is wrongfully refused (*Gissel v. State*, 111 Idaho 725, 730-31 (1986)).

Here, Herbert (and after his death, his estate or the trust) was in lawful possession of the buildings even if all of plaintiff's testimony is admitted and accepted at face value. Neither Herbert nor Tim thus "appropriated" the buildings because they were legally in possession thereof at the date of sale.

To establish the tort of conversion, plaintiff thus had to prove that a demand for return of the buildings was made on Tim (or rather the trust) for the return of the buildings and that that demand was wrongfully rejected. Plaintiff offered no proof of either. Plaintiff did not testify that he demanded of Tim that the buildings be returned to him at any time before they were sold or that Tim refused to do so. Accordingly, even if plaintiff was entitled to enforce his agreement with Herbert, plaintiff failed to prove the tort of conversion as a matter of law.

Defendant's Post-Trial Brief, p. 9. According to Tim Turrell's argument, even though the modular buildings were Carpenters, they were rightfully on Herbert Turrell's land, and since Tim Turrell sold them *before* Carpenter made a demand for the buildings, Carpenter can never recover damages from Tim Turrell. Interesting theory, and another creative "black hole" argument by Tim Turrell, but a theory which finds no support in the facts or in the law.

The phone call between Carpenter and Tim Turrell constitutes a *demand* by Carpenter ("They weren't yours to give away") and a *refusal* by Tim Turrell ("You'll have to do what you have to do"). Carpenter made additional *demand* when he filed this lawsuit.

Apparently, at no time has Tim Turrell approached the buyers of these buildings, Dan Selden and Leonard Turpin, to try and get them back. In any event, at no time has Tim Turrell ever offered them back to Carpenter, and that fact can be construed as nothing other than a *refusal*. Tim Turrell's reliance on *Gissel* is misplaced for a variety of reasons.

First, the portion of *Gissel* cited by Turrell is from the dissenting opinion, not the majority opinion, and Turrell neglected to mention that fact in his briefing. Second, *Gissel* merely discusses the obvious fact that a thief cannot maintain an action in conversion. Third, nothing in either the majority or dissenting opinions in *Gissel* discusses that one must make

a demand for possession *and* have it wrongfully refused. Even if *Gissel* did require a refusal, as pointed out above, Carpenter did demand possession and Tim Turrell has at all times during this dispute wrongfully refused such demand.

Next, Tim Turrell claims Carpenter sued the wrong parties, arguing:

A seller of personal property has no ability to convey a greater title than he had, regardless of whether the purchaser had notice or any reason to believe of the real owner's interest in the property (*Massey-Ferguson, Inc. v. Talkington*, 88 Idaho 501, 502 (1965)). Even the intervention of bona fide purchaser for value of such property does not defeat the true owner's ability to regain the property. A bona fide purchaser who refuses the demand of an owner entitled to immediate possession of stolen personal property is guilty of conversion (*Nora v. Safeco Insurance Co.*, 99 Idaho 60, 68 (1978)).

If the buildings belonged to plaintiff, Tim Turrell did not have the authority to convey title thereto to the individuals who bought them. Plaintiff accordingly had, and still has, the ability to retrieve possession from those buyers after making proper demand on them.

Defendant's Post-Trial Brief, p. 9. Once again, Turrells cite to the dissenting opinion in *Nora v. Safeco Insurance Co.*, 99 Idaho 60, 68, 577 P.2d 347, 355 (1978), without telling this Court they are doing so. All of this argument misses the point that Carpenter chose to sue Turrells for conversion. Just as with the Turrells' argument that Carpenter failed to join the estate of Herbert Turrell or the Trust of Herbert and Marianne Turrell (discussed above), Turrells could have brought the buyers Dan Selden and Leonard Turpin into this litigation. At any time, Turrells could have brought in or joined the buyers to whom Tim Turrell sold the buildings as a reasonable or an indispensable party. I.R.C.P. 19, 20, 21. Turrells have failed to do this. At any time, Turrells could have filed a motion that Carpenter failed to bring in an indispensable party. I.R.C.P. 12(b)(7). Turrells have made no such motion. Turrells argument that Carpenter should be the one to go after these individuals would put the burden of bringing those individuals into the litigation upon the

“victim” of the conversion, Carpenter, rather than upon the “tortfeasor”, Turrells. The law does not require such. Indeed, by choosing to sue Turrells in conversion, which Carpenter had every right to do, Carpenter might not have been able to also sue the individual buyers for return of the property, if such would be an “inconsistent” remedy. *Largilliere Co. v. Kunz*, 41 Idaho 767, 772, 244 P. 404, 405 (1926).

Finally, Tim Turrell argues Carpenter has not proven damages. His argument, in its entirety is:

The only evidence of value as to the buildings before this Court is plaintiff’s self-serving statement that the buildings were for sale for \$27,000 and that he paid \$20,000 for property he left to sit unattended for almost 4 years in a pasture. Not only is his claim to have paid “cash” in an amount that would have triggered a mandatory report to the Federal Government in a business transaction for which he would need and want a proper paper trail for tax purposes highly suspect on its face, but plaintiff offered nothing to corroborate that claim. Don Murrell (listed as a witness), the owner of the business that allegedly sold the buildings to plaintiff, was not called to verify his receipt of cash, the alleged bill of sale is silent as to what plaintiff paid, and no banking records were offered to establish where plaintiff drew the money, if in fact he did.

The only hard evidence before the Court is what two willing buyers paid for the buildings - \$3,500.00.

Defendant’s Post-Trial Brief, pp. 10-11. This argument turns the shifting burden of production of evidence between the parties on its head. Carpenter testified to what and how he paid for the buildings. Carpenter’s testimony was credible, and more importantly, it was **uncontradicted!** If Tim Turrell finds it odd that he paid cash to Don Murrell and that Don Murrell did not testify, so be it. But finding such odd doesn’t shift the burden back to Carpenter. Carpenter put on his proof, Tim Turrell put on none as far as valuation is concerned. Tim Turrell’s briefing does nothing but cast aspersions. Tim Turrell certainly could have called Don Murrell as a witness. Presumably, Tim Turrell’s attorney called

prospective witnesses such as Don Murrell to find out what they might say at trial. Tim Turrell in his argument above is essentially asking this Court to *presume* complicity due to a cash transaction. This Court will not engage in such an unfounded presumption. Evidence is what carries the day at trial, and Tim Turrell put on none on this issue. Since Turrell did not call Don Murrell as a witness *after Carpenter had testified about value*, the failure of Don Murrell to be called as a witness by either party only cuts against Turrell.

Due to a failure to timely disclose expert witnesses, Carpenter was unable to put on expert testimony as to the value of these two buildings. The evidence is uncontroverted that Carpenter paid \$20,000.00 for both buildings. Carpenter testified that he paid cash for these buildings. While that is unusual, the Court does not find it reason to find Carpenter not to be credible due to the unusual nature of that transaction. Carpenter testified he thought he could sell these two modular buildings for \$25,000.00. Later, Carpenter was asked to give a fair market value of the two buildings as of November 2006, to which he expressed the opinion that the one sold to Turpin (the lunchroom) was worth about \$15,000.00 and the other worth about \$12,000.00, for a total of \$27,000.00. While an owner can testify as to an opinion of value of the owner's property, even if that testimony is uncontradicted, the Court need not believe that opinion that the modular homes could have been sold within a reasonable time for \$25,000 to \$27,000. The Court does not agree with that valuation placed by Carpenter for two reasons. First, in the three and one half years the modular homes were stored on Herbert Turrell's property, they were for sale, and in fact did not sell, for any price. There was no testimony by Carpenter that he even received an offer that he rejected. Thus, even back in May 2003 when Carpenter acquired these two modular homes, there is evidence that they were not worth the price claimed by

Carpenter. Second, there is evidence that the buildings were worth less in November and December 2006 (when Tim Turrell wrongfully sold them) than they were in May 2003 when Carpenter acquired them and placed them on Herbert Turrell's land. December and November 2006 is the time period at which the fair value of these modular homes must be ascertained. There was no evidence that modular homes appreciate over time. There was no evidence that modular homes are in short supply due to some unusual demand in this area. Thus, there is every reason that the passage of three and one half years was probably unkind to these modular homes in that they depreciated and weathered. However, the depreciation and weathering in three and one half years would not result in a drop in value as evidenced by the meager price for which Tim Turrell sold these homes, a mere \$1,750 each, or \$3,500 combined. Tim Turrell testified that when he sold these two homes there was a lot of junk inside and some vinyl siding taken off. Tom Turrell testified that "These were just two more shacks out there with all the other junk, they were nothing special." Carpenter on the other hand testified that he last went in the buildings about a year before they were removed, and at that time each had a little skirting and downspouts stored inside, but otherwise they were in good shape. The evidence shows these two modular homes to be in better shape than Tim Turrell or Tom Turrell testified. Exhibit D. In fact, Exhibit D shows the two modular homes in more recent times were in very good shape. Using the \$20,000.00 that Carpenter, in the business of selling modular homes such as these, paid for these two modular buildings in 2003 as a starting point, and applying depreciation over three and one half years, this Court finds that in November and December 2006, the home Carpenter hoped to sell for \$12,000 to be worth \$8,000, and the building Carpenter hoped to sell for \$15,000 to be worth \$10,000, for a total of

\$18,000.00. That is the fair market value in November and December 2006. Fair market value is the appropriate measure of damages for the tort of conversion. ICJI 9.11.

II. FINDINGS OF FACT.

1. On or about May 23, 2003, the Plaintiff Carpenter purchased from G. Don Murrell, Sr., a lunchroom modular building Serial #601-102A and an office modular building, Serial #400-101A. Subsequent to the purchase of the lunchroom and office buildings, Carpenter delivered and stored the same at real property owned by Herbert F. and Marianne Turrell, husband and wife, located at 2855 W. Yukon Avenue, Post Falls, Idaho with the Turrell's verbal permission.

2. Marianne Turrell testified her husband, Herbert F. Turrell passed away sometime in January, 2005. Defendant Tim Turrell testified his father, Herbert F. Turrell passed away on January 9, 2005.

3. Approximately in June 2006, Tim Turrell telephoned Carpenter about a potential buyer for one of the buildings and gave Carpenter the potential buyer's telephone number. Carpenter contacted the potential buyer, but a sale was never consummated.

4. At no time during the period of time that Carpenter's buildings were stored on the Turrell property was Carpenter ever advised verbally or in writing by either Herbert Turrell or Marianne Turrell to remove the same, nor was he ever requested to pay rent or any form of compensation as for the storage of said buildings on the Turrell property.

5. On or about March 15, 2007, Carpenter took a potential customer to the Turrell property to look at the buildings hoping to sell either one of them and discovered that the buildings were no longer there. Being aware that Herbert F. Turrell had passed

away, Carpenter contacted Tim Turrell to determine the status of Carpenter's buildings. Tim Turrell advised Carpenter that Tim Turrell had given and/or gifted both of the buildings but would not reveal to Carpenter to whom or who transported the buildings from the Turrell property.

6. Upon investigation, Carpenter determined Tim Turrell sold the office building to Leonard Turpin for \$1,750.00 on or about November 29, 2006, and the lunchroom building to Dan Selden for \$1,750.00 on or about December 8, 2006.

7. The sale of the lunchroom and office buildings by Tim Turrell was without prior knowledge, consent or authority of Carpenter.

8. Carpenter received no proceeds from the same of the lunchroom building and/or office building from Tim Turrell.

9. The fair market value of the lunchroom building is \$8,000.00.

10. The fair market value of the office building is \$10,000.00.

III. CONCLUSION OF LAW.

1. The Plaintiff Carpenter was the owner of the lunchroom and office buildings hereinafter referred to as buildings.

2. Marianne Turrell was rightfully in possession of the buildings as bailee. The relationship between Carpenter and Herbert F. Turrell and Marianne Turrell was that of a gratuitous bailment, *Quinto vs. Millwood Forest Products, Inc.*, 130 Idaho 162, 165, 938 P.2d 189, 192 (Ct.App. 1997), in that it was solely for the benefit of Carpenter. Tim Turrell was acting as agent for his mother, Marianne Turrell in cleaning up her property. In a gratuitous bailment, the bailee is only liable for the loss of the bailed item if the bailee was grossly negligent. *Id.* The Court finds Tim Turrell, and thus, Marianne

Turrell grossly negligent in selling Carpenter's two buildings.

3. Defendant Tim Turrell, without authority of the bailee, assumed dominion and control of the Plaintiff's buildings.

4. Tim Turrell exercised dominion and control of the buildings, thereby permanently depriving Carpenter of possession of said personal property by the sale of the buildings to Selden and Turpin. *Wiseman vs. Schaffer*, 115 Idaho 537, 540-41, 768 P.2d 800, 803-04 (Ct.App. 1989). Even if Tim Turrell is unaware of the existence of Carpenter's rights in which Tim Turrell interferes, Tim Turrell is still liable. *Id.*

5. Any allegation by Tim Turrell that he was unaware of Carpenter's rights over the buildings which Tim Turrell converted to his own use is irrelevant and Tim Turrell is still liable. *Restatement of Torts (2nd)* Section 222, 223, 224.

6. Tim Turrell is liable to Carpenter for damages resulting from his wrongful conversion of Carpenter's buildings. The measure of damages is the full value of the buildings at the time and place of the sale to third parties. *Restatement of Torts (2nd)* Section 222(A), Comment C; *Wiseman (supra)*.

7. Idaho Code §9-202(3) is not relevant to the instant case because the Estate of Herbert Turrell is not a party or named defendant in this matter. There is no claim by Carpenter against Marianne Turrell or the Estate of Herbert Turrell, and any proffered testimony as to any agreement or communication between Carpenter and Herbert F. Turrell concerning a state of affairs or matter of fact prior to Herbert Turrell's death is not barred by said statute. *Argyle v. Slemaker*, 99 Idaho 544, 547, 585 P.2d 954, 957 (1978),

8. It is not necessary to prove a demand and refusal and the intent of the parties

is immaterial when a conversion occurs by wrongful taking. *Klam v. Koppel*, 63 Idaho 171, 182-83, 118 P.2d 729 (1941).

9. Defendants Turrells are indebted to plaintiff Carpenter in the sum of \$18,000.00, representing the fair market value of the buildings, for which judgment for Carpenter and as against the Turrells will be entered.

IV. ORDER.

IT IS HEREBY ORDERED that plaintiff Carpenter has prevailed on his claims against defendants Turrells, and that Carpenter's counsel prepare a judgment in accord with this decision, findings and conclusions.

Entered this 19th day of June, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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