User Name: Jeremy Bass
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Documents (22)

1. *Shepard's®:Countrywide Home Loans, Inc. v. Sheets 160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114, 2016 WL 1638202 (Idaho,April 26, 2016)*
   Client/Matter: -None-
   Requested Categories:
   History - Requested
   Citing Decisions - None applied
   Other Citing Sources - None applied
   Table of Authorities - Not Requested
2. *Idaho Code sec. 9-505, Idaho Code sec. 9-505*
   Client/Matter: -None-
3. *Plaintiff-Appellee: GERSTEIN v. Attorney-Appellant: ROBINS KAPLAN, LLP, 2021 CO App. Ct. Briefs LEXIS 460*
   Client/Matter: -None-
4. *380 PROPS. v. SORROW, 2019 GA App. Ct. Briefs LEXIS 1677*
   Client/Matter: -None-
5. *HERNDON v. CITY OF SANDPOINT, 2022 ID S. Ct. Briefs LEXIS 643*
   Client/Matter: -None-
6. *PORCELLO v. The Estate of ANTHONY J. PORCELLO, 2019 ID S. Ct. Briefs LEXIS 1699*
   Client/Matter: -None-
7. *WILSON v. WILSON, 2019 ID S. Ct. Briefs LEXIS 1612*
   Client/Matter: -None-
8. *WILSON v. WILSON, 2019 ID S. Ct. Briefs LEXIS 1444*
   Client/Matter: -None-
9. *REESE v. SIDDOWAY & CO., 2019 ID S. Ct. Briefs LEXIS 103*
   Client/Matter: -None-
10. *NORTH IDAHO BLDG. CONTRS. ASS'N v. CITY OF HAYDEN, 2018 ID S. Ct. Briefs LEXIS 304*
    Client/Matter: -None-
11. *SELECT PORTFOLIO SERVICING v. DUNMIRE, 2019 NV S. Ct. Briefs LEXIS 2783*

Client/Matter: -None-

12. *Oregon-Idaho Utils. Inc. v. Skitter Cable TV Inc., 2017 U.S. Dist. Ct. Motions LEXIS 133518*
Client/Matter: -None-

13. Plaintiff-Appellee: GERSTEIN v. Attorney-Appellant: ROBINS KAPLAN, LLP, 2021 CO App. Ct. Briefs LEXIS 460_Attachment1
Client/Matter: -None-

14. 380 PROPS. v. SORROW, 2019 GA App. Ct. Briefs LEXIS 1677_Attachment1
Client/Matter: -None-

15. HERNDON v. CITY OF SANDPOINT, 2022 ID S. Ct. Briefs LEXIS 643_Attachment1
Client/Matter: -None-

16. PORCELLO v. The Estate of ANTHONY J. PORCELLO, 2019 ID S. Ct. Briefs LEXIS 1699_Attachment1
Client/Matter: -None-

17. WILSON v. WILSON, 2019 ID S. Ct. Briefs LEXIS 1612_Attachment1
Client/Matter: -None-

18. WILSON v. WILSON, 2019 ID S. Ct. Briefs LEXIS 1444_Attachment1
Client/Matter: -None-

19. REESE v. SIDDOWAY & CO., 2019 ID S. Ct. Briefs LEXIS 103_Attachment1
Client/Matter: -None-

20. NORTH IDAHO BLDG. CONTRS. ASS'N v. CITY OF HAYDEN, 2018 ID S. Ct. Briefs LEXIS 304_Attachment1
Client/Matter: -None-

21. SELECT PORTFOLIO SERVICING v. DUNMIRE, 2019 NV S. Ct. Briefs LEXIS 2783_Attachment1
Client/Matter: -None-

22. Oregon-Idaho Utils. Inc. v. Skitter Cable TV Inc., 2017 U.S. Dist. Ct. Motions LEXIS 133518_Attachment1
Client/Matter: -None-

LexisNexis

Shepard's®: Report Content

History: Requested

Citing Decisions: None Applied

Other Citing Sources: None Applied

Table Of Authorities: Not Requested

***Shepard's*®:** Countrywide Home Loans, Inc. v. Sheets 160 Idaho 268,371 P.3d 322,2016 Ida. LEXIS 114,2016 WL 1638202: (Idaho April 26, 2016)

No subsequent appellate history

History (1)

1. **Citation you *Shepardized*™**

Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114, 2016 WL 1638202

Court: Idaho | **Date:** April 26, 2016

Citing Decisions (8)

Analysis: Followed by (1), "Cited by" (7)

Headnotes:HN3 (2), HN4 (1), HN6 (1)

Idaho Supreme Court

1. Jones v. Lynn, 169 Idaho 545, 498 P.3d 1174, 2021 Ida. LEXIS 179, 2021 A.M.C. 205, 2021 WL 5441515

LB **Cited by:** 169 Idaho 545 p.560; 498 P.3d 1174 p.1189
... "The unclean hands doctrine 'stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327(2016)** (quoting Ada Cnty. Highway Dist. v. Total Success Investments, LLC , 145 Idaho 360 , 370 , 179 P.3d 323 , 333 (2008)). In determining if [the clean ...

Discussion: | **Court:** Idaho | **Date:** November 22, 2021 | **Headnotes:**: HN4

2. Porcello v. Porcello, 167 Idaho 412, 470 P.3d 1221, 2020 Ida. LEXIS 170, 102 U.C.C. Rep. Serv. 2d (CBC) 718, 2020 WL 4432813

LB **Cited by:** 167 Idaho 412 p.427; 470 P.3d 1221 p.1236
... credible evidence that the parties agreed that the Hayden [Lake] home would be used to secure subsequent refinanc[ing] of the Via Venito or Woodinville properties[,]" finding that there were no discussions of refinancing the Legacy loan until after the loan expired. The district court distinguished this case from Biersdorff v. Brumfield , 93 Idaho 569 , 468 P.2d 301 (1970) , and rejected the Estates' reliance on **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322(2016)** ...

Court: Idaho | **Date:** August 3, 2020

3. Wadsworth & Reese, PLLC v. Siddoway & Co., PC, 165 Idaho 364, 445 P.3d 1090, 2019 Ida. LEXIS 123, 2019 WL 3332904

G **Followed by:** 165 Idaho 364 p.372; 445 P.3d 1090 p.1098
This quasi-contract "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and, in some cases, in spite of an agreement between the parties." Continental Forest Prods. v. Chandler Supply Co., 95 Idaho 739, 518 P.2d 1201 (1974). Unjust enrichment occurs where (1) the plaintiff confers a benefit on the defendant; (2) the defendant appreciates the benefit; and (3) the defendant's acceptance of the benefit is inequitable without payment to the plaintiff for the benefit's value. ... Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 326 (2016). **(HN3)**

Discussion: | **Court:** Idaho | **Date:** July 25, 2019 | **Headnotes:**: HN3

4. Hoffman v. Bd. of Local Improvement Dist. No. 1101, 163 Idaho 464, 415 P.3d 332, 2016 Ida. LEXIS 420

LB **Cited by:** 163 Idaho 464 p.470; 415 P.3d 332 p.338
... Wandering Trails, LLC v. Big Bite Excavation, Inc. , 156 Idaho 586 , 592 , 329 P.3d 368 , 374 (2014) . "An enforceable contract must be complete, definite, and certain in all of the contract's material terms." Id. **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 274, 371 P.3d 322, 328(2016)** . The

district court considered extrinsic evidence to evaluate whether Appellants' execution of a release of claims against the Boards and their agents and employees related to the ...

Discussion: | **Court:** Idaho | **Date:** December 21, 2016 | **Headnotes:**: HN6

Idaho District Court

5. Jones v. Nosworthy, 2018 Ida. Dist. LEXIS 20, 2018 A.M.C. 2903

Cited by:
... Dram Shop Act applies to these facts, and it shields from liability "any person who sold or otherwise furnished alcohol" who did not receive notice "within one hundred eighty (180) days from the date the claim or cause of action arose by certified mail." I.C. § 23-808 . Plaintiffs cite **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327(2016)** , and argue that Defendants cannot assert the 180-day deadline for giving notice in Idaho 's Dram Shop Act because ...

Court: Idaho Dist. Ct. | **Date:** August 9, 2018

9th Circuit - U.S. District Courts

6. Self Storage Advisors v. SE Boise Boat & RV Storage, 2021 U.S. Dist. LEXIS 21971, 2021 WL 372789

Cited by:
... law, the "unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue." **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322(2016)** (internal quotation marks, alterations, and citation omitted). Because the second cause of action relating to the revised agreement is no longer a controversy ...

Court: Dist. Idaho | **Date:** February 3, 2021

7. Roost Project, LLC v. v. Andersen Contr. Co., 437 F. Supp. 3d 808, 2020 U.S. Dist. LEXIS 21677, 2020 WL 560574

Cited by: 437 F. Supp. 3d 808 p.824
... law a plaintiff must prove: (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." Nelson-Ricks Cheese Company, Inc. v. Lakeview Cheese Company, LLC , 331 F.Supp.3d 1131 , 1145 (D. Idaho 2018) (citing **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 326(Idaho 2016)** (citing Teton Peaks Inv. Co. ...

Court: Dist. Idaho | **Date:** February 4, 2020

8. Nelson-Ricks Cheese Co. v. Lakeview Cheese Co., LLC, 331 F. Supp. 3d 1131, 2018 U.S. Dist. LEXIS 117345

Cited by: 331 F. Supp. 3d 1131 p.1145
... law a plaintiff must prove: (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit. **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 326(Idaho 2016)** (citing Teton Peaks Inv. Co. LLC v. Ohme , 146 Idaho 394 , 195 P.3d 1207 , 1211 (Idaho 2008)) . "The essence of the quasi-contractual theory of unjust ...

Court: Dist. Idaho | **Date:** July 12, 2018 | **Headnotes:**: HN3

Other Citing Sources: (11)

Annotated Statutes

1. **Idaho Code sec. 9-505**

   ... Where written documents, unsigned by mortgagee, did not match the loan amount and interest rate that mortgagee believed that bank had promised, there was no meeting of the minds and, thus, no contract to be enforced between the parties.**Countrywide Home Loans, Inc. v. Sheets,160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114(2016)**. Waiver of Defense. The defense of the statute of frauds is waived where it does not appear from the complaint that the contract sued on does not fall within it, ...

   Content: Statutes

Briefs

2. **Plaintiff-Appellee: GERSTEIN v. Attorney-Appellant: ROBINS KAPLAN, LLP**, 2021 CO App. Ct. Briefs LEXIS 460

   ... ("The doctrine of unclean hands applies only when the plaintiff's allegedly unclean conduct was willful or fraudulent. Mere negligence is not sufficient."); O'Neil v. Picillo , 682 F.Supp. 706 , 727 (D.R.I. 1988) (same), aff'd , 883 F.2d 176 (1st Cir.1989) ;**Countrywide Home Loans, Inc. v. Sheets, 371 P.3d 322, 327(Idaho 2016)**(for unclean hands doctrine to apply, "the conduct must be intentional or willful, rather than merely negligent"); Hoffman Constr. Co. v. U.S. Fabrication ...

   Content: Court Filings | **Date:** June 14, 2021

3. **380 PROPS. v. SORROW**, 2019 GA App. Ct. Briefs LEXIS 1677

   ... Any party seeking equitable relief is subject to the unclean hands doctrine. O.C.G.A. § 23-1-10 . Williams v. Williams , 255 Ga. 264 , 265 (1985) ("It is well established . . . that equity is not available to one who lacks clean hands as to the relief sought."); cf.**Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273(Sup. Ct. 2106)**("In determining if the clean hands doctrine applies, a court has discretion to evaluate the relative conduct of both parties and to determine ...

   Content: Court Filings | **Date:** July 19, 2019

4. **HERNDON v. CITY OF SANDPOINT**, 2022 ID S. Ct. Briefs LEXIS 643

   ... "The unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327(2016)** (internal citations omitted). On appeal, Herndon argues that the City chose to deal with the Festival through a defective lease which was executed in violation ...

   Content: Court Filings | **Date:** August 11, 2022

5. **PORCELLO v. The Estate of ANTHONY J. PORCELLO**, 2019 ID S. Ct. Briefs LEXIS 1699

   ... and Mark had made interest payment for many months. Tr., Vol. VIII, p. 1351, L. 6-25. The district court also observed that during trial and in written closing argument, Tony and Annie failed to develop the advancement argument, other than to make a conclusory statement that Mark and Jennifer failed to satisfy the terms of the Note and Deed of Trust. R., p. 476. The district court also distinguished **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 327(2016)** ...

   Content: Court Filings | **Date:** October 18, 2019

6. **WILSON v. WILSON**, 2019 ID S. Ct. Briefs LEXIS 1612

... B. The magistrate court did not error in finding the $ 35,000.00 gift from Mr. Wilson to Ms. Kinsey for the purchase of the property located 1110 8th Avenue, Lewiston, Idaho was not an asset of the party's marriage . In his Appellant brief, Mr. Wilson claims that the court errored in not awarding him in an equitable lien upon Ms. Kinsey's home at 1110 8th Avenue home. Mr. Wilson cites **Countrywide Loans v. Sheets and Bank of America, 160 Idaho 268, 371 P.3d 322(2016)** as authority that ...

Content: Court Filings | **Date:** October 15, 2019

7. **WILSON v. WILSON**, 2019 ID S. Ct. Briefs LEXIS 1444

... question in this case, which is what is to be done to recognize the equity of providing Appellant with equitable compensation for his separate property contribution to the real estate now classified as separate property? The answer is to impose an equitable lien on the home for all or part of the $ 35,000.00 down payment. An equitable lien is a court ordered tool for enforcing the doctrine of unjust enrichment. That doctrine was recently stated in **Countrywide Loans v. Sheets and Bank of America,** ...

Content: Court Filings | **Date:** September 15, 2019

8. **REESE v. SIDDOWAY & CO.**, 2019 ID S. Ct. Briefs LEXIS 103

... A party is only entitled to damages for unjust enrichment if he establishes three elements: "(1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." **Countrywide Home Loans, Inc. v. Sheets,160 Idaho 268, 272, 371 P.3d 322, 326(2016)** (quoting Teton Peaks Inv. Co. , LLC v. Ohme, 146 Idaho 394 , 398 , 195 P.3d 1207 , 1211 ...

Content: Court Filings | **Date:** January 22, 2019

9. **NORTH IDAHO BLDG. CONTRS. ASS'N v. CITY OF HAYDEN**, 2018 ID S. Ct. Briefs LEXIS 304

... a fee of $ 2,280. Id. But, such conduct does not rise to the level of "inequitable, unfair and dishonest, or fraudulent and deceitful," conduct which is necessary for the application of the doctrine of unclean hands. **Countrywide Home Loans, Inc. v. Sheets,160 Idaho 268, 271, 371 P.3d 322, 325(2016)** . As previously stated, nothing in Loomis mandates that the only methodology a city may follow to calculate a legal cap fee is that which was used by the City of Hailey or that the failure ...

Content: Court Filings | **Date:** February 21, 2018

10. **SELECT PORTFOLIO SERVICING v. DUNMIRE**, 2019 NV S. Ct. Briefs LEXIS 2783

... , 245 P.3d 535 (2010) (citing Houston v. Bank of Am. Fed. Sav. Bank , 119 Nev. 485 , 489 , 78 P.3d 71 , 74 (2003)) . See also **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322(2016)** (attorney's fees awarded to Bank of America where borrower "failed to pay on his loan for six years, apparently hoping to obtain a windfall due to Bank of America 's error[.]"); Oliverio , 109 Wash.App. at 73 , 33 P.3d at 1106 ...

Content: Court Filings | **Date:** April 17, 2019

Motions

11. **Oregon-Idaho Utils. Inc. v. Skitter Cable TV Inc.**, 2017 U.S. Dist. Ct. Motions LEXIS 133518

... The elements of unjust enrichment are that (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit. **Countrywide Home Loans, Inc. v. Sheets,371 P.3d 322, 329(Idaho 2016)** .deg Here, OIU alleged that it provided a benefit to the Skitter Defendants by paying $ 4500 to Kingdom Telephone; that Skitter "accepted the benefits"; ...

Content: Court Filings | **Date:** December 11, 2017

Legend

	Warning - Negative Treatment is Indicated	R	Red - Warning Level Phrase
Q	Questioned - Validity questioned by citing references	O	Orange - Questioned Level Phrase
	Caution - Possible negative treatment	Y	Yellow - Caution Level Phrase
	Positive - Positive treatment is indicated	G	Green - Positive Level Phrase
A	Analysis - Citing Refs. With Analysis Available	B	Blue - Neutral Level Phrase
I	Cited - Citation information available	LB	Light Blue - No Analysis Phrase
	Warning - Negative case treatment is indicated for statute		

End of Document

Idaho Code § 9-505

Statutes current through all legislation from the 2022 Regular Session.

Idaho Code > Title 9 Evidence (Chs. 1 — 18) > Chapter 5 Indispensable Evidence — Statute of Frauds (§§ 9-501 — 9-508)

9-505. Certain agreements to be in writing.

In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section 9-506, Idaho Code.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

5. A promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit.

History

C.C.P. 1881, § 937; R.S., R.C., & C.L., § 6009; am. 1919, ch. 149, § 79a, p. 443; C.S., § 7976; I.C.A., § 16-505; *am. 1993, ch. 397, § 1*, p. 1460; *am. 1996, ch. 177, § 1*, p. 566.

Annotations

STATUTORY NOTES

RESEARCH REFERENCES

A.L.R.

STATUTORY NOTES

Cross References.

Contracts of executors or administrators, *§ 15-3-808*.

Leases of more than ten head of livestock to be in writing, *§ 25-2001*.

Sales contracts, *§ 28-2-201*.

Compiler's Notes.

Former subsection (4) of this section, concerning lease of chattels, was repealed by S.L. 1967, ch. 161, § 10-102. For present law, see *§ 28-2-201*.

JUDICIAL DECISIONS

Acknowledgement.

A defendant's admission of an unwritten contract during the course of litigation will prevent the defendant from relying upon the statute of frauds, if the acknowledgement is of the exact alleged contract and not just evidence of some agreed terms. *Peterson v. Shore, 146 Idaho 476, 197 P.3d 789, 2008 Ida. App. LEXIS 137 (Ct. App. 2008)*.

Annexation Agreement.

Annexation agreement between a city and a property owner created an enforceable lien under subsection (4) of this section and *§ 9-503* because the agreement and its exhibits adequately described the location, quantity, and exterior boundaries of the property. It was not necessary to provide specific descriptions of each lot within the planned subdivision. *Old Cutters, Inc. v. City of Hailey, 488 B.R. 130, 2012 Bankr. LEXIS 5995 (Bankr. D. Idaho 2012)*, aff'd, *No. 1:13-CV-00057-EJL, 2014 U.S. Dist. LEXIS 45787 (D. Idaho Mar. 31, 2014)*.

Application of Section.

This section does not apply to action by corporation to recover profits made by office, since action is one to recover under an implied trust. *Melgard v. Moscow Idaho Seed Co., 73 Idaho 265, 251 P.2d 546, 1952 Ida. LEXIS 240 (1952)*.

This section applies to agreements for the leasing of real property, not to the assignment of an existing lease agreement. *Hunt v. Hunt, 110 Idaho 649, 718 P.2d 560, 1985 Ida. App. LEXIS 744 (Ct. App. 1985)*.

The statute of frauds is inapplicable when a contract, although not fully performed by both sides, is mutually acknowledged to exist. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

The term "full" performance means performance of all obligations by both sides to a contract; it is universally recognized that the statute of frauds is inapplicable to a contract fully performed by both sides. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

This section generally requires a written promise; however, an exception exists when the promise is original or independent from, and not merely collateral to, the agreement between the promisee and a third-party debtor since an original obligation of the promisor is not covered by the terms of the statute of frauds. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co., 115 Idaho 373, 766 P.2d 1254, 1988 Ida. App. LEXIS 175 (Ct. App. 1988)*.

A contract dispute between a pension services company and a home builder, who developed a subdivision with a loan of funds from the pension company, related to the repayment terms of the loan and not to the sale of property; thus, the provisions of this section were not applicable. *Am. Pension Servs. v. Cornerstone Home Builders, Llc, 147 Idaho 638, 213 P.3d 1038, 2009 Ida. LEXIS 111 (2009)*.

Because an employer's promise to answer for a newly hired employee's loan obligation to her previous employer directly benefitted the new employer, the agreement is an exception to the statute of frauds requirement of written evidence. *Campbell v. Parkway Surgery Ctr., LLC, 158 Idaho 957, 354 P.3d 1172, 2014 Ida. LEXIS 358 (2014)*.

Subsection (2) did not apply to a vice president's breach of contract claim, where he alleged that an investment advisory company and his employer assumed joint liability for his compensation as original obligors, the record supported those allegations, and there was triable issue of fact as to whether the advisory company intended to

bind itself to pay the vice president's compensation. *Bailey v. Peritus 1 Assets Mgmt., LLC, 162 Idaho 458, 398 P.3d 191, 2017 Ida. LEXIS 221 (2017)*.

Purpose of the statute of frauds was not served by the estate using it as a sword against the company to escape its own breach of contract. *Tricore Invs. LLC v. Estate of Warren, 168 Idaho 596, 485 P.3d 92, 2021 Ida. LEXIS 74 (2021)*.

Boundary of Land.

Where the location of true boundary line between coterminous owners is unknown to either party and is uncertain or in dispute, an oral agreement between them fixing the boundary line is not regarded as a conveyance of real property in violation of the statute of frauds, but merely as the location of respective existing estates and the common boundary of each of the parties. *Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306, 1960 Ida. LEXIS 182 (1960)*.

Where the location of a true boundary line between coterminous owners is known to either of the parties, or is not uncertain and not in dispute, oral agreement between them purporting to establish another line between them as the boundary between their properties constitutes an attempt to convey real property in violation of statute of frauds and is invalid. *Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306, 1960 Ida. LEXIS 182 (1960)*.

Where the location of the true boundary line between coterminous owners is unknown, uncertain or in dispute, the coterminous owners may orally agree upon a boundary line, and the agreement, when possession is taken under it, will be binding upon the owners and those claiming under them and will not violate the statute of frauds for lack of a writing because it is not a conveyance of land, but merely the locating and establishing of the common boundary. *Hyde v. Lawson, 94 Idaho 886, 499 P.2d 1242, 1972 Ida. LEXIS 354 (1972)*, overruled, *Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046, 1979 Ida. LEXIS 464 (1979)*, overruled in part, *Trappett v. Davis, 102 Idaho 527, 633 P.2d 592, 1981 Ida. LEXIS 376 (1981)*.

In every case where a boundary by agreement is asserted, the underlying issue is whether such an agreement represents an oral conveyance of land in violation of the statute of frauds. The general rule of case law is that an agreement which arises from uncertainty or dispute over the location of a boundary is valid and does not constitute an oral conveyance of land. *Norwood v. Stevens, 104 Idaho 44, 655 P.2d 938, 1982 Ida. App. LEXIS 289 (Ct. App. 1982)*.

Mediation agreement fell within the boundary agreement exception to statute of frauds, the elements of which are: (1) an uncertain or disputed boundary and (2) an express or implied agreement subsequently fixing that boundary. *Goodman v. Lothrop, 143 Idaho 622, 151 P.3d 818, 2007 Ida. LEXIS 1 (2007)*.

An oral agreement purporting to establish a new boundary line between two properties, and thus transfer land from one owner to another, would violate the statute of frauds. *Fischer v. Croston, 163 Idaho 331, 413 P.3d 731, 2018 Ida. LEXIS 40 (2018)*.

There is an exception to the general rule that an agreement to convey real estate is invalid under the statute of frauds unless it is committed to writing, where such an agreement qualifies as a boundary by agreement. This exception is permitted because such an agreement does not constitute an oral conveyance of land. The two requirements for a boundary by agreement are: an uncertain or disputed boundary and an express or implied agreement as to the new boundary. *Fischer v. Croston, 163 Idaho 331, 413 P.3d 731, 2018 Ida. LEXIS 40 (2018)*.

Concealment of Material Fact.

Where there was no evidence at the trial court level to indicate that defendants concealed from buyer a "no sale" policy regarding lot in question, there was no knowingly false statement or concealment of a material fact sufficient to entitle plaintiffs to enforcement of an oral contract under a theory of equitable estoppel. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Promissory estoppel was not properly invoked as a defense to Idaho's statute of frauds, in a case dealing with a bank promising to lend money above the statutory amount, where borrower never proved that the bank made any false representations or concealed any material facts with actual or constructive knowledge of the truth. *Kimmes v. D.L. Evans Bank, No. 11-40045-JDP, No. 12-08067-JDP, 2014 Bankr. LEXIS 543 (Bankr. D. Idaho Feb. 10, 2014)*, aff'd, *528 B.R. 436, 2015 U.S. Dist. LEXIS 39504 (D. Idaho 2015)*.

Construction.

This section is strictly construed. *Kerr v. Finch, 25 Idaho 32, 135 P. 1165, 1913 Ida. LEXIS 3 (1913)*; *Kratzer v. Day, 12 F.2d 724, 1926 U.S. App. LEXIS 3349 (9th Cir. 1926)*.

When consideration of a party's promise is for money to be furnished to or received by a third person, if transaction be such that third person remains responsible to person who furnishes him with such money, such promise is collateral and, under the statute of frauds, will not bind the party unless it be in writing. *Storer v. Heitfeld, 19 Idaho 170, 113 P. 80, 1910 Ida. LEXIS 102 (1910)*.

Where there is no allegation in complaint that third person was responsible to person who furnished him with money, or that defendant was to pay debt or default of third person, or that there was any personal liability on his part to do so, transaction is not brought within provisions of this section. *Hoy v. Anderson, 39 Idaho 430, 227 P. 1058, 1924 Ida. LEXIS 41 (1924)*.

While evidence to answer for debt or default of another must be in writing, no such rule obtains where party treats debt as his own. *Kelly v. Arave, 41 Idaho 723, 243 P. 366, 1925 Ida. LEXIS 160 (1925)*.

The legislature used "extend[ing]" in subsection 5 to mean "granting or making available" and not as a grant to lengthen or "extend" the period for repayment of the loan. *Rule Sales & Serv., Inc. v. U.S. Bank Nat'l Ass'n, 133 Idaho 669, 991 P.2d 857, 1999 Ida. App. LEXIS 79 (Ct. App. 1999)*.

Contents of Memorandum.

Although no particular form of language or instrument is necessary to constitute a note or memorandum required by the statute of frauds, the essentials of the oral agreement must be contained in the writing(s); the memorandum must plainly set forth the parties to the contract, the subject matter thereof, the price or consideration, a description of the property, and all the essential terms and conditions of the agreement. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Court Judgments.

Statute of frauds and parol evidence rule had no application to a court judgment that was not contractually agreed upon by stipulation or settlement agreement. *McKoon v. Hathaway, 146 Idaho 106, 190 P.3d 925, 2008 Ida. App. LEXIS 77 (Ct. App. 2008)*.

Covenant Not to Compete.

In an action to enforce an unwritten five-year covenant not to compete, the employee was not estopped to invoke the statute of frauds, where the employer failed to identify any actions, such as payment of extra consideration, referable to and evidencing the covenant. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

The five-year covenant not to compete which contained no reference to death was not removed from the statute of frauds by the possible termination by death. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

Non-compete covenant prohibited competition for five years, which did fall within the statute of frauds, but the covenantor did not show how this particular assignment of the non-compete covenant from one corporation to another was subject to the statute of frauds, i.e., that the assignment itself could not be performed within one year. *Bybee v. Isaac, 145 Idaho 251, 178 P.3d 616, 2008 Ida. LEXIS 18 (2008)*.

Debt of Another.

One who has property of debtor in his hands and agrees to sell it and to apply proceeds of sale to payment of debtor's debt does not thereby promise to answer for the debt of another, within meaning of this section. *Smith v. Caldwell, 6 Idaho 436, 55 P. 1065, 1899 Ida. LEXIS 6 (1899)*.

Stockholder's promise to pay creditor's claim against corporation, if creditor would accept less than full amount, was within statute of frauds. *Reed v. Samuels, 43 Idaho 55, 249 P. 893, 1926 Ida. LEXIS 15 (1926)*, overruled, *Mickelsen Constr., Inc. v. Horrocks, 154 Idaho 396, 299 P.3d 203, 2013 Ida. LEXIS 106 (2013)*.

Agreement by creditor to pay rent due by debtor, in consideration of landlord refraining from attaching goods in tenant's store, was not within statute of frauds where tenant owed creditor for some of the goods and creditor removed these from store. *Sullivan v. Idaho Whsle. Co., 43 Idaho 149, 249 P. 895, 1926 Ida. LEXIS 16 (1926)*.

Agreement to pay for material or services furnished independent contractor is promise to answer for debt, default, or miscarriage of another and is within statute. *McQuade v. Edward Rutledge Timber Co., 46 Idaho 471, 268 P. 570, 1928 Ida. LEXIS 121 (1928)*.

Indorsement by stockholder in national bank of notes of investment company organized by stockholders to take over doubtful paper of bank was not within statute of frauds where it was made in consideration of other stockholders taking over bank and all his bank stock. *Thomas v. Hoebel, 46 Idaho 744, 271 P. 931, 1928 Ida. LEXIS 165 (1928)*.

Where amount of mortgage indebtedness is deducted from purchase-price and retained by purchaser, purchaser, assuming mortgage indebtedness, does not promise to answer for debt of another so as to require agreement to be in writing. *Sickman v. Moler, 47 Idaho 446, 276 P. 309, 1929 Ida. LEXIS 136 (1929)*. See also *First Nat'l Bank v. Peterson, 47 Idaho 794, 279 P. 302, 1929 Ida. LEXIS 188 (1929)*.

Defendants who entered into oral contract to purchase lumber from plaintiff, which lumber was thereafter delivered to a corporation organized by the defendants, could not contend that, if they were held liable, they would be held responsible for the debt, default or miscarriage of another without a promise in writing, since the defendants were the principal debtors and not the sureties. *Hoff Bldg. Supply v. Wright, 76 Idaho 298, 282 P.2d 478, 1955 Ida. LEXIS 270 (1955)*.

Where the shareholders of a corporation had mutually agreed to pay attorney's fees, such agreement was made separately and remotely from earlier written promises to guarantee the obligations of the corporation, and the defense of the lawsuits in question was for the benefit of the shareholders in their personal capacities, the oral agreement that obligated each shareholder to pay one-third of the attorney's fees incurred for the defense of lawsuits against the corporation was an original one under *§ 9-506*, rather than a collateral agreement within the terms of subdivision 2 of this section. Therefore, the statute of frauds did not bar plaintiff shareholder's claim for reimbursement of money expended for attorney's fees. *Beaupre v. Kingen, 109 Idaho 610, 710 P.2d 520, 1985 Ida. LEXIS 539 (1985)*.

An oral agreement that the bank would lend the lessee money, which would be used to pay the rent, in return for subordination of the lessor's security interest in the lessee's crops, was not a promise to answer for the debt of another and did not contravene subdivision 2 of this section. *Johnson Cattle Co. v. Idaho First Nat'l Bank, 111 Idaho 604, 716 P.2d 1376 (1986)*.

Contractor's action to enforce an oral agreement by a business/property owner to guaranty her tenant's credit card payment was barred by subsection 2., as there was not a sufficient writing signed by the owner. *Mickelsen Constr., Inc. v. Horrocks, 154 Idaho 396, 299 P.3d 203, 2013 Ida. LEXIS 106 (2013)*.

Easements.

Easements are interests in real property, and subdivision 5 provides that interests in real property must be transferred by written instrument; an easement established by unwritten agreement is merely a license, revocable by the licensor. *Bob Daniels & Sons v. Weaver, 106 Idaho 535, 681 P.2d 1010, 1984 Ida. App. LEXIS 449 (Ct. App. 1984)*.

Effect of Complete Performance.

Statute of frauds does not apply to contracts fully performed. *Willis v. Willis, 33 Idaho 353, 194 P. 470, 1920 Ida. LEXIS 62 (1920)*.

Oral contract to leave property to another on death of promisor does not come within inhibition of statute of frauds when there has been complete performance on the part of the promisees. *Bedal v. Johnson, 37 Idaho 359, 218 P. 641, 1923 Ida. LEXIS 200 (1923)*.

Delivery of warranty deed to escrow agent was sufficient to take escrow agreement out of the statute of frauds. *Nelson v. Altizer, 65 Idaho 428, 144 P.2d 1009, 1943 Ida. App. LEXIS 4 (1943)*.

An agreement by defendant to pay plaintiff $10,000, payable $1,000 a year for ten years, was taken out of the statute of frauds where plaintiff had performed her share of the bargain, to-wit; by refraining from filing of proceeding to contest will of father of parties. *Sims v. Purcell, 74 Idaho 109, 257 P.2d 242, 1953 Ida. LEXIS 259 (1953)*.

Full performance would remove an oral contract from the proscriptions of the statute of frauds, even if it were applicable. *Fairfax v. Ramirez, 133 Idaho 72, 982 P.2d 375, 1999 Ida. App. LEXIS 69 (Ct. App. 1999)*.

Effect of Part Performance.

Part performance of an oral agreement for lease of property for longer than a year takes same out of the statute and renders it enforceable. *Deeds v. Stephens, 8 Idaho 514, 69 P. 534, 1902 Ida. LEXIS 45 (1902)*.

A deed properly executed and left with the attorney of the grantor of real estate is sufficient to remove the bar of the statute of frauds in an action for specific performance, where the purchase price has been paid. *Robbins v. Porter, 12 Idaho 738, 88 P. 86, 1906 Ida. LEXIS 95 (1906)*.

The doctrine of part performance by lessees against lessors is sustained in this state. *Fry v. Weyen, 58 Idaho 181, 70 P.2d 359, 1937 Ida. LEXIS 6 (1937)*.

Part performance of an oral contract for the conveyance of real property takes same out of the statute and may be enforced by specific performance. *Anselmo v. Beardmore, 70 Idaho 392, 219 P.2d 946, 1950 Ida. LEXIS 187 (1950)*.

The transaction in question was taken out of the statute of frauds because it had been partially executed by the transfer of the property to the defendant by two of the debtors, where when judgment became a lien upon the land, two of the three judgment debtors sold to the purchaser, the purchaser while failing to do so having orally agreed to pay the judgment, the creditor thereupon levying upon sums of such third debtor to satisfy the judgment. *Jones v. Better Homes, Inc., 79 Idaho 294, 316 P.2d 256, 1957 Ida. LEXIS 219 (1957)*.

Where there has been full or partial performance of a contract normally within the statute of frauds, such a contract is nonetheless valid where the remedy sought is specific performance. *Tew v. Manwaring, 94 Idaho 50, 480 P.2d 896, 1971 Ida. LEXIS 261 (1971)*.

Sufficient part performance by a purchaser of real property removes the contract from the operation of the statute of frauds, and although the equitable doctrine of part performance is inapplicable to an action at law, satisfaction of the doctrine of part performance would entitle the purchaser to specific performance. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Where city's approval of subdivision of property was a condition precedent to the existence of any contract, oral or written, for the sale of property and purchasers were willing to assume expense of securing subdivision as part of negotiation costs, purchasers' actions in having property surveyed and submitting subdivision plat did not constitute possession, either actual or pursuant to oral agreement, sufficient to establish part performance and remove oral contract from the statute of frauds; moreover, the cost of securing subdivision approval ($436) was not substantial enough in relation to the $90,000 value of the property to establish part performance. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Where employee's reliance when accepting his job transfer and taking out interest-free home equity loan was no less referable to the loan agreement itself, and to comply policies identified in the record, than to the oral agreement by employer to buy employee's house and where no acts separately referable to the oral agreement have been demonstrated, there was no part performance sufficient to take the agreement out of the statute of frauds. *IBM Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507, 1984 Ida. App. LEXIS 436 (Ct. App. 1984)*.

Where purchaser did not take possession of the property or make any improvements thereof, nor paid taxes thereon, there was no part performance which would take oral contract for sale of land out of the statute of frauds. *Hemingway v. Gruener, 106 Idaho 422, 679 P.2d 1140, 1984 Ida. LEXIS 467 (1984)*.

Part performance, when established, yields an equitable remedy — specific performance of the oral agreement by the other party; accordingly, where employee did not seek by his counterclaim to enforce oral agreement for a sale of property to employer, the doctrine of part performance as an exception to statute of frauds would yield a remedy unsuited to the purpose for which the doctrine was urged and court would not apply it. *IBM Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507, 1984 Ida. App. LEXIS 436 (Ct. App. 1984)*.

In some circumstances, an oral agreement may be removed from the strictures of the statute of frauds by part or full performance; the exception protects a party who demonstrates reliance upon an oral contract by acts that would not have been done except for the contract. However, such reliance cannot be established by conduct referable to a cause other than the oral contract. *IBM Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507, 1984 Ida. App. LEXIS 436 (Ct. App. 1984)*.

In some circumstances, part performance may establish an equitable ground to avoid the strictures of the statute of frauds. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

Even if an indemnity contract is a surety agreement as contemplated by this section, part performance of an unwritten agreement will satisfy the statute of frauds. *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc., 713 F. Supp. 1350, 1989 U.S. Dist. LEXIS 6095 (D. Idaho 1989)*, rev'd, *940 F.2d 1253, 1991 U.S. App. LEXIS 17087 (9th Cir. 1991)*.

Employment Contract.

Where oral contract of employment was to continue for a period of seven years from Dec. 1, 1959, the fact that employee was working under such agreement from Oct. 24, 1959, until his arrest by his employer on Dec. 11, 1959, and as an added part performance of such contract had moved his family to the place of his employment, would not validate the agreement, which by its terms was not to be performed within one year and was not in writing. *Allen v. Moyle, 84 Idaho 18, 367 P.2d 579, 1961 Ida. LEXIS 229 (1961)*.

Where labor union agreement failed to mention the duration period to discuss terms of payment and to denote the parties, the agreement was not a memorandum or writing embodying the oral agreement and, therefore, it was irrelevant to the oral contract under which plaintiff claimed damages. *Remlinger v. Dravo Corp., 94 Idaho 292, 486 P.2d 1005, 1971 Ida. LEXIS 321 (1971)*.

If, under an oral employment contract, the employee was hired for a fixed period coterminous with the 30-year lease on the plant site, then the fixed period would place his employment contract squarely within the statute of frauds. *Whitlock v. Haney Seed Co., 110 Idaho 347, 715 P.2d 1017, 1986 Ida. App. LEXIS 377 (Ct. App. 1986)*.

Where the oral employment agreement contained both a condition, satisfactory performance by the employee, and a contingency, any extrinsic event such as change in company ownership, cessation of plant operations, or expiration of the plant lease, the contract did not fall within the statute of frauds because of the contingency, even if satisfactory performance is not a type of condition which obviates the statute of frauds. *Whitlock v. Haney Seed Co., 110 Idaho 347, 715 P.2d 1017, 1986 Ida. App. LEXIS 377 (Ct. App. 1986)*.

The statute of frauds barred enforcement of the noncompetition clause because plaintiff never signed the proposed employment contract, and the evidence was insufficient to demonstrate equitable estoppel, or that defendant admitted the contract. *Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho 485, 20 P.3d 21, 2001 Ida. App. LEXIS 1 (Ct. App. 2001)*.

Equitable Estoppel.

Performance in reliance upon an oral promise must be explainable only by existence of the promise to prove estoppel in a statute of frauds action. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

The doctrine of full performance by one party, like the doctrine of part performance, does not take the contract out of the statute of frauds; rather, it should be treated as a form of equitable estoppel. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

The elements of equitable estoppel may be satisfied in a statute of frauds case when one party orally has made a false promise and the promisee has relied specifically upon it, changing position to his detriment. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

Evidence and Pleading.

This section is a substantive law dealing with contracts affecting personal property and commercial transactions. It deals with the origin and basis of a cause of action, and the rule of evidence that it embodies is only an incident to remedy under the statute. *Kerr v. Finch, 25 Idaho 32, 135 P. 1165, 1913 Ida. LEXIS 3 (1913)*; *Seder v. Grand Lodge, A.O.U.W., 35 Idaho 277, 206 P. 1052, 1922 Ida. LEXIS 59 (1922)*.

Where it appears on the face of the complaint that the contract sued on is within the statute, it need not be set up in the answer. *Magee v. Winn, 52 Idaho 553, 16 P.2d 1062, 1932 Ida. LEXIS 85 (1932)*.

A contract falling within the statute of frauds is not void but voidable and a complaint which alleges a contract generally is sufficient. *Slusser v. Aumock, 56 Idaho 793, 59 P.2d 723, 1936 Ida. LEXIS 89 (1936)*.

In an action for four months' rent on a building, the complaint was not demurrable on the ground that the rental agreement was not alleged to be in writing, where there was nothing in the complaint to indicate that the agreement was for a renting of a building for more than from month to month. *Winter v. Bens, 62 Idaho 250, 109 P.2d 890, 1941 Ida. LEXIS 7 (1941)*.

Exchange of Real Property.

Where plat was not signed by both parties and the signed exchange agreement did not expressly refer to it, the plat cannot be used to provide the required legal description and, thus, the exchange agreement failed for lack of sufficient legal description. *Scott v. Castle, 104 Idaho 719, 662 P.2d 1163, 1983 Ida. App. LEXIS 221 (Ct. App. 1983)*.

Execution Required by Both Parties.

Where consideration of such contracts consists of mutual promises of each, the memorandum must be signed by both parties, and it must be complete in all essentials and leave nothing to parol. *Houser v. Hobart, 22 Idaho 735, 127 P. 997, 1912 Ida. LEXIS 73 (1912)*, limited, *Marshall v. Covington, 81 Idaho 199, 339 P.2d 504, 1959 Ida. LEXIS 207 (1959)*.

Contract within the purview of this section, executed as required by law by one party but not by the other, is invalid and can not be enforced by either party at any time. *Kerr v. Finch, 25 Idaho 32, 135 P. 1165, 1913 Ida. LEXIS 3 (1913)*.

That defendant signed unperformed agreement for work by plaintiff on mining claims did not take agreement out of statute, it being void for want of mutuality. *Rouker v. Richardson, 49 Idaho 337, 288 P. 167, 1930 Ida. LEXIS 115 (1930)*.

An agreement for the extension of a real estate mortgage executed by the mortgagor's grantee and forwarded to the mortgagee's home office and returned to its agent who caused it to be recorded was not subject to the objections that it lacked mutuality and was not executed by the mortgagee as required by the statute of frauds, since the acceptance and recording of the agreement, at the mortgagee's instance, although not completed until some two months after the execution by the mortgagor's grantee, rendered the agreement binding on the mortgagee, particularly where both parties treated the instrument as a consummated extension agreement, payments being thereafter made and received in accordance with its terms. *Union Cent. Life Ins. Co. v. Nielson, 62 Idaho 483, 114 P.2d 252, 1941 Ida. LEXIS 36 (1941)*.

This section requires both parties to a bilateral oral contract to sign the memorandum supporting the oral agreement. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

The signature of both parties is required only where the agreement is bilateral. *Hunt v. Hunt, 110 Idaho 649, 718 P.2d 560, 1985 Ida. App. LEXIS 744 (Ct. App. 1985)*.

Where both parties to real estate purchase and sale agreement mutually acknowledge the existence of their agreement with respect to the purchase of the property, such agreement was not invalid under the statute of frauds for lack of seller's signature. *Kelly v. Hodges, 119 Idaho 872, 811 P.2d 48, 1991 Ida. App. LEXIS 67 (Ct. App. 1991)*.

Existence of Contract.

Record did not support a finding that the estate sufficiently admitted the existence of the purchase and sale agreement in a judicial proceeding so as to remove the bar of the statute of frauds; arguing whether the estate admitted the contract existed was not really the point, as the key was that the estate argued that it did not exist as a valid and enforceable contract. *Tricore Invs. LLC v. Estate of Warren, 168 Idaho 596, 485 P.3d 92, 2021 Ida. LEXIS 74 (2021)*.

Failure to Comply.

Failure to comply with the statute of frauds renders an oral agreement unenforceable both in an action at law for damages and in a suit in equity for specific performance. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Failure to comply with subdivision 5 renders an oral agreement transferring an interest in real property unenforceable both in law and in equity. *Bob Daniels & Sons v. Weaver, 106 Idaho 535, 681 P.2d 1010, 1984 Ida. App. LEXIS 449 (Ct. App. 1984)*.

Installment Sale.

Where buyer of real property sent to seller a letter which declared purchase price, percentage down payment and interest rate, but did not indicate the maturity date of the note, the beginning date of the installment payments, the amount of installment payments, or whether and how the note was secured, the letter was not sufficient to take the parties' oral agreement out of the statute of frauds. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Where the parties to an oral agreement to sell real estate intend deferred payments, the terms and conditions of the credit transaction must be set forth in the memorandum in order to satisfy the statute of frauds. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Lost Deed Doctrine.

Lost deed doctrine does not supplant the statute of frauds. A party seeking to establish the sale of real estate must establish that the agreement to sell the property was in writing. The lost deed doctrine simply effectuates what Idaho's statue of frauds expressly allows — to establish the existence of that writing through secondary means when the writing itself cannot be found. *Hall v. Exler, 517 P.3d 96, 2022 Ida. LEXIS 111 (2022)*.

Oral Agreement.

Oral agreement to build and maintain partition fences is not a contract for sale or lease of realty. *Tsuboi v. Cohn, 40 Idaho 102, 231 P. 708, 1924 Ida. LEXIS 116 (1924)*.

Oral agreements to build and maintain partition fences are binding upon parties and their privies when recognized and acted upon. *Tsuboi v. Cohn, 40 Idaho 102, 231 P. 708, 1924 Ida. LEXIS 116 (1924)*.

Oral agreement of plaintiff to purchase house being constructed on defendant's property was not enforceable where deed, though placed with bank, was under control of defendant, and material elements of the agreement were not agreed upon, so that plaintiff was entitled to recover for material and labor furnished as a down payment contingent on plaintiff securing a loan for the balance, since contract was not completed and remained in the stage of negotiations. *Raff v. Baird, 76 Idaho 422, 283 P.2d 927, 1955 Ida. LEXIS 297 (1955)*.

Where plaintiff, in suit to quiet title, was not relying on an oral contract for the conveyance of real property but was holder of legal title the defense of the statute of frauds was not established. *Dickerson v. Brewster, 88 Idaho 330, 399 P.2d 407, 1965 Ida. LEXIS 417 (1965)*.

If husband and wife orally contracted to make and did make irrevocable mutual and reciprocal wills, and husband died without changing his will, contract would be enforceable in equity at wife's death, notwithstanding it would transfer an interest in real property. *Collord v. Cooley, 92 Idaho 789, 451 P.2d 535, 1969 Ida. LEXIS 230 (1969)*.

Where oral agreement was made for purchase of real property, which was confirmed by buyer's letter to seller accompanied by a $5,000 deposit check which seller placed in escrow, and where buyer executed a deed of trust, a deed of trust note, a seller's closing statement, a lot sale agreement and other loan documents, none of which were signed by the seller, the oral agreement was unenforceable under the statute of frauds since the deposit check, which was the only writing signed by both parties, did not set out the terms of the agreement and could not be supplemented by the buyer's letter because it made no reference to such letter. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

An oral agreement by employer to buy property for the amount of employee's equity, if the property was not sold within nine months after employee moved to his new assignment was unenforceable under subdivision 5. *IBM Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507, 1984 Ida. App. LEXIS 436 (Ct. App. 1984)*.

An oral agreement to substitute the mode or time of performance of an executory contract required to be in writing is valid and binding, provided that no other material term is changed and the agreement is made before the expiration of the written contract. *Kelly v. Hodges, 119 Idaho 872, 811 P.2d 48, 1991 Ida. App. LEXIS 67 (Ct. App. 1991)*.

For a valid gift of real property, there must be a "conveyance or other instrument in writing" subscribed by the party to be charged. If made by an agent of the party to be charged, such authority must also be in writing. Although no particular instrument is necessary to constitute a note or memorandum required by the statute of frauds, the essential terms of an oral gift must be contained in the writing or writings. *Erb v. Kohnke, 121 Idaho 328, 824 P.2d 903, 1992 Ida. App. LEXIS 15 (Ct. App. 1992)*.

In a matter involving an appeal from a failed venture to develop a Christian retreat ranch, an oral contract existed, but there was no violation of the statute of frauds as the oral contract was for the formation of a partnership for the purpose of developing a Christian retreat ranch, not an oral contract for the sale of land, which transaction was incidental to the oral contract. *Spence v. Howell, 126 Idaho 763, 890 P.2d 714, 1995 Ida. LEXIS 8 (1995)*.

The plain language of subsection 5 does not mandate that all terms of a loan agreement and associated security arrangements be in writing; therefore, the oral agreement to lengthen plaintiff's time for performance under the promissory note and to modify defendant's collection rights under the security agreements did not alter defendant's promise to lend money and were not subject to the statute of frauds. *Rule Sales & Serv., Inc. v. U.S. Bank Nat'l Ass'n, 133 Idaho 669, 991 P.2d 857, 1999 Ida. App. LEXIS 79 (Ct. App. 1999)*.

This section barred a breach of contract claim because, assuming that there was in fact a pre-commitment to loan money and that the bank agreed to take a second position on an eighty-acre parcel, no one claimed that such an agreement was in writing. *Bank of Commerce v. Jefferson Enters., LLC, 154 Idaho 824, 303 P.3d 183, 2013 Ida. LEXIS 202 (2013)*.

Oral Modification.

A verbal agreement entered into to lease a room made in return for a written lease of another room, being intended for a period longer than one year, was invalid due to the application of the statute of frauds. *Bennett v. Richards, 80 Idaho 140, 326 P.2d 986, 1958 Ida. LEXIS 192 (1958)*.

Oral modification of bank's letter of guarantee would be barred under the statute of frauds. *USA Fertilizer, Inc. v. Idaho First Nat'l Bank, 120 Idaho 271, 815 P.2d 469, 1991 Ida. App. LEXIS 146 (Ct. App. 1991)*.

Parol Proof Inadmissible.

To render oral contract that falls within the statute of frauds enforceable by action, the memorandum thereof must state contract with such certainty that its essentials can be known from memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them. *Blumauer-Frank Drug Co. v. Young, 30 Idaho 501, 167 P. 21, 1917 Ida. LEXIS 89 (1917)*.

If a boundary line is not disputed, indefinite or uncertain, a parol agreement changing its location is within the statute of frauds and is void. *Kunkle v. Clinkingbeard, 66 Idaho 493, 162 P.2d 892, 1945 Ida. LEXIS 155 (1945)*.

Despite livestock owner's contention to the contrary, alleged oral agreement between the livestock owner and a bank regarding financing did not satisfy the statute of frauds, and commitment letters could not provide evidence of a writing when they were never executed; there was no applicable exception to the statute of frauds, and the

doctrines of part performance, equitable estoppel and promissory estoppel did not apply. *Lettunich v. Key Bank Nat'l Ass'n, 141 Idaho 362, 109 P.3d 1104, 2005 Ida. LEXIS 61 (2005)*.

Part Performance.

"Part" performance means performance by either or both parties of less than all their respective obligations under the contract. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

Doctrine of part performance was not applicable where lease did not implicate the statute of frauds. *Lawrence v. Jones, 124 Idaho 748, 864 P.2d 194, 1993 Ida. App. LEXIS 186 (Ct. App. 1993)*.

As a consequence of *§§ 9-503*, *9-504* and this section, where alleged part performance can be explained as consistent with some other purpose or arrangement, an oral contract to sell will not be established; therefore, where evidence indicated tenants/alleged purchasers did not take any action regarding the premises other than moving in and operating the bakery, made monthly payments consistent with rental, and made no valuable improvements to premises with repairs being made by landlord/alleged vendors, no clear and convincing evidence existed to support existence of an oral contract to sell. *Hinkle v. Winey, 126 Idaho 993, 895 P.2d 594, 1995 Ida. App. LEXIS 69 (Ct. App. 1995)*.

Performance Within One Year.

Contract whereby corporation agrees to employ a man at a specified salary so long as he continues to own and hold his stock in the corporation does not come within purview of the statute of frauds on ground that the same was not in writing, for the reason that such contract is capable of being fully performed, completed, and terminated within a year. *Darknell v. Coeur d'Alene & St. Joe Transp. Co., 18 Idaho 61, 108 P. 536, 1910 Ida. LEXIS 8 (1910)*.

First subdivision of this section will not prevent recovery of an agreed and stipulated price contracted to be paid for services and labor which have been rendered by employee during a period exceeding one year, simply because contract was not reduced to writing. *Darknell v. Coeur d'Alene & St. Joe Transp. Co., 18 Idaho 61, 108 P. 536, 1910 Ida. LEXIS 8 (1910)*.

Written contracts not containing the main features of oral contracts which they were intended to replace do not take the oral contracts out of the statute of frauds. *Welch v. Bigger, 24 Idaho 169, 133 P. 381, 1913 Ida. LEXIS 139 (1913)*.

Where termination of contract is dependent upon the happening of a contingency which may occur within a year, although it may not happen until after expiration of a year, contract is not within the statute of frauds. *Seder v. Grand Lodge, A.O.U.W., 35 Idaho 277, 206 P. 1052, 1922 Ida. LEXIS 59 (1922)*; *Hubbard v. Ball, 59 Idaho 78, 81 P.2d 73, 1938 Ida. LEXIS 42 (1938)*.

A contract which by its terms is not to be performed within a year from the making thereof is not taken out of the statute of frauds by reservation of an option to cancel the same by one or both parties within a year. *Seder v. Grand Lodge, A.O.U.W., 35 Idaho 277, 206 P. 1052, 1922 Ida. LEXIS 59 (1922)*.

Continuous employment for continuous service is valid if termination be dependent on contingency which may occur within a year. *Hubbard v. Ball, 59 Idaho 78, 81 P.2d 73, 1938 Ida. LEXIS 42 (1938)*.

Where plaintiff's answers to interrogatories contemplated the endurance of alleged contract for four or five years and in his affidavit for summary judgment it was his opinion that the terms of the contract could and might be completed within one year, the answers and opinion were conflicting and thus did not comply with the provisions of Idaho R. Civ. P. 56(e) to render it admissible in showing a genuine issue of material fact, that the contract could be performed within one year from making thereof, so as to take that oral contract out of statute of frauds. *Remlinger v. Dravo Corp., 94 Idaho 292, 486 P.2d 1005, 1971 Ida. LEXIS 321 (1971)*.

Even if a contract appears on its face to anticipate performance for more than one year, it may fall outside this section if it is subject to a condition or contingency that could occur within a year, terminating further performance. *Whitlock v. Haney Seed Co., 110 Idaho 347, 715 P.2d 1017, 1986 Ida. App. LEXIS 377 (Ct. App. 1986)*.

Where an alleged oral contract of employment could not be performed within 1 year, the trial court should have instructed the jury on the statute of frauds defense. *Burton v. Atomic Workers Fed. Credit Union, 119 Idaho 17, 803 P.2d 518, 1990 Ida. LEXIS 202 (1990)*.

Where an oral contract was subject to several contingencies, all of which could have occurred within one year, the statute of frauds did not bar enforcement of the contract. *General Auto Parts Co. v. Genuine Parts Co., 132 Idaho 849, 979 P.2d 1207, 1999 Ida. LEXIS 74 (1999)*.

District court erred in holding that an alleged oral contract for long-term employment fell within the statute of frauds where the employee alleged that the term of the contract was until his retirement, and the employee could have retired within one year. *Mackay v. Four Rivers Packing Co., 145 Idaho 408, 179 P.3d 1064, 2008 Ida. LEXIS 31 (2008)*.

Parents of debtors who declared Chapter 7 bankruptcy were not precluded under this section from filing a claim against the debtors' bankruptcy estate, seeking payment of a loan they made to the debtors so the children could purchase a house. Even though the parties to the loan did not create a writing which outlined the terms of the loan, this section allows the use of verbal contracts that can be performed in less than a year, and both the parents and the debtors believed that the loan would be repaid in less than a year. *In re Lacey, No. 12-41656-JDP, 2014 Bankr. LEXIS 598 (Bankr. D. Idaho Feb. 13, 2014)*.

Property Description.

Reference to the lot number, subdivision, city, county, and state provided a sufficient property description for a new subdivision, because it was the best information available; thus, after the seller rejected executory contracts as a debtor in bankruptcy, a statute of frauds objection to the buyers' proofs of claim failed. *In re Best View Constr. & Dev., LLC, No. 20-00674-JMM, 2021 Bankr. LEXIS 2314 (Bankr. D. Idaho Aug. 24, 2021)*.

Purpose.

The object of the statute of frauds is to prevent potential fraud by forbidding disputed assertions of enumerated kinds of contracts without any written basis. *Frantz v. Parke, 111 Idaho 1005, 729 P.2d 1068, 1986 Ida. App. LEXIS 480 (Ct. App. 1986)*.

The apparent purpose of this section is to protect banks and other businesses from claims that they made an oral commitment to lend money or to grant credit and breached such commitment by failing to deliver the funds. Once the loan funds have been delivered to the borrower, so there is no longer an executory promise to make a loan, this section, by its plain language, has no further application. *Rule Sales & Serv., Inc. v. U.S. Bank Nat'l Ass'n, 133 Idaho 669, 991 P.2d 857, 1999 Ida. App. LEXIS 79 (Ct. App. 1999)*.

Ratification.

Invalid ratification of an agreement that was unenforceable under this section because of the lack of prior written authorization for the original agent who signed the agreement did not prevent later valid ratification of the agreement by a principal under this section, where the ratification occurred before the prospective purchaser decided to decline the purchase. *Graham Capital Corp. v. Simpson, 126 Idaho 749, 890 P.2d 335, 1995 Ida. LEXIS 36 (1995)*.

Real Estate Contract.

Because the real property contract was subject to the statute of frauds, gaps in essential terms regarding the security agreement could not be filled by parol evidence. *Lawrence v. Jones, 124 Idaho 748, 864 P.2d 194, 1993 Ida. App. LEXIS 186 (Ct. App. 1993)*.

Although a real estate contract need not contain a security provision if none is contemplated, once parties attempt to provide for security, it becomes an essential term of the contract. *Lawrence v. Jones, 124 Idaho 748, 864 P.2d 194, 1993 Ida. App. LEXIS 186 (Ct. App. 1993)*.

Where the real estate agreement between the parties was unenforceable for noncompliance with the statute of frauds, the developer could not enforce that part of the agreement regarding arbitration. *Lexington Heights Dev., LLC v. Crandlemire, 140 Idaho 276, 92 P.3d 526, 2004 Ida. LEXIS 103 (2004)*.

Legal description in the parties' real estate agreement did not contain a sufficient description of the property to be sold because it did not contain any description sufficient to identify the approximate five-acre parcel that was to be excluded from the sale; the agreement was invalid regardless of whether the parties did or could have agreed upon the boundaries of the excluded property and the landowners could have then obtained a survey of the property and the agreement did not reference as the boundaries of the excluded parcel any structure or landmark that could be then identified by parol evidence. *Lexington Heights Dev., LLC v. Crandlemire, 140 Idaho 276, 92 P.3d 526, 2004 Ida. LEXIS 103 (2004)*.

Lock-in agreement regarding a certain interest rate for a home refinancing did not constitute a commitment to lend that violated the statute of frauds; moreover, the question was whether the agreement was an enforceable contract. *Bajrektarevic v. Lighthouse Home Loans, Inc., 143 Idaho 890, 155 P.3d 691, 2007 Ida. LEXIS 12 (2007)*.

Trial court erred in finding that statute of frauds was satisfied in a contract dispute for the sale of real property because the property description within the contract was insufficient. *Ray v. Frasure, 146 Idaho 625, 200 P.3d 1174, 2009 Ida. LEXIS 16 (2009)*.

Where a real estate development agreement provided the existing legal description of the entire property and identified a specific amount of completed lots that were to be developed and sold by the debtor to the other contracting party within each portion of the parcel, the agreement contained a sufficient description of the property to satisfy this section. *Gugino v. Kastera, LLC, 433 B.R. 806, 2010 Bankr. LEXIS 2494 (Bankr. D. Idaho 2010)*.

To satisfy the statute of frauds, not only must an agreement for the sale of real property be in writing and subscribed by the party to be charged, but the writing must also contain an adequate description of the property, either in terms or by reference, so that the property can be identified without resort to parol evidence. *Gugino v. Kastera, LLC, 433 B.R. 806, 2010 Bankr. LEXIS 2494 (Bankr. D. Idaho 2010)*.

A property description in a real estate sales contract that consisted solely of a physical address did not satisfy the statute of frauds. *In re McMurdie, 448 B.R. 826, 2010 Bankr. LEXIS 4520 (Bankr. D. Idaho 2010)*.

Exclusion of evidence regarding the alleged right of first refusal was an abuse of discretion, but harmless. The evidence was being offered to defend against a claim, the district court abused its discretion in misapplying the appropriate legal standard, and no valid right of first refusal existed, as a description of the real property subject to the right of first refusal did not exist for statute of frauds purposes. *Tricore Invs. LLC v. Estate of Warren, 168 Idaho 596, 485 P.3d 92, 2021 Ida. LEXIS 74 (2021)*.

Sales and Leases of Realty.

Receipt or memorandum reading, "Lowe, Idaho, March 7, 1902. Received from S. C. Kurdy, one hundred and ninety dollars on land, Sec. 25, Ts. 32 R. 2 E. 160 acres," signed by the parties sought to be charged, is insufficient upon which to enforce specific performance. *Kurdy v. Rogers, 10 Idaho 416, 79 P. 195, 1904 Ida. LEXIS 50 (1904)*.

Mere giving of a check as earnest money is not sufficient evidence of the purchase of real property. *Schulz v. Hansing, 36 Idaho 121, 209 P. 727, 1922 Ida. LEXIS 137 (1922)*.

Purported lease, not being definite and certain and not being complete within itself as to all essentials of lease of real property for term of more than one year, so that there is nothing left to be established by parol, does not satisfy requirements of this section. *Gaskill v. Jacobs, 38 Idaho 795, 225 P. 499, 1924 Ida. LEXIS 173 (1924)*.

Assignee of mortgagee, knowing that mortgagee had agreed that mortgage should be valid only if sale was not consummated and had taken an assignment of deposit of the purchase-price, could not assert that contract of sale was made by agent without written authority. *Corbett v. Vette, 9 F.2d 773, 1926 U.S. App. LEXIS 2374 (9th Cir.)*, cert. denied, *271 U.S. 663, 46 S. Ct. 475, 70 L. Ed. 1139, 1926 U.S. LEXIS 723 (1926)*.

Where strip of land was attempted to be sold orally, contrary to the provisions of this section, the subsequent quiet title action by the purchaser's successor in title failed in the absence of a showing of any uncertainty or misunderstanding as to the true boundary. *Balmer v. Pollak, 67 Idaho 494, 186 P.2d 217, 1947 Ida. LEXIS 129 (1947)*.

The instrument of "formal written contract" to which appellants refer is appended to and made a part of the amended complaint: it is in the form of a contract for the sale and purchase of real property, but it cannot be regarded as a contract, since it is not subscribed by respondents, the parties sought to be charged, and since appellants admit the insufficiency of the memorandum, standing alone, as a contract for the sale and purchase of real property, the statute of frauds defeats appellants' contention. *Moen v. Minzel, 79 Idaho 228, 313 P.2d 1079, 1957 Ida. LEXIS 211 (1957)*.

The complaint sufficiently stated a cause of action where former realty owners against whom mortgage had been foreclosed alleged an agreement had been entered into with junior lienholder that latter was to redeem property on last day of redemptive period and that former owners were then to secure a purchaser for such realty and personal property located thereon, they to be compensated for such services by the grant of certain parcels of land, but buyer and junior lienholder in violation of such oral agreement consummated the sale depriving former owners of agreed compensation. *Harvey v. Brown, 80 Idaho 379, 330 P.2d 982, 1958 Ida. LEXIS 224 (1958)*.

Proof of an oral lease as defense against claim to land on basis of adverse possession was not barred by this section because the lease in question was terminable at will and had been executed prior to bringing the action. *Aldape v. State, 98 Idaho 912, 575 P.2d 891, 1978 Ida. LEXIS 359 (1978)*.

Where the record indicated that counsel for the plaintiff renters had conceded in argument before the trial court that the renters did not have a sales contract with the defendant owners of the property, the trial court properly denied plaintiffs' motion to amend their claim in order to prove an oral agreement for sale of the property since the evidence supported the trial court's finding that the parties, in fact, reached no meeting of the minds. *Haskin v. Glass, 102 Idaho 785, 640 P.2d 1186, 1982 Ida. App. LEXIS 200 (Ct. App. 1982)*.

Where neither the attorney's letter to purchaser concerning land transaction nor the warranty deed were referred to in the check from purchaser to seller which was the only writing signed by both parties to the transaction, the documents were not sufficient to take the transaction out of the statute of frauds. *Hemingway v. Gruener, 106 Idaho 422, 679 P.2d 1140, 1984 Ida. LEXIS 467 (1984)*.

Failure of parties who entered into agreement for real estate purchase to reach agreement initially as to payment date was not fatal to their contract for the date was subsequently fixed and the date and amount due were set out in writing in letters to the purchasers and the closing agent, and a deed signed and acknowledged was sent to the closing agent. *Crittenden v. Crane, 107 Idaho 213, 687 P.2d 996, 1984 Ida. App. LEXIS 502 (Ct. App. 1984)*.

Where real estate agreement was expressed in a written contract, as later supplemented by written correspondence, and contained all the essential terms and conditions, as a matter of law, it did not violate the statute of frauds; therefore, seller was liable in damages for breach of the contract when he refused to convey the

property to the purchaser on the date set for closing. *Crittenden v. Crane, 107 Idaho 213, 687 P.2d 996, 1984 Ida. App. LEXIS 502 (Ct. App. 1984)*.

Sales of Goods.

Where none of the requirements of this section are complied with at the time sale is made, the contract can only be enforced against purchaser if he afterwards receives and accepts the goods; but in case he does afterwards so receive and accept them, the contract becomes executed and the statute has no application. *Coffin v. Bradbury, 3 Idaho 770, 35 P. 715, 1894 Ida. LEXIS 5 (1894)*.

Where evidence is conflicting, question of what constitutes such a receipt and acceptance of the goods, as to take contract out of the statute, is a question for jury. *Coffin v. Bradbury, 3 Idaho 770, 35 P. 715, 1894 Ida. LEXIS 5 (1894)*.

Where seller orders goods for buyer from third person according to specifications furnished by latter, and the goods are shipped by third person and stored in a warehouse for buyer, who, on being informed of the fact, makes a payment on the purchase-price and states that he will remove goods in a few days, transaction is not a sale from seller to buyer within provisions of this section, but seller is rather an agent for buyer. *C.R. Shaw Lumber Co. v. Manville, 4 Idaho 369, 39 P. 559, 1895 Ida. LEXIS 19 (1895)*.

Where W sues F and procures an attachment, and F by way of cross-complaint claims damages against A, resulting from the wrongful issuance of attachment, and orally assigns to C, for a consideration already paid, any judgment that he may recover on his cross-complaint, such assignment is not within the statute of frauds. *McCornick v. Friedman, 9 Idaho 754, 76 P. 762, 1904 Ida. LEXIS 94 (1904)*.

Where essential part of a contract for sale of mining stock for more than $200.00 rests in parol, and there has been no delivery of any part of property and no payment of any part of purchase-price, such contract is void. *Snow Storm Mining Co. v. Johnson, 186 F. 745, 1911 U.S. App. LEXIS 4165 (9th Cir. 1911)*.

Act of buyer of goods under a contract in offering to sell goods which he has contracted to purchase is such an act as constitutes an acceptance of the goods so as to take contract out of the operation of the statute. *Bicknell v. Owyhee Sheep & Land Co., 31 Idaho 696, 176 P. 782, 1918 Ida. LEXIS 116 (1918)*.

Settlement Agreement.

A stipulation to settle litigation whose subject matter is within the statute of frauds must be in writing and signed by the parties to be charged; thus, when the subject matter of the stipulation falls within the proscription of the statute of frauds, and the agreement is oral and executory, it is unenforceable. *Olson v. Idaho Dep't of Water Resources, 105 Idaho 98, 666 P.2d 188, 1983 Ida. LEXIS 475 (1983)*.

Signing of Memorandum.

Although it is not necessary that the memorandum evidencing an oral agreement be signed with the intent to comply with the statute of frauds, the signature must be made with the declared or apparent intent of authenticating the writing relied upon as a memorandum. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Successor in Interest.

If a contract satisfies the statute of frauds vis-à-vis a predecessor company, then it can be enforced against a successor in interest and does not pose a statute of frauds problem. *Alsco, Inc. v. Fatty's Bar, LLC, 166 Idaho 516, 461 P.3d 798, 2020 Ida. LEXIS 63 (2020)*.

Unsigned Writings.

Idaho follows the doctrine that an unsigned writing may be considered as part of a memorandum supporting an oral agreement only where express reference to it is made in a signed writing. *Hoffman v. SV Co., 102 Idaho 187, 628 P.2d 218, 1981 Ida. LEXIS 320 (1981)*.

Although an agreement for the sale of real property was reduced to writing several times, it never was signed by the party to be charged and, consequently, there was no enforceable agreement. *Wolske Bros. v. Hudspeth Sawmill Co., 116 Idaho 714, 779 P.2d 28, 1989 Ida. App. LEXIS 174 (Ct. App. 1989)*.

Where written documents, unsigned by mortgagee, did not match the loan amount and interest rate that mortgagee believed that bank had promised, there was no meeting of the minds and, thus, no contract to be enforced between the parties. ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322, 2016 Ida. LEXIS 114 (2016)***.

Waiver of Defense.

The defense of the statute of frauds is waived where it does not appear from the complaint that the contract sued on does not fall within it, and the party relying on the statute as a defense fails to plead it. *Slusser v. Aumock, 56 Idaho 793, 59 P.2d 723, 1936 Ida. LEXIS 89 (1936)*; *Magee v. Winn, 52 Idaho 553, 16 P.2d 1062, 1932 Ida. LEXIS 85 (1932)*.

Even though it would have been a better practice for the plaintiff lessee to have raised the affirmative defense of the statute of frauds in her reply to the defendant lessor's counterclaim or to have requested an amendment, where the defendant knew of the affirmative defense and was given time to present argument in opposition to the defense, the plaintiff did not waive her right to raise the statute of frauds defense by first raising it in a summary judgment motion. *Bluestone v. Mathewson, 103 Idaho 453, 649 P.2d 1209, 1982 Ida. LEXIS 273 (1982)*.

Failure to plead the defense of the statute of frauds in the amended answer acts as a waiver of the defense and all objections based on it; therefore, defendant's failure to first present the statute of frauds issue to the trial court for resolution precludes consideration of the question on appeal. *Ernst v. Hemenway & Moser Co., 120 Idaho 941, 821 P.2d 996, 1991 Ida. App. LEXIS 56 (Ct. App. 1991)*.

Water Rights.

A water right is defined, not in terms of metes and bounds as in other real property, but in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use and a compromise, in a stipulation to settle a water rights dispute, to change or exchange any of these definitional factors would be identical to a compromise to change or exchange a portion of the metes and bounds description of real property and, as such, would fall directly within the statute of frauds. *Olson v. Idaho Dep't of Water Resources, 105 Idaho 98, 666 P.2d 188, 1983 Ida. LEXIS 475 (1983)*.

Where oral stipulation to settle water rights dispute changed existing water rights by reshuffling priority dates and changing amounts of use, such stipulation was a contract falling within the statute of frauds and, if still executory, was unenforceable. *Olson v. Idaho Dep't of Water Resources, 105 Idaho 98, 666 P.2d 188, 1983 Ida. LEXIS 475 (1983)*.

Written Authority.

District court erred in granting summary judgment to the prospective purchasers of lot on the basis that the sale agreement was unenforceable because the seller's original agent did not have written authority to sign the agreement as required by subdivision 5 of this section prior to the signing, because, although there was not an express ratification of the agreement before the prospective purchasers declined the purchase, the agreement was enforceable as the closing documents were signed by the president and the secretary acting as valid agents of the seller before the purchaser declined to purchase the property. *Graham Capital Corp. v. Simpson, 126 Idaho 749, 890 P.2d 335, 1995 Ida. LEXIS 36 (1995)*.

Cited in:

Sears v. Flodstrom, 5 Idaho 314, 49 P. 11, 1897 Ida. LEXIS 25 (1897); *Castleberry v. Hay, 8 Idaho 670, 70 P. 1055, 1902 Ida. LEXIS 63 (1902)*; *Valley Lumber Co. v. McGilvery, 16 Idaho 338, 101 P. 94, 1908 Ida. LEXIS 141 (1908)*; *Hull v. Cartin, 61 Idaho 578, 105 P.2d 196, 1940 Ida. LEXIS 43 (1940)*; *Abbl v. Morrison, 64 Idaho 489, 134 P.2d 94, 1943 Ida. LEXIS 21 (1943)*; *Chatterton v. Luker, 66 Idaho 242, 158 P.2d 809, 1945 Ida. LEXIS 133 (1945)*; *Crouch v. Bishoff, 76 Idaho 216, 280 P.2d 419, 1955 Ida. LEXIS 259 (1955)*; *Dalby v. Kennedy, 94 Idaho 72, 481 P.2d 30, 1971 Ida. LEXIS 267 (1971)*; *Tandy & Wood, Inc. v. Munnell, 97 Idaho 142, 540 P.2d 804, 1975 Ida. LEXIS 375 (1975)*; *First Interstate Bank v. West, 107 Idaho 851, 693 P.2d 1053, 1984 Ida. LEXIS 600 (1984)*; *Katseanes v. Yamagata, 109 Idaho 702, 710 P.2d 612, 1985 Ida. App. LEXIS 763 (Ct. App. 1985)*; *Old Stone Capital Corp. v. John Hoene Implement Corp., 647 F. Supp. 916, 1986 U.S. Dist. LEXIS 17587 (D. Idaho 1986)*; *Baker v. Kulczyk, 112 Idaho 417, 732 P.2d 386, 1987 Ida. App. LEXIS 355 (Ct. App. 1987)*; *Karterman v. Jameson, 132 Idaho 910, 980 P.2d 574, 1999 Ida. App. LEXIS 40 (Ct. App. 1999)*; *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust, 144 Idaho 233, 159 P.3d 870, 2007 Ida. LEXIS 111 (2007)*; *Apple's Mobile Catering, LLC v. O'Dell, 149 Idaho 211, 233 P.3d 142, 2010 Ida. LEXIS 92 (2010)*; *Wash. Fed. Sav. v. Van Engelen, 153 Idaho 648, 289 P.3d 50, 2012 Ida. LEXIS 222 (2012)*; *David & Marvel Benton v. McCarty, 161 Idaho 145, 384 P.3d 392, 2016 Ida. LEXIS 359 (2016)*.

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Am. Jur.

72 Am. Jur. 2d, Statute of Frauds, § 1 et seq.

C.J.S.

37 C.J.S., Statute of Frauds, § 1 et seq.

A.L.R.

Fixtures, parol exception of, from lease. *29 A.L.R.3d 1441*.

Sufficiency of description of terms and conditions of lease, or lease provision, so as to comply with statute of frauds. *12 A.L.R.6th 123*.

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Plaintiff-Appellee: GERSTEIN v. Attorney-Appellant: ROBINS KAPLAN, LLP

Case No. 2020 CA 2097

COURT OF APPEALS OF COLORADO

June 14, 2021

Reporter
2021 CO APP. CT. BRIEFS LEXIS 460 *

Plaintiff-Appellee: GIL GERSTEIN v. Attorney-Appellant: ROBINS KAPLAN, LLP

Type: Brief

Prior History: Appeal from Arapahoe District Court. Honorable Frederick T. Martinez, Judge. Case No. 2018 CV 032620.

Counsel

Attorneys for Attorney-Appellant: GORDON & REES LLP, John M. Palmeri, #14252, John R, Mann, #16088, Margaret L. Boehmer, #45169, Denver, Colorado.

Title

REPLY BRIEF

Text

[*1] CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

I hereby certify that this brief complies with all requirements of *C.A.R. 28* and *C.A.R. 32*, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in *C.A.R. 28(g)(1)*.

. It contains 4,942 out of 5,700 words.

The brief complies with the standard of review requirements set forth in *C.A.R. 28(a)(7)(A)* and/or *C.A.R. 28(b)*.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of *C.A.R. 28* and *C.A.R. 32*.

/s/ John R. Mann
John R. Mann, #16088

I. Reply to Appellee's Statement of Facts.

A. Scope of Robins Kaplan's involvement below.

In August 2018, Gil Gerstein was terminated from his employment at EyeFive, Inc., a company he owned with two childhood friends. (CF, pp.1483-1484). Following his termination, EyeFive attempted to redeem his ownership interest pursuant to a Buy-Sell Agreement Gerstein signed. (CF, p.1486). Disappointed with the ownership value he

agreed to in the Buy-Sell Agreement, Gerstein retained the law firm of Moye White to handle his claims **[*2]** against EyeFive . (CF, pp.2-7, 1486).

On Gerstein's behalf, Moye White filed a Complaint against EyeFive in November 2018, and two Amended Complaints in January and June 2019. (CF, pp.1486-1487). The trial court's July 19, 2019 case management order set trial for April 6, 2020, and an expert disclosure deadline for December 2, 2019. (CF, p.1487). On October 8, 2019, Gerstein learned that the expert retained by Moye White was not a business valuation expert and that a new expert would have to be retained to prepare a business valuation. (*Id.*). A settlement conference on October 28, 2019 was unproductive due to the absence of a credible business valuation expert to support Gerstein's valuation of EyeFive. (*Id.*). On November 1, 2019, Gerstein wrote an email to Moye White expressing his frustration with the failed settlement conference. (*Id.*). Moye White responded on November 4, 2019, stating it would "be seeking the court's permission to withdraw as your counsel next week." (*Id.*).

Approximately five months before trial and less than a month before the expert disclosure deadline, Gerstein retained Robins Kaplan LLP to litigate the case through trial. At the time Gerstein **[*3]** retained Robins Kaplan, he did not have an expert qualified to prepare a business valuation report. (CF, p.1487). Although Robins Kaplan is based in Minneapolis, Gerstein retained attorneys from Robins Kaplan's New York office (CF, pp.1203-1209), and specifically agreed to their rates. (CF, pp.1457, 1461). While Robins Kaplan's representation of Gerstein lasted approximately five months, it occurred during a particularly litigation-heavy and demanding part of the case. (CF, pp.1234-1236, 1266-1267, 1305-1306, 1386-1388, 14191432). Robins Kaplan's attorneys accomplished an enormous amount of work during that brief time, including settling Gerstein's claims and Defendants' counterclaims. [1] (CF, pp. 1435, 1452).

B. Gerstein's expert was not stricken because of Robins Kaplan's "gross negligence."

Four months before trial, a motion was filed on Gerstein's behalf seeking a continuance of the trial and pretrial discovery and disclosure deadlines (CF, pp. 1232-1238). **[*4]** Defendants opposed the continuance (CF, pp.1264-1271), pointing out that Gerstein did not provide an expert report or disclosures that complied with *C.R.C.P. 26(a)(2)(B)(I)*. (CF, p.1268). The defendants also moved to strike Gerstein's disclosed valuation expert for failure to comply with the Rule. (CF, pp.1278-1283). The reply in support of the motion for continuance (CF, pp.1286-1294) expressly requested an extension of the expert disclosure deadline "to a reasonable amount of time following Defendants' completion of their document production and depositions" if the continuance was denied. (CF, p.1293-1294).

The trial court denied the continuance (CF, p.1296), and granted the defendants' motion to strike Gerstein's expert. (CF, pp.1381-1385). The court's principal reasons for striking the expert were that the complete Rule 26(a)(2)(B) disclosures were not made, no excuse was given for the failure to disclose, and "At no time did any of Plaintiff's five lawyers petition the Court for an extension of time to submit the *C.R.C.P. 26(a)(2)(B)* disclosures." (CF, p.1382).

Based on this order, Gerstein asserts the trial court held Gerstein's expert was stricken due to Robins Kaplan's **[*5]** "gross negligence." The court, however, never held that Robins Kaplan's conduct amounted to "gross negligence." Rather, it determined that the expert disclosures were not made and there was no motion for extension of time to make them. The trial court's order striking the expert stated:

> It also appears that based on the Case Management Order, Plaintiff knew that he was going to retain an expert in this precise field. Nonetheless, Plaintiff failed to petition the Court for an extension of time in which to disclose these reports. [2] Instead, Plaintiff made gross assumptions that opposing counsel and the Court would

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[1] Although Gerstein states he paid Robins Kaplan more than $ 285,000 in fees during its representation, he doesn't dispute that he never paid it the $ 211,815.97 in fees which are the subject of its charging lien. (CF, p.1468).

[2] The statement that "Plaintiff failed to petition the Court for an extension of time in which to disclose these reports" is not entirely accurate, since the reply in support of the motion for continuance expressly requested an extension of the expert disclosure

simply acquiesce to counsel's inaction. Now, Plaintiff asks for an opportunity to cure this gross defect. (CF, p.1384).

Gerstein assertion that **[*6]** the trial court found "gross negligence" mischaracterizes the trial court's ruling. The court did not determine this was "gross negligence," or even negligence. The "gross defect" the court perceived was the "gross assumptions" that opposing counsel and the court "would simply acquiesce" to inadequate or untimely expert disclosures. That counsel made "gross assumptions" amounting to a "gross defect" about how opposing counsel and the court would behave does not equate to "gross negligence."

C. The malpractice complaint's allegations are not facts.

Gerstein recites the allegations of his malpractice complaint as though they were facts instead of mere unsubstantiated allegations. Gerstein's assertion he was forced to settle because his valuation expert was stricken fails to acknowledge or address the impact of the Shareholder Buy-Sell Agreement he signed, which contractually established share value and precluded him from litigating valuation of the business. [3] (CF, pp.258-271). Regardless of whether presented a valuation expert at trial, he was still bound by this contractual valuation. (CF, pp.1419-1432). Another motivating factor in Gerstein's decision to settle was that he could no longer afford to litigate the case, as evidenced by his failure to pay Robins Kaplan.

In any event, the specific allegations of Gerstein's malpractice complaint are beside the point because the issue on appeal does not concern the merits of that action but rather its use as a strategic device in the court below to avoid he attorney's lien proceeding. If Gerstein is able to substantiate his allegations in the malpractice action, he may be entitled to damages in that proceeding. But he is not entitled to presumptively determine his **[*8]** damages by making mere allegations of malpractice. He must pay the fees owed and separately pursue his legal malpractice claim.

II. Because the trial court had exclusive jurisdiction, it erred in denying Robins Kaplan's motion on the ground that its fees were being litigated in another action.

A. Reply concerning preservation statement.

Gerstein's assertion that the issue of the trial court's exclusive jurisdiction over the attorney's lien proceeding was not preserved for review is not well-taken. Robins Kaplan argued below that the trial court had exclusive jurisdiction over the charging lien (CF, pp.1516-1517), and specifically argued that "As Robins Kaplan's charging lien arises out of its work performed in this case, and the settlement obtained by Gerstein in this case, this Court alone has jurisdiction." (CF, p.1516). This argument that the trial court had exclusive jurisdiction because the "charging lien arises out of its work performed in this case, and the settlement obtained by Gerstein in this case" was sufficient to preserve the issue of prior jurisdiction for appeal.

It sufficiently preserved the issue because it intrinsically and inherently refers to priority **[*9]** as the source of that exclusive jurisdiction, inasmuch as an attorney's lien begins to accrue when the work is performed, *Cope v. Woznicki, 140 P.3d 239, 241 (Colo.App.2006)*, and attaches "immediately" when judgment is obtained, *North*

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deadline "to a reasonable amount of time following Defendants' completion of their document production and depositions" if the continuance was denied. (CF, p.1293-1294).

[3] Section 7.1 of the Buy-Sell Agreement provides:

> The Fair Market Value per Share of the company will be determined by mutual written agreement of all of the Shareholders within thirty (30) days of the last day of each Taxable **[*7]** Year and shall initially be one million five hundred thousand dollars ($ 1,500,000.00). In the event that all of the Shareholders fail to agree upon a determination of the Fair Market Value per Share of the Company, then the Fair Market Value per Share of the Company shall be the most recent agreed upon Fair Market Value per Share, which shall initially be one million five hundred thousand dollars ($ 1,500,000.00). (CF, p.263).

Valley Bank v. McGloin, Davenport, Severson & Snow, P.C., 251 P.3d 1250, 1254 (Colo.App.2010), so that the trial court acquired jurisdiction over the lien when Robins Kaplan's work was first performed in November 2019, and no later than March 19, 2020, when Gerstein's settlement was confirmed. (CF, p.1452). *See* Martinez v. Mintz Law Firm, LLC, 371 P.3d 671, 675 (Colo.2016). Robins Kaplan's argument that the trial court had exclusive, prior jurisdiction was thus sufficiently preserved for appeal by its argument that the court had exclusive jurisdiction because the "charging lien arises out of its work performed in this case, and the settlement obtained by Gerstein in this case," since that exclusive jurisdiction necessarily derives from the lien's priority in time over the subsequently filed malpractice action. *See* Froid v. Zacheis, 2021 COA 74, P 21 (Colo.App.2021) (argument preserved for appeal notwithstanding failure to articulate specific grounds therefor in lower court); Dill v. Rembrandt Grp., Inc., 474 P.3d 176, 183 (Colo.App.2020) (use of specific terminology unnecessary to preserve issue for appeal).

[*10] B. The trial court had exclusive jurisdiction to enforce the lien.

Gerstein first argues the trial court did not have exclusive jurisdiction over the attorney's lien because his legal malpractice complaint was filed on July 16, 2020, more than two months before Robins Kaplan's motion to reduce the lien to judgment. This argument fails, however, because the trial court acquired jurisdiction over the lien no later than March 19, 2020, when Gerstein's settlement was confirmed. North Valley Bank, 251 P.3d at 1254. This priority made its jurisdiction exclusive over any subsequently filed action. *See* Public Serv. Co. v. Miller, 313 P.2d 998, 999-1000 (Colo.1957).

Gerstein next argues the trial court properly exercised its discretion in declining to invoke the priority rule or address the merits of Robin Kaplan's motion. but the court with prior exclusive jurisdiction has no discretion in this regard. *See* Utilities Bd. of City of Lamar v. Southeast Colo. Power Assn., 468 P.2d 36, 37 (Colo. 1970); Miller, 313 P.2d at 999-1000. The only case Gerstein cites in support, Battle North, LLC v. Sensible Housing Co., 370 P.3d 238, 245 (Colo.App.2015), is inapposite because it addressed the discretion of a court that had only concurrent jurisdiction, not prior jurisdiction, to stay **[*11]** the concurrent proceeding pending the outcome of the prior case. *Battle North* has no application in this case, which concerns the decision of the court with ***prior*** jurisdiction, not concurrent jurisdiction, to decline to grant relief altogether and not merely stay the proceeding, in contrast to *Battle North*, where the issue was whether a court with concurrent jurisdiction was required to stay that proceeding because another court had prior jurisdiction. [4] That a court with concurrent jurisdiction has discretion to stay a proceeding notwithstanding the priority rule does not mean that a court with prior jurisdiction has the discretion to refuse to grant relief because another court has concurrent jurisdiction over the same parties and subject matter. *See* Miller, 313 P.2d at 999-1000 (court that acquires jurisdiction first has "exclusive jurisdiction of both the subject matter and the parties, and no other court of co-ordinate power could interfere with its action.").

Battle North ***[*12]*** nevertheless recognized "The priority rule holds that '[w]here two courts may exercise jurisdiction over the same parties and subject matter, ... the first action filed has priority of jurisdiction, and ... the second action must be stayed until the first is finally determined.'" Id., 370 P.2d at 244 (quoting Town of Minturn v. Sensible Housing Co., 273 P.3d 1154, 1159 (Colo.2012)). Applying the priority rule here, because the lien proceeding has priority of jurisdiction, it should not yield to Gerstein's malpractice action, and entry of judgment on the lien would not interfere with the concurrent malpractice action. The trial court accordingly erred or abused its discretion in declining to enter judgment on Robins Kaplan's attorney's lien because it believed that would "preemptively enter a judgment on a contested issue which is currently being addressed in another proceeding." (CF, p.1523). *See* Miller, 313 P.2d at 999-1000.

In *Miller*, the supreme court rejected the attempt by party dissatisfied with a ruling of the Public Utilities Commission to appeal the ruling in a different district court from where other appeals were pending, on the ground that the court where the action was first commenced had prior **[*13]** and exclusive jurisdiction over it. Although the court did not indicate whether the second action was filed for an improper purpose, it nevertheless noted that if both

[4] *Battle North* ultimately held the priority rule was not implicated because the concurrent action was brought under C.R.C.P. 105.1, which "creates an exception to the rule." Id., 370 P.2d at 246.

actions proceeded "the ultimate judgment of both courts could be brought into conflict, thus creating a serious situation, and enforcement of conflicting decisions would be impossible." *Id. at 1000*.

In *Martin v. District Court, 375 P.2d 105, 106 (Colo.1962)*, the defendant in the first lawsuit filed a second lawsuit against the plaintiff in another district court in an attempt to gain a strategic advantage in the litigation. The facts in *Martin* make clear this was a matter of gamesmanship: the plaintiff commenced an action in Denver District Court by serving the defendant with the summons and complaint but did not file the complaint until two weeks after service; the defendant then filed his complaint against the plaintiff in Adams District Court a hour before the plaintiff filed her complaint in Denver. Relying on *Miller*, the court rejected this attempt to circumvent the first court's jurisdiction, holding that "since the action in the Denver district court was commenced prior to the Adams county action, exclusive jurisdiction rested with **[*14]** the Denver district court."

This case involves the same kind of attempt to gain a strategic advantage by filing a second action when another court already had jurisdiction. Even though the trial court here acquired jurisdiction over the lien first, Gerstein filed a separate civil action to challenge Robin's Kaplan's fees, thereby depriving Robins Kaplan of the benefit of a judgment enforcing the lien and forcing Robins Kaplan into a forum it did not choose in order to enforce its lien, contrary to the intent of § 13-93-114. Allowing the trial court's order here to stand will only reward the kind of gamesmanship that the supreme court thwarted in *Martin*.

III. The trial court erred in requiring Robins Kaplan to enforce the lien in a separate and independent action.

Gerstein does not separately address Robins Kaplan's argument that *§ 13-93-114, C.R.S.*, entitles it to enforce its lien in the action in which the legal services were performed. An attorney's lien is a special statutory proceeding that expressly contemplates the lien will be enforced in the court in which the unpaid legal services were performed. Although § 13-93-114 provides that a lien may be enforced "by the proper **[*15]** civil action," this contemplates an independent action to enforce the lien brought ***by the lienor*** , *see Gold v. Duncan Ostrander & Dingess, P.C., 143 P.3d 1192, 1193 (Colo.App.2006)*, and does not require an attorney to litigate the validity of a lien in any civil action other than the action that gave rise to the lien claim and in which it performed the services that are the subject of the lien. *Gee v. Crabtree, 560 P.2d 835, 836 (Colo.1977)*. *See Davis v. King, 560 Fed. Appx. 756, 758 (10th Cir. 2014)* (federal court had jurisdiction over attorney lien proceeding because lien was based on work attorney did for lawsuit).

Because it affords no exception to enforcement of the lien against the funds recovered, the charging lien statute does not contemplate any exception for allegations of legal malpractice, or requiring an attorney to litigate the lien in a collateral proceeding. *See Mintz Law Firm, 371 P.3d at 679-80 (Colo. 2016)* (Coates, J., dissenting) ("the express language of the statute provides that 'such lien may be enforced by the proper civil action'-not that the validity or enforceability of the lien may be challenged in a proper civil action.... The attorney's lien statute itself is unconcerned with, and simply fails to provide a vehicle for others to challenge, the **[*16]** validity of an attorney's lien, and we have never suggested otherwise."). Given the opportunity, moreover, Gerstein cites no authority in which a court declined to reduce a charging lien to judgment because of an unadjudicated legal malpractice claim.

The purpose of § 13-93-114 in giving "the court wherein such cause is pending" jurisdiction to adjudicate the lien is to prevent any monies obtained through the services of counsel from being paid to the client before the attorney is paid. *See Collins v. Thuringer, 21 P.2d 709, 710 (Colo.1933)*; *Stiner v. Planned Mgt. Servs., Inc., 923 P.2d 186, 188 (Colo.App.1995)*. The lien interest is in the settlement funds themselves, and, because this interest arose in this action where the settlement was reached, the instant action is the proper action to enforce the lien because the settlement payor, EyeFive, is a party, and because, once judgment is entered on the lien, the trial court can order EyeFive to pay the monthly settlement payments directly to Robins Kaplan until its lien is satisfied. *See Gee, 560 P.2d at 836* ("The trial judge who heard the proceedings which gave rise to the lien is in a position to determine whether the amount asserted as a lien is proper and can determine the means for **[*17]** the enforcement of the lien."). Because, however, EyeFive is not a party to the malpractice action, that court cannot order it to pay the settlement funds directly to Robins Kaplan in satisfaction of the lien; only the *EyeFive* court can. This is why the trial court erred in refusing to order the lien reduced to judgment solely because the separate legal malpractice

action was pending: it deprived Robins Kaplan of the precise remedy the statute was meant to provide-a judgment that will reach the settlement funds while they are still in the payor's hands. *See* Stiner, 923 P.2d at 188.

IV. The trial court erred in denying Robins Kaplan's motion in the absence of a valid objection by Plaintiff.

Once Robins Kaplan filed its motion to reduce the lien to judgment, the trial court was required to determine the validity of the lien. *See* Seitz v. Seitz, 516 P.2d 654, 655 (Colo.App.1973). Any objections by Gerstein to the amount or validity of the lien should have been presented in his response to the motion. Although Gerstein did not object to entry of judgment on the ground the fees claimed were unreasonable (CF, pp.1500-1509, 1515), he nevertheless argues he presented "evidence"-consisting of the trial court's orders **[*18]** denying the motion for continuance and striking his expert witness-supporting his contention that Robin Kaplans was precluded from recovering its fees by the equitable doctrine of "unclean hands."

However, Gerstein presented no actual, admissible evidence of "unclean hands," but instead offered only legal argument and the unsubstantiated allegations of his malpractice complaint. Although the trial court did not rely on or refer to the "unclean hands" doctrine in its order (CF, p.1523), Gerstein nonetheless argues that "the district court's own prior findings of gross negligence committed by RK would have necessitated a finding that it represented Mr. Gerstein with 'unclean hands,' and would have resulted in the denial of RK's equitable motion for judgment on its charging lien." Answer Brief at 20. Yet Gerstein cites no authority either for the position that mere professional negligence constitutes "unclean hands," or even for what kind of evidence is required to establish "unclean hands."

The equitable doctrine of "unclean hands" holds that a "court will not consider a request for equitable relief under circumstances where the litigant's own acts offend the sense of equity to **[*19]** which he or she appeals." Ajay Sports, Inc. v. Casazza, 1 P.3d 267, 276 (Colo.App.2000). Under the unclean hands doctrine, "a party engaging in improper or fraudulent conduct relating in some significant way to the subject matter of the cause of action may be ineligible for equitable relief." Whiting Oil & Gas Corp. v. Atlantic Richfield Co., 321 P.3d 500, 508 (Colo.App.2010), *aff'd*, 320 P.3d 1179 (Colo.2014). *See* Premier Farm Credit, PCA v. W-Cattle, LLC, 155 P.3d 504, 519 (Colo.App.2006) (unclean hands doctrine "simply means that equity refuses to lend its aid to a party who has been guilty of unconscionable conduct in the subject matter in litigation."); Jameson v. Foster, 646 P.2d 955, 958 (Colo.App. 1982) (same). "The rule as to 'clean hands' is one of public policy, for the protection of the integrity of the court, not for a defense." Rhine v. Terry, 143 P.2d 684, 685 (Colo.1943).

Consequently, for the unclean hands doctrine to apply, the party seeking judicial relief must have engaged in willful conduct that is illegal, fraudulent, unethical, or unconscionable. *See* H. McClintock, HANDBOOK OF THE PRINCIPLES OF EQUITY § 26 (2d ed.1948) ("unclean hands" typically involves willful conduct that is illegal, unconscionable, or fraudulent); 30A C.J.S. *Equity* § 117 (2021) (unclean hands doctrine bars relief "for willful conduct which **[*20]** is fraudulent, illegal, or unconscionable"); *e.g.,* Crawford Rehab. Servs., Inc. v. Weissman, 938 P.2d 540, 548 (Colo. 1997) (employee who engaged in resume fraud did not have "clean hands"); International Network, Inc. v. Woodard, 405 P.3d 424, 432 (Colo.App.2017) (seller who intentionally breached exclusive listing agreement and concealed negotiations to deprive broker of commission had unclean hands).

Mere negligence, however, does not rise to the level of "unclean hands." *See* Eresch v. Braecklein, 133 F.2d 12, 14 (10th Cir.1943) ("The [unclean hands] maxim refers to willful misconduct rather than merely negligent misconduct."). Courts have uniformly held that mere negligence is insufficient to bar relief under the unclean hands doctrine. *See* Shearson/American Express, Inc. v. Mann, 814 F.2d 301, 307 (6th Cir.1987); International Union v. Local Union No. 589, 693 F.2d 666, 672 (7th Cir.1982) ("The bad conduct constituting unclean hands must involve fraud, unconscionability or bad faith toward the party proceeded against."); Chitkin v. Lincoln Nat. Ins. Co., 879 F.Supp. 841, 854 (S.D.Cal.1995) ("The doctrine of unclean hands applies only when the plaintiff's allegedly unclean conduct was willful or fraudulent. Mere negligence is not sufficient."); O'Neil v. Picillo, 682 F.Supp. 706, 727 (D.R.I. 1988) (same), *aff'd*, 883 F.2d 176 (1st Cir.1989); ***Countrywide Home Loans, Inc. v. Sheets, 371 P.3d 322, 327 (Idaho 2016)*** (for unclean hands **[*21]** doctrine to apply, "the conduct must be intentional or willful, rather than merely negligent"); Hoffman Constr. Co. v. U.S. Fabrication & Erection, Inc., 32 P.3d 346, 360 (Alaska 2001) ("an allegation of negligence cannot suffice to raise the defense of 'unclean hands'"); Roussalis v. Apollo Elec. Co., 979 P.2d 493, 497 (Wyo.1999) ("simple mistakes" insufficient to invoke unclean hands doctrine); *see also* Wells Fargo

& Co. v. Stagecoach Props., Inc., 685 F.2d 302, 308 (9th Cir.1982) ("Bad intent is the essence of the [unclean hands] defense."); *Omega Indus., Inc. v. Raffaele, 894 F.Supp. 1425, 1431 (D.Nev.1995)* (unclean hands "will bar a party from receiving an equitable remedy where that party has acted in bad faith"). *See generally* 30A C.J.S. *Equity* § 118 (2021) ("The conduct which forms the basis for the application of the maxim of clean hands refers to willful misconduct rather than merely negligent misconduct."). Tellingly, Gerstein cites no authority from any jurisdiction holding that mere allegations of professional negligence are sufficient to sustain the defense of "unclean hands." [5]

Calvert v. Mayberry, 442 P.3d 905 (Colo.App.2016), *aff'd in part & rev'd in part*, *440 P.3d 424 (Colo.2019)*, the sole case Gerstein relies on, involved an attorney's ethical misconduct, specifically a violation of *COLO.R.PROF.COND. 1.8(a)*, rather than mere negligence. The attorney in *Calvert* loaned his mentally-impaired client more than $ 100,000 and then, to secure his interest in the loan, recorded a false deed of trust on the client's home in a second client's name without either clients' knowledge or consent. The attorney then attempted to persuade the second client to assign the deed of trust to the attorney's real estate company as part of a calculated scheme to **[*23]** deprive the first client of her home. *Id., 442 P.3d at 909*. The attorney also violated Rule 1.8(a) by entering into a business transaction with a client that failed to comply with the Rule. This was the kind of conduct at issue in *Calvert*, which did not involve an attorney's charging lien and did not even address the "unclean hands" doctrine.

Here, in contrast, Gerstein has alleged only negligence as the basis of his malpractice claim, not willful conduct that is illegal, fraudulent, unethical, in bad faith, or otherwise "unconscionable." Specifically, he alleges Robins Kaplan was negligent in failing to serve the expert documents and report by the expert disclosure deadline and in failing to file a motion to extend that deadline. (CF, p.1492, P 69). These allegations appear based on the trial court's findings that Rule 26(a)(2)(B) disclosures were not made and there was no motion for extension of time to make them. But the court did not characterize this conduct as "gross negligence" or even as negligence.

Gerstein's "unclean hands" argument is thus based on a fundamental error: Gerstein simply presumes that an attorney's breach of a disclosure obligation to an adverse party **[*24]** necessarily and automatically constitutes the breach of a duty of professional care to a client. But this conclusion does not follow because these are separate and distinct duties that arise from different sources, and legal malpractice cannot be inferred merely from the breach of a duty imposed by a procedural rule. Gerstein's argument that the trial court's order establishes that Robins Kaplan's conduct was negligent is just that, argument, not evidence.

Further, Gerstein offered no evidence of any willful conduct and no evidence of any fraud, illegality, bad faith, or other unconscionable conduct on Robins Kaplan's part. Nothing in the trial court's orders denying the motion for continuance and striking the expert witness even remotely suggests conduct rising to this level, and nothing in Gerstein's malpractice complaint alleges fraud, illegality, bad faith, or unconscionable conduct. (CF, pp.1482-1493). It does not even allege "willful" conduct on Robins Kaplan's part. (CF, p.1492, PP 69-71). Gerstein's argument that the unclean hands doctrine necessarily would have resulted in denial of Robins Kaplan's motion for judgment on its lien therefore fails because negligence, even **[*25]** "gross negligence" (which is not recognized in Colorado), is insufficient to sustain the defense of "unclean hands" as a matter of law and equity, and because there was no evidence of willful, fraud, illegality, bad faith, or any other unconscionable conduct by Robins Kaplan.

Moreover, no Colorado case has ever recognized "unclean hands" as a defense to an attorney's charging lien, not even *Calvert*. The only recognized challenges to a charging lien relate to the reasonableness of the fees claimed,

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[5] Gerstein cites *Saudi Basic Industries Corp. v. ExxonMobil Corp., 401 F.Supp.2d 383, 393-94 (D.N.J.2005)* for the position that the "unclean hands" doctrine applies to "gross negligence," but the district court there did not hold that it does, and instead **[*22]** applied a standard of "blatant or reckless disregard." *Id.* Colorado law, in contrast, requires conduct that is fraudulent, unethical, or unconscionable for the defense of "unclean hands," *Whiting Oil & Gas, 321 P.3d at 508*, and does not recognize degrees of negligence such as "gross negligence." *See Adams v. Colorado & S. Ry. Co., 113 P. 1010, 1012 (Colo.1911)* ("Degrees of negligence are not recognized in this jurisdiction."); *Dukeminier v. K-Mart Corp., 651 F.Supp. 1322, 1323 (D.Colo.1987)* ("The gross negligence claim is merely a reaffirmation of the claim for negligence. As such it is redundant.").

e.g., *In re Marriage of Rosenberg, 690 P.2d 1293, 1295 (Colo.App.1984)*; *Apa v. Qwest Corp., 402 F.Supp.2d 1247, 1250 (D.Colo.2005)*, but Gerstein never challenged the reasonableness of Robins Kaplan's fees below.

Gerstein's argument that the result below would have been the same if the trial court had retained jurisdiction over it because the unclean hands doctrine precluded entry of judgment on the attorney's lien on equitable grounds thus fails at every turn. Gerstein presented no evidence that Robins Kaplan acted with "unclean hands": there was no evidence that its conduct toward Gerstein was in any way willfully illegal, fraudulent, in bad faith, or unconscionable, and mere negligence is insufficient to invoke the "unclean hands" doctrine. But there **[*26]** wasn't any evidence that Robins Kaplan's conduct was negligent either, since the trial court's orders on which Gerstein relies do not address any duty of professional care that Robins Kaplan owed to Gerstein. All Gerstein has offered, both below and on appeal, is argument and allegations of his malpractice complaint, which fail to establish either "unclean hands" or that the unclean hands doctrine is even a valid defense under § 13-93-114. But even if the unclean hands doctrine is a valid defense to an attorney's charging lien, Gerstein still has offered no reason why the court below should not have entered judgment on the lien.

V. Conclusion.

Although this appeal involves competing jurisdiction between two district courts, the larger issue in this case is whether a client can avoid a charging lien by filing a legal malpractice action to circumvent the lien proceeding. Colorado courts have repeatedly rejected attempts by parties to divest a trial court of jurisdiction by filing another action concerning the same subject matter, and this Court should do the same.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2021, a true and correct copy of the foregoing **REPLY BRIEF** was electronically filed and served via Colorado Courts E-Filing to the following:

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/s/ John R. Mann

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380 PROPS. v. SORROW

CASE NUMBER A19A2098

COURT OF APPEALS OF GEORGIA

July 19, 2019

Reporter
2019 GA APP. CT. BRIEFS LEXIS 1677 *

380 PROPERTIES, LLC., Appellant, v. LORI SENE SORROW, Appellee.

Type: Brief

Counsel

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Title

BRIEF OF APPELLEE LORI SENE SORROW

Text

[*1] Appellee Lori Sene Sorrow hereby files her brief in opposition to Appellant 380 Properties, LLC's appeal.

PART ONE - APPELLEE'S RESPONSE TO APPELLANT'S INTRODUCTION AND FACTUAL BACKGROUND

Appellee has set forth a detailed background factual statement in her brief as Appellant in the related case *Lori Sene Sorrow v. 380 Properties, LLC*, A19A2097, which statement is also pertinent to this case and which Appellee incorporates by reference. *Appellant's Br. (2097) at pp. 1-7*. Appellant sets forth below additional other facts which are pertinent to this cross-appeal and necessary to provide more content and context to Appellant's introduction and factual background. *Appellant's Br. (2098) at pp. 1-5*.

Appellant commenced this case in March 2014 asserting claims for trespass, ejectment, nuisance, punitive damages and attorney's fees. [R. (2097) 5-36]. Appellee, through her initial answer and counterclaim and two amendments, asserted counterclaims for easement abandonment, express easement rights, prescriptive easement and adverse possession. [R. (2097) 39-53, 491-501, 594-607].

Appellee has resided at 1130 State Street ("1130 State") since 1996. [R. (2097) 1209]. Appellant acquired **[*2]** 380 14th Street ("380 14th) in December 2013 and, within three months of becoming Appellee's neighbor, commenced this lawsuit. [R. (2097) 5, 1047].

In 2014, Appellant applied for rezoning of 380 14th to authorize a hotel development. [R. (2097) 1052]. As part of this rezoning, Appellant submitted a conditional site plan that expressly stated that "all existing to remain including trees" as to the conditions in the alley adjacent to Appellant's home. [R. (2097) 1508-10]. While the rezoning application and this litigation were pending, Appellant sought Appellee's support for the rezoning. [R. (2097) 1105 (p. 56, line 5) through 1106 (p. 55, line 9]. Appellee resolved that she would follow the lead of her neighborhood, and when the neighborhood decided to oppose the rezoning, Appellee joined in this opposition. [R. (2097) 1104 (p. 53, lines 1-6), 1105 (p. 57, lines 4-10)]. The rezoning was eventually approved by the City. [R. (2097) 1052].

Almost immediately following its acquisition of 380 14th, Appellant began lobbying the City to issue a citation to Appellee. [R. (2097) 2150-51, 2161-62]. Initially, the focus of Appellant's lobbying was to have the City issue a citation against **[*3]** Appellee relative to an open pole barn, which she utilized to cover her car in a portion of the alley which is the subject of her easement abandonment claim. [*Id.*]. Following Appellant's effort, the City, in early 2014, issued a citation to Appellee asserting that she had an unpermitted structure in the alley. [R. (2097) 2159]. Prior to this citation, Appellee had never received a permit/building code citation from the City. [R. (2097) 873]. On April 14, 2014, this citation was disposed of by a *nolo contendere* plea entered by Appellee. [R. (2097) 2151, 2164]. Upon such disposition, Appellee and the City agreed that no more citations would be issued to Appellee until this litigation had concluded and the rights of the parties in the alley were determined. [R. (2097) 2151]. This agreement was entered on the municipal court docket on the same date. [R. (2097) 979, 989].

In August 2014, Appellant made efforts again to cause the City to cite Appellee, notwithstanding the April 2014 agreement between Appellee and the City. [R. (2097) 2151-52]. Appellant made a complaint to the Mayor's Office of Constituent Services, which was in turn relayed to the City's Office of Buildings. [***[*4]*** *Id.*]. In August, Appellant's attorney complained directly to the City's Solicitor's office to seek additional citations against Appellee. [R. (2097) 2152, 2166-70]. In these instances, the City expressly acknowledged the April 2014 agreement suspending City enforcement action until such time as this litigation had concluded, and it declined Appellant's request to issue additional citations. [*Id.*].

Undaunted, and with disregard of the City-Appellee agreement, Appellant continued its efforts to induce the City to issue citations to Appellee. In December 2014, Appellant's owners emailed the City seeking to have citations issued to Appellee. [R. (2097) 2152, 2172-73]. Appellant even sought to get involved another enforcement division, (i.e., the City's Office of Zoning Enforcement), but this division concluded the matter was not within its purview. [R. (2097) 2152-53, 2172-73, 2175-78].

By December 2014, discovery in this litigation had closed and the parties were under a December 22, 2014 deadline to submit summary judgment motions. [R. (2097) 54, 88]. Appellee submitted her motion by the deadline, with fifteen affidavits providing detailed and extensive evidence on the historical **[*5]** use of the alley supporting her claims for easement abandonment, express easement rights to Mecaslin Street, and adverse possession. [R. (2097) 89-313]. Appellant failed to file a summary judgment motion by the court ordered deadline. [R. (2097) 445-51].

Instead, Appellant continued its efforts to have Appellee cited. On January 2, 2015, Appellant's owners sent City code enforcement officials an email referencing a prior phone call and meeting with these City officials and one of Appellant's attorney (M. Hakim Hilliard). [R. (2097) 2153, 2180]. In response, one of the City's officials stated that the City would be issuing a citation to Appellee. [R. (2097) 2189]. The City, in fact, issued a citation to Appellee the same month, which was essentially identical to the citation disposed of in April 2014 by Appellee's *nolo contendere* plea. [R. (2097) 2153, 2186]. In issuing this citation, the City, at Appellant's behest and urging, contravened the April 2014 agreement it had reached with Appellee to refrain from further enforcement activity until this litigation had concluded. [R. (2097) 979, 989, 2151].

In January 2015, Appellant continued to email the City regarding the citation **[*6]** status of Appellee. [R. (2097) 2154, 2188]. In February 2015, the City issued another citation to Appellee, again in contravention of the April 2014 Agreement. [R. (2097) 2154, 2191]. In February 2015, Appellant's owners again emailed numerous officials at the City, this time including a complaint regarding a storage shed in Appellee's back yard. [R. (2097) 2154, 2193-94].

Appellant's efforts intensified on March 16, 2015, when its legal counsel sent an arrogant, demanding letter to the City stating that Appellant had finally been able to convince the City to cite Appellee; demanding that a City inspector assigned to the case be replaced; stating his understanding, as Appellant's legal counsel, that another inspector would be sent to Appellee's property to issue more citations to her; expressing his client's concern with the afore-referenced City inspector remaining involved in the matter; stating that Appellant was troubled that the inspector had refused to issue more citations to Appellee; seeking confirmation that Appellee's property would be inspected that day and citations would be issue; and threatening to take the matter to Mayor Kasim Reed's office if these demands were **[*7]** not met. [R. (2097) 2154-55, 2196-97]. Following this communication, a city

representative responded informing Appellant's counsel of a planned onsite visit to Appellee's home by city officials. [R. (2097) 2155, 2199]. And in April 2015, Appellee was served with a new citation. [R. (2097) 2156, 2206].

During this same month, Appellant, without seeking leave of court, filed its first motion for summary judgment more than three months after the scheduling order deadline. [R. (2097) 425-40]. The sole basis of Appellant's summary judgment motion was the assertion of an unclean hands defense based upon the very citations, which Appellant actively lobbied the City for, issued to Appellee in 2014 and in January 2015 (and the threat, subsequently realized) of additional citations, again which Appellant lobbied for, to Appellee. [*Id.*].

In May and June 2015, Appellant continued to barrage the City regarding Appellee, asking the zoning enforcement division to reverse its decision about citing Appellee and requesting meetings related to their requests. [R. (2097) 2156, 2208-09]. On June 24, 2015, Appellant's legal counsel sent the City's Deputy Solicitor a letter seeking to confirm Appellant's **[*8]** understanding of the individual citations that would be addressed at trial, listing a range of alleged violations (most of which had nothing to do with the alley between 1130 State and 380 14th), and comparing Ms. Sorrow to an individual who had widely publicized code enforcement issues in the City at that time. [R. (2097) 2157, 2220-22]. The facts in the preceding paragraphs are undisputed, in that Appellant did not challenge the authenticity of the documents establishing such facts, but instead sought to dismiss these facts as irrelevant (and therefore immaterial). [R. (2097) 2140-49, 2269-83].

Later, Appellant was involved in communication with the City about an administrative search warrant that was executed at Appellee's residence. [R. (2097) 1616, lines 12-20]. In July 2015, Noman Rashid, one of Appellant's owners who had been pre-advised and furnished with prior information that the City was planning on executing a search of Appellee's home, began demanding to be updated by the Solicitor's office on whether the warrant had been executed. [R. (2097) 1617, lines 6-25 through 1618, lines 1-9]. However, when asked at deposition what information he thought would come from the **[*9]** administrative search warrant that was relevant to the alley, Mr. Rashid stated "I have no idea." [R. (2097) 1618, lines 10-14].

The administrative search warrant was executed in September 2015 and subsequently suppressed by the City's Municipal Court. [R. (2097) 868, 872-898] [1] Notwithstanding all of Appellant's agitation and influencing of the City's actions against Appellee, the three 2015 citations against Appellee were dismissed with prejudice. [R. (2097) 2157, 2224, 2226, 2228].

PART TWO - ARGUMENT AND CITATION OF AUTHORITY.

A. Appellant's brief substantially violates the rules of this Court regarding record citation, and Appellant's uncited and miscited factual assertions do not warrant consideration in this appeal. (Enumerations Nos. 1 and 2).

Proper citation of the record is the *sine qua non* of appellate briefing. An appellant's brief is required to have "citation **[*10]** to the parts of the record or transcript essential to a consideration of the errors". Ct. App. Rule 25(a)(1). The citations are to be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court. *Id.* There are glaring, substantial passages of Appellant's brief which wholly fail to comply with this rule.

Appellant's noncompliance with this Court's rule regarding proper citation has the apparent motivation of casting Appellee in a negative light on this appeal, regardless of the record itself. Appellant's disregard for citation protocol manifests early in its brief; there are fifteen sentences in Appellant's "Introduction and Factual Background", only five of which are cited. *Appellant's Br. (2098) at pp. 1-3*. The remaining ten sentences are uncited, and an examination of these sentences reinforces Appellee's conclusion that Appellant's commentary was intended to cast

[1] Appellee has initiated litigation against the City related to its conduct in this matter, including a Fourth Amendment claim related to the search warrant, which remains pending. Sorrow v. City of Atlanta, United States District Court, Northern District of Georgia, Civil Action No. 1:17-cv-02908-MLB.

her in a negative light, without regard to the absence of factual support in the record for statements placed before this Court in Appellant's introduction. *Id.*

The properties in question are characterized in the first sentence **[*11]** as "prime Midtown Atlanta real estate", without any citation to the record establishing this as a fact. *Id. at p. 1*. Next there is an uncited reference to "potential purchasers" having "explored the acquisition and development of these sites [for years]. *Id.* This unsupported commentary is the attempted set-up for the first mischaracterization of Appellee.

The third sentence proclaims that "for years, Defendant has sought to stop such developments as all costs." *Id.* Appellant do not point to a single fact in the record to establish this bold, sweeping statement. Moreover, this unsupported statement is directly contradicted in multiple places by Appellee's testimony. When asked if she had been involved in trying to stop other developments at 380 14th, Appellee responded "no". [R. (2097) 1104 (p. 53, lines 13-16)]. Appellee also testified that she considered supporting Appellant's development plans if her Home Park neighborhood (where these properties are located) had decided to support the development, and her opposition arose after the neighborhood voted to oppose the project. [R. (2097) 1104 (p. 52, line 25 through p. 53, line 6)].

In the fourth sentence of the introduction, **[*12]** Appellant states falsely that Appellee's "own testimony establishe[d] . . . intimidation campaigns and legal threats intended to scare away potential buyers" but no citation to Appellee's deposition is made to support these incendiary remarks. *Appellant's Br. (2098) at p. 2*. In the next sentence, Appellant states that its purchase and exploration of development of 380 14th was "much to the chagrin of [Appellee]". *Id.* While there is a citation behind this sentence, the citation is imprecise and confusing [2] and provides no support for the characterization of Appellee's state of mind regarding Appellant's purchase of the land. The remainder of this paragraph has no citations regarding Appellee's alleged "ramping up her efforts to stop development", "extensive[ly] lobbying the City of Atlanta against rezoning of the property", "threats of legal action", and "trespassing upon the land". [3]*Id.*

The next (third) paragraph continues with the asserted theme of Appellee "trespassing" on Appellant's land, notwithstanding the fact that the outcome of this litigation will ultimately determine this issue. *Id.* The first two citations in the paragraph suffer from the same deficiencies as described in footnote 1. However, in its assertion that Appellee's purported trespassing resulted in "numerous criminal citations", Appellant omitted material additional information that one citation was disposed of on a *nolo contendere* ***[*14]*** plea, without any admission of liability by Appellee, three other citations were dismissed with prejudice [R. (2097) 2157, 2224, 2226, 2228], and charges set forth in the April 2015 citation had nothing to do with the alley or any fence traversing the alley. [R. (2097) 2156, 2206] Moreover, Appellant left out any mention of the central role it played, through its owners and attorneys, in lobbying the City and procuring the issuance of these citations, as is detailed in Appellee's statement of facts above and analyzed and discussed in Section B.5 of this brief below.

In the last sentence of the third paragraph and the fourth and final paragraph of the introduction, Appellant irrationally attempts to characterize the issues present in this litigation (that it commenced) as part of Appellee's intent to "hinder development" and "stop development" of the property. *Appellant's Br. (2098) at p. 2-3*. This overlooks the facts that the issues in this case presented by Appellee's counterclaims involve uses of the alley and

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[2] Appellant makes numerous citations to the record in Appellee's appeal as follows: (R. (2097)-324). Some of these citations include references to "Exhibits" and "Tabs". Appellant's Memorandum of Law in Opposition to Appellee's Motion for Summary Judgment and Rule 56(f) motion is found at page 324 of the record in Appellee's appeal. [R. (2097) 324-88]. While the motion, as set forth in the record, has a number of documents accompanying it, these documents are not designated as "Exhibits" or "Tabs", as indicated by Appellant's brief citations. Thus, in addition to the problem of an absence of supporting citations for many statements contained in the brief, a number of the actual **[*13]** citations, such as the one referenced in the footnoted sentence, lead nowhere and are ultimately unintelligible.

[3] Appellant's attempt to characterize Appellee's opposition to its rezoning in a negative light misses the fundamental principle that she had a First Amendment right to do so.

the prescriptive easement pathway over 380 14th which go back years and years and decades in time, far predating Appellant's purchase of 380 14th. [R. (2097) 1026-1058, **[*15]** 1146-1229].

Appellant's liberties with the record, its abject failure to assure that there is support in the record for statements made, and its further failure to point this Court and Appellee to the places in the record that supposedly support factual assertions, is improper appellate advocacy. This Court has noted that "briefs that fail to provide proper citations can hinder this [c]ourts consideration of parties' arguments on appeal." *May v. S.E. GA Ford, Inc., 344 Ga. App. 459*, no.1 (2018) (citations and punctuation omitted). This Court has further advised that "[i]t is not the duty of this [c]ourt to cull the record on a party's behalf to locate information or facts in support of a party." *Demere March Assoc. v. Boatright Roofing and Gen. Contracting, 343 Ga. App. 235, 236 n.1 (2017)*. Appellee submits that Appellant's introduction is so extremely deficient that it should receive no consideration in the determination of this appeal and that Appellee's statement of facts above, which is extensively cited to the record, should be treated as unopposed.

B. The trial court correctly denied Appellant's motions for partial summary judgment as to the affirmative defense of unclean hands, albeit for incorrect reasons. (Enumeration [*16] No. 1)

1. Appellant's unclean hands defense fails, as a matter of law, because the conduct alleged to be inequitable is unrelated to Appellee's counterclaims.

Georgia appellate courts are consistent and firm in requiring a direct connection between the equitable claims and issues present in a case and the assertion of unclean hands as a defense to such claims. In the absence of a direct connection to the claims, the defense fails. *100 Lakeside Trail Trust v. Bank of America, N.A., 342 Ga. App. 762, 768 (2017)*; *Hampton Island, LLC v. HAOP, Inc., 306 Ga. App. 542, 547 (2016)*; *Clawson v. Intercat, Inc., 294 Ga. App. 624, 628 (2009)*; *Simpson v. Pendergast, 290 Ga. App. 293, 298 (2008)*; *Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 858-59 (2005)*; *Gibson v. Huffman, 246 Ga. App. 218, 224 (2000)*; *Adams v. Crowell, 157 Ga. App. 576 (1981)*. In *Zaglin*, this Court stated this principle clearly and succinctly:

> The unclean hands maxim which bars a complainant in equity from obtaining relief has reference to an inequity which infects the cause of action so that to entertain it would be violative of conscience. It must directly relate to the transaction concerning which complaint is made. The rule refers to equitable rights respecting the subject-matter of the action. It does not embrace outside matters.

Zaglin, supra, 275 Ga. App. at 858.

Appellee's claims below are **[*17]** as follows: (i) a claim as to easement rights as to the portion of the alley immediately adjacent to her home, which portion has been obstructed as to access from owners and occupants of 380 14th for more than twenty years prior to Appellant's acquisition of 380 14th; (ii) an ingress/egress easement in the alley from the point of obstruction at the rear of her home through to Mecaslin Street; (iii) a prescriptive easement from the alley over 380 14th Street to 14th; and (iv) fee simple title under adverse possession as to a portion of the alley immediately adjacent to the rear of her property. [R. (2097) 1026-44]. Appellee's claims are grounded in a history of use as to these various areas of property going back more than seven years as to the prescriptive easement and more than twenty years as to the easement abandonment, express easement and adverse possession claims. [R. (2097) 1026-1058, 1146-1229]. These claims rest factually on the actions and inactions of property owners and users of 1130 State and 380 14th going back to the 1960s. [R. (2097) 1146-1229].

Appellant purported unclean hands defense rests on the issuance of one City citation issued to Appellee in 2014, three **[*18]** City citations issued to her in 2015, and mischaracterized references to Appellee's testimony regarding city permitting. *Appellant Br. at pp. 3-4*. These citations, the genesis and disposition of which will be the focus of more detail later in this brief, and the testimony regarding city permitting are fundamentally unrelated to the claims of easement rights arising out of abandonment, out of continuous use of an express easement, and rights based upon a prescriptive easement and adverse possession. They are quintessentially the "outside matters" referred to by this Court in *Zaglin*.

An examination of this Court's many precedents reinforce this analytical conclusion. In *100 Lakeside Trail*, Bank of America brought an action to reform a security deed to reflect the correct party. The action arose with respect to certain assets that the bank had acquired from another financial institution. The defendant asserted that the bank had engaged in inequitable conduct by not exercising due diligence when it acquired the security deed and by inducing one of the defendants to stop making payments prior to the bank's pursuing foreclosure. Based upon these allegations, the defendant asserted **[*19]** an unclean hands defense. This Court affirmed the trial court's granting of summary judgment in favor of the bank and rejected the unclean hands defense finding that the alleged inequitable conduct was not related to the claim to reform the security deed. *100 Lakeside Trail, supra, 342 Ga. App. 768, 768*.

In *Hampton Island*, plaintiffs sought the equitable relief of specific performance as to a purchase and sale agreement which required defendant to purchase two parcels of land from plaintiffs as part of a settlement. Defendant alleged that plaintiffs had solicited a third party to breach contractual obligations owing to defendant and attempted to interpose an unclean hands defense based on such allegations. This Court, as in *100 Lakeside Trail*, affirmed the trial court's grant of summary judgment in favor of plaintiffs, unequivocally finding that the facts underlying defendant's assertion of an unclean hands defense were unrelated to plaintiff's equitable claim.

In *Clawson*, Intercat sued three of its former employees for specific performance of a shareholder agreement which required the employees to sell back their stock following their terminations. The employees asserted **[*20]** that they were terminated in retaliation for filing a shareholder's derivative action making claims against Intercat's president for financial misconduct, and they attempted to defeat plaintiff's equitable claims by asserting that their allegedly improper termination constituted unclean hands. The trial court granted Intercat's summary judgment motion, and this Court affirmed, stating that "the doctrine of unclean hands applies to misconduct in the same underlying transaction as the agreement sought to be enforced". *Id. at 674*. This Court found that the facts alleged as unclean hands were inapplicable to plaintiff's claims.

In *Simpson*, plaintiff sued defendant for specific performance of a shareholder agreement which required defendant to sell shares to plaintiff. Defendant responded that plaintiff had breached certain fiduciary duties owed to the corporation, and therefore had unclean hands precluding the equitable relief of specific performance. This Court affirmed the trial court's finding that the breach of fiduciary duties allegations did not relate to the specific performance claim, although the trial court's ruling was reversed on other grounds.

In *Zaglin*, the defendant **[*21]** counterclaimed against an estate for enforcement of sale on death provisions in joint venture agreements with the decedent. Plaintiff, the estate representative, sought to assert an unclean hands defense arguing that defendant had failed to comply with certain duties owed to the estate under the joint venture agreements in question. As in numerous cases summarized above, summary judgment was granted in favor of the party seeking the equitable relief, and the unclean hands defense was rejected as unrelated.

Gibson v. Huffman, 46 Ga. App. 218 (2000), is closely analogous to the instant case. The plaintiff obtained an injunction to enforce restrictive covenants limiting defendant's property to agricultural and recreational uses. The defendant alleged that plaintiff was in violation of restrictive covenants related to his residential property and that these asserted violations constituted unclean hands precluding plaintiff's entitlement to equitable relief. This Court upheld the trial court's entry of the injunction, agreeing with the trial court's conclusion that the facts of defendant's unclean hands defense was not related to plaintiff's claim.

In *Adams*, plaintiff sued on a note **[*22]** given pursuant to the sale of real property. Defendant asserted that plaintiff sought to deprive her co-seller from a share of the note proceeds and contended that these factual allegations provided an unclean hands defense. This Court affirmed the trial court's judgment in favor of plaintiff and concluded that the alleged unclean hands defense had no application to the case.

These clear and consistent holdings, most of which affirm summary judgment in favor of the party seeking equitable remedies and adverse to the party seeking to interpose an unclean hands defense, emphasize that the direct relationship requirement of the defense is applied strictly and is of material substance. In this case, Appellee has presented evidence, unrefuted by Appellant, from neighbors and persons knowledgeable about 1130 State,

380 14th and the alley that the area that is the subject of Appellee's easement abandonment claim has been obstructed and used by 1130 State as a private driveway for a period of time tracing back to the 1960s. She has also presented evidence, unrefuted by Appellant, that previous owners of 380 14th going back to the late 1970s were aware of an obstruction by the owners and occupants of 1130 State to the portion of the alley that is subject of Appellee's easement abandonment and that there was resulting nonuse of this portion of the alley for more than twenty years. [R. (2097) 1026-58, 1146-1229]. Appellee's evidence further establishes that owners and occupants of 1130 State (i) have used the remainder of the alley from the point of obstruction to Mecaslin Street as a means on ingress and egress consistently throughout the years; for more than seven years have used a pathway from the alley across 380 14th to access 14th Street and, as a result of such use and other actions including maintenance and repair of the pathway, have gained prescriptive easement rights; (iii) have adversely, openly, publicly, uninterruptedly, exclusively and peaceably possessed a portion of the alley, and are entitled to fee simple title as a result of the adverse possession. [*Id.*]. There is no direct relationship, such as is required by Georgia law, between Appellee's real estate claims and the municipal citations and permitting issues raised by Appellant.

Notwithstanding the trial court's conclusion that there remained issues of fact to be tried as to Appellant's unclean hands defense, both the trial court and Appellant earlier in these proceedings articulated that Appellee's claims in this litigation and the municipal citations and permitting issues were unrelated. In a June 10, 2015 hearing on the first motions for summary judgment filed in this case, the trial court judge expressed his view on Appellant's unclean hands defense:

> Judge Dempsey: "The clean hands thing doesn't have any kind of weight whatsoever because it isn't related to the underlying transaction. The fact that [Ms. Sorrow is] getting cited and all that stuff has nothing to do with the underlying transaction. . . . The other side's clean hand thing doesn't get it."

[T-13]. The trial **[*23]** court's conclusion stated above judge was entirely correct. More noteworthy is that Appellant also concluded in court proceedings that the municipal citations and claims at issue in this case were unrelated. As will be discussed in the section below detailing Appellant's inequitable conduct, in early 2015, Appellant was exerting intense pressure to impel the City to prosecute Appellee. After the City issued a citation to Appellee in February 2015, Appellee moved to dismiss the citation on the basis that the City and Appellee had reached an agreement, entered on the docket of the Municipal Court, that no further citations would be issued to Appellee until such time as the underlying litigation was resolved. [R. (2097) 2151]. On March 4, 2015, Appellant, through its counsel of record in the litigation below, filed an "Interested Party's Response to Motion to Dismiss". [R. (2097) 763]. In that filing, Appellant argued vociferously that this litigation was "unrelated" to the municipal citations:

> The civil action pending between Sorrow and 380 Properties . . . is unrelated to Sorrow's citations. . . .
>
> Sorrow, however, asks this Court to overlook her conduct and dismiss the **[*24]** present case based on an unrelated civil litigation pending in the Superior Court of Fulton County. See 380 Properties, LLC v. Lori Sene Sorrow, Fulton County Superior Court, Civil Action No. 2014 CV 243275.
>
> The civil litigation has to do with whether Sorrow had a *right* to construct the pole barn on property owned by 380 Properties and block easements rights in the alley. The present case [City of Atlanta Municipal Court] involves whether the City issued permits and approved plans for the construction of the pole barn, fences, and storage shed, which are prerequisites for constructing each of these. The issues in the civil litigation and this case are *completely unrelated*. (emphasis in original).
>
> This Court should not be distracted by the *unrelated* civil litigation. (emphasis in original).

[*Id.*]. Appellant was correct in its March 2015 municipal court filing, the trial court was correct in its June 10, 2015 hearing, and Appellee was correct in her December 2017 motion for summary judgment when all concluded that the claims and issues in the instant litigation are unrelated to the municipal citations that were issued to Appellee. The trial court did not err in denying **[*25]** Appellant's motion for summary judgment as to the affirmative defense of unclean hands, but as argued in Appellee's appeal, the trial court should have granted Appellee's motion for partial summary judgment as to this defense. *Appellant's Br. (2097) at pp. 27-31*.

2. Appellant has failed to make the requisite showing of injury arising out of the alleged inequitable conduct.

Appellant has made no showing below that it was directly injured by the conduct alleged to be unclean hands. This is a requirement, and the failure to do so is fatal to its attempt to claim the defense. *Gibson, supra; Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 451 (11th Cir. 1993)*; *Boone v. Corestaff Support Services, Inc., 805 F.Supp.2d 1362 (N.D. Ga. 2011)*. *Gibson* is instructive on this point as well. In striking down the defendants' argument that plaintiff's alleged violation of residential restrictive covenants provided a defense to plaintiff's entitlement to injunctive relief against defendants for violations of use covenants pertaining to agricultural land, this Court observed:

> [T]he restrictions in [Plaintiff's] deed were made for the benefit of the other residential property owners only and not for the benefit of defendants' agricultural property.

*Gibson, **[*26]** supra, 246 Ga. App. at 224*. The building codes under which citations were issued to Appellee in 2014 and 2015 are exercises of the City's police power for the benefit of the general public and not for the specific benefit of Appellant. *Clive v. Gregory, 280 Ga. App. 836, n. 3 (2006)*. Further, the issues that Appellant attempts to raise regarding permitting requirements apply to periods of time well before Appellant became the owner of 380 14th and no retroactive showing of injury to Appellant arising out of these matters, and the period of time before Appellant became an owner of 380 14th, can logically be made.

3. The authorities cited by Appellant for the proposition that the issuance of municipal citations establishes the unclean hands defense in cases involving equitable claims to real estate are not apposite.

Against the phalanx of authorities holding that the unclean hands defense does not apply when the alleged inequitable conduct is not directly related to the equitable claims, Appellant has tortured one case, materially mischaracterizing it as being "binding precedent" and then later "persuasive authority" for the proposition that the issuance of municipal citations alone established the unclean hands **[*27]** defense as to equitable real estate claims. The misread case is *Hollifield v. Monte Vista Biblical Gardens, 251 Ga. App. 124 (2001)*. In *Hollifield*, the defendant sought to buy the land of his neighbor; his neighbor refused. Ignoring this rejection, defendant proceeded to exercise control and dominion as to his neighbor's land by erecting a fence, paving a driveway, and building an encroachment on his neighbor's property. One of defendant's actions knowingly violated the applicable local government building code. Within five years of these actions, the neighbor sued for ejectment. Defendant responded by arguing that plaintiff was estopped from obtaining the remedy of ejectment because plaintiff had not taken action to prevent the completion of the improvements. Defendant's estoppel argument was rejected by the trial court, and this Court affirmed the rejection of defendant's estoppel defense, holding that when a party "fails to exercise reasonable diligence by knowingly building on the land of another . . . he cannot avail himself of the defense of estoppel." *Id. at 126*. Thus, the first material ground of distinction of *Hollifield* is that the affirmative defense at issue in that case was estoppel, not **[*28]** unclean hands.

A second material point of distinction from this case is that in *Hollifield*, the ejectment claim was brought within five years of the placement of the encroaching structures. *Id. at 125*. This fact was specifically noted by the Court, who observed that a different legal result could have resulted had the claim been for adverse possession (requiring a continuous, exclusive, uninterrupted public and peaceful use for 20 years) or adverse possession under color of title (requiring such use for seven years). *Id. at 127-28*. Appellant's claims are within the very time frames identified by the *Hollifield* court as a distinguishing factor.

A third material point of distinction is that the county code violations mentioned in the case were not central to the case's holding. In *dicta*, the Court discussed defendant's absence of good faith and reasonable diligence and commented upon his admission that he had intentionally violated a local building code when he built the encroachments on plaintiff's property. *Id at 127*. But contrary to Appellant's assertion, there is simply no language anywhere in the opinion that a building code violation would have established a dispositive **[*29]** unclean hands defense as to an adverse possession or abandonment of easement claim.

A fourth material point of distinction is that contrary to the defendant in *Hollifield* and contrary to Appellant's assertions, Appellee has made no admissions of violations of the City's municipal code. As noted earlier, Appellee entered a *nolo contendere* plea to the 2014 citation and in so doing, expressly did not admit guilt. [R. (2097) 2151, 2164]. Appellee contested all of the 2015 citations, and all were dismissed with prejudice. [R. (2097) 2157, 2224, 2226, 2228]. Finally, Appellant's characterizations of Appellee's deposition testimony as admissions of municipal code violations are unfounded and not supported by the record. Specifically, Appellee testified that she believed that a general repair permit she obtained applied to the roof that she placed on the pole barn. [R. (2097) 2409 (lines 11-15), 2411 (lines 11-15), 2485 (lines 23-25) through 2486 (lines 1-6)]. Appellee further testified that she did not believe that she needed a variance or other approval for the pole barn. [R. (2097) 2416 (lines 8-19), 2513 (lines 22-25 through 2514 (lines 1-4)]. Appellant further testified that the **[*30]** fence which obstructed the alley in 1990 (when her family first acquired an ownership interest in 1130 State) was already there and that subsequent owners "inherited" the fence. [R. (2097) 2370 (lines 18-24), 2462 (lines 8-14)].

Appellant also proffered below and in its appellate brief, presumably as persuasive authority, a Nevada case, *City of Reno v. Nevada First Thrift, 100 Nev. 483, 686 P.2d. 231 (1981)*. Appellant's citation of this case as authority for the proposition that the unclean hands defense is established as to equitable real estate claims by the issuance of municipal citations is unacceptably misleading and outright frivolous. This is so because in *Reno*, the unclean hands defense was not before the Nevada Supreme Court and was not considered by the court. In that case, a developer had substantially completed construction of a project, when the city changed its zoning laws and building code. The city subsequently denied the developer a business license and certificate of occupancy because the project did not meet the standards of the new regulations. The developer sued the city seeking an order compelling the issuance of the license and certificate. The trial court denied plaintiff's relief, alleging **[*31]** that it had unclean hands with respect to certain building code violations. After a change in ownership, the new owner brought a second lawsuit (a mandamus action) before a different judge and prevailed in obtaining both the license and certificate. The city appealed, but the Nevada Supreme Court affirmed the issuance of the mandamus, holding that under the doctrine of estoppel, "when a building permit has been issued, vested rights against changes in zoning laws exist after the permittee has incurred considerable expense in reliance thereupon." *Id. at 487*. In *dicta*, the Nevada Supreme Court commented that the earlier trial court ruling had applied the unclean hands doctrine, but expressly noted that "we, of course, have no occasion to pass on the propriety of that ruling." *Id. at 489*. Thus, the issue of whether building code violations equate to unclean hands such as will render unavailable equitable remedies was not before, and therefore not reviewed by, the Nevada Supreme Court. Accordingly, *Reno* provides absolutely no support for Appellant's unclean hands argument.

As with his conclusion that unclean hands was unavailable to Appellant because of the unrelatedness of **[*32]** the alleged inequitable conduct and Appellee's equitable claims, the trial court also correctly analyzed and read *Hollifield*. In its order denying the parties second summary judgment motions, the trial court stated:

> The Court notes that is not persuaded by Plaintiff's argument with regard to an unclean hands defense to the counterclaims. Plaintiff reads *Hollifield* too broadly. There, the unclean hands defense is upheld against an estoppel theory, not against a claim asserting prescriptive title or abandonment of easement. *Hollifield* is further distinguished from the case at hand because the relevant timeframe there is well short of the statutory time to acquire prescriptive title, even by color of title, as the court so notes. *251 Ga. App. 127-128*.

Throughout this litigation and on this appeal, Appellant has read *Hollifield* in an unjustifiably expansive manner. *Hollifield* provides no basis for the reversal of the trial court's denial of Appellant's summary judgment motion on the issue of unclean hands, nor does it provide any impediment to the reversal of the trial court's denial of Appellee's motion for partial summary judgment on this issue in the related appeal.

[*33] 4. Appellant would be unable to establish an unclean hands defense at trial because the evidence upon which it would rely is inadmissible.

There is a complete absence of a legal basis for the assertion of the unclean hands defense by Appellant in this case. Appellant's difficulty is compounded by the fact that there is also a complete absence of a factual basis for the

defense in this case. The evidence that Appellant seeks to muster in support of the unclean hands defense would be inadmissible at the trial of this case.

This evidence falls into two categories, namely the four citations issued by the City to Appellee alleging code violations and Appellee's testimony that she did not obtain permits for certain items pertaining to her property. [4] Turning to the citations first, it is clear under Georgia **[*34]** law that these citations are not admissible at trial. The first citation was issued in 2014 and disposed of by a *nolo contendere* plea entered by Appellee on April 14, 2014. *Nolo contendere* pleas are not admissions of guilt, and accordingly, Appellee's *nolo plea* in the Municipal Court of Atlanta is not admissible in the trial of this case. *O.C.G.A. § 24-4-410(2); Waszczak v. City of Warner Robins, 221 Ga. App. 528, 529 (1996)*; *Reese v. Lyons, 193 Ga. App. 548 (1989)*.

The three citations issued against Appellee in 2015 were all dismissed with prejudice. [R. (2097) 2157, 2224, 2226, 2228]. Even if these citations had not terminated favorably to Appellee, they would still be inadmissible, as only felony convictions or crimes of moral turpitude are admissible in civil actions. *O.C.G.A. § 24-6-609*.

Given that the issues of permitting regarding Appellee's property are not related to Appellee's equitable claims, her testimonial evidence regarding these permitting matters would be irrelevant to the issues to be decided and required to be excluded on this ground. When the exclusion of this evidence is factored into the equation, there is no competent evidence that could be presented that would provide a basis for a finding any **[*35]** inequitable conduct by Appellee.

5. The undisputed record below establishes that as to the municipal citations in question, it is Appellant's conduct which has been inequitable.

Any party seeking equitable relief is subject to the unclean hands doctrine. *O.C.G.A. § 23-1-10*. *Williams v. Williams, 255 Ga. 264, 265 (1985)* ("It is well established . . . that equity is not available to one who lacks clean hands as to the relief sought."); *cf.* ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273 (Sup. Ct. 2106)*** ("In determining if the clean hands doctrine applies, a court has discretion to evaluate the relative conduct of both parties and to determine whether the conduct of the party seeking an equitable remedy should, in the light of all the circumstances, preclude such relief.")

Appellee submits that it is Appellant's conduct which has been inequitable in light of the circumstances of this case. In effect, Appellant sought to manufacture its unclean hands defense through lobbying for and procuring the very citations which it alleges as inequitable conduct. These citations were brought about through relentless, threatening tactics, and steadfast bullying by Appellant and its attorneys. [R. (2097) 2152-53, 2166-70, 2172-73, 2175-78, **[*36]** 2180, 2188, 2191, 2193-94, 2196-97, 2199, 2208-09, 2220-22].

The record paints a clear picture of Appellant using undue influence to pressure the City into issuing the 2015 citations against Appellee, notwithstanding the April 2014 agreement reached with the City's Solicitor's Office that no more citations would be issued against Appellee until this litigation was concluded. [R. (2097) 2151]. All of this points to conduct on the part of Appellant that is unfair, unjust and inequitable. Several things stand out in these facts which emphasize the unwholesome conduct by Plaintiff. First, the Solicitor's Office and Municipal Court both recognized the wisdom of awaiting resolution of this litigation regarding Appellee and Appellant's rights in the alley, however Appellant completely disrespected the judgment and decision of the Solicitor's Office with respect to the agreement it made with Appellee and the judgment and decision of the Municipal Court in entering the agreement on the docket of the court. [R. (2097) 2152, 2166-70, 2172-73, 2175-78, 2180, 2188, 2191, 2193-94, 2196-97, 2199, 2208-09, 2220-22] Second, Appellant should have been willing to allow this legal action to reach its **[*37]** conclusion, since it is Appellant that initiated this lawsuit. [R. (2097), 5-35]. Third, the essence of this matter is that

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[4] Appellee has maintained that as to certain items, no permit was required, and that as to other items, she had obtained the appropriate city permit. [R.(2097) 2409 (lines 11-15), 2411 (lines 11-15), 2416 (lines 8-19), 2485 (lines 23-25) through 2486 (lines 1-6)] [R.(2097), 2513 (lines 22-25 through 2514 (lines 1-4)]. Appellee has made no admissions as to these permitting matters.

Appellant brought about the very citations upon which it seeks to mount an unclean hands defense. As it is Appellant's conduct that has been inequitable, the unclean hands defense is unavailable to Appellant.

6. Appellant's unclean hands defense fails because the conduct alleged to be inequitable is not unconscionable nor violative of conscience.

The unclean hands doctrine applies only to illegal, immoral, fraudulent or unconscionable conduct. *Miles v. Deen, 184 Ga. App. 198 (1987)*. The conduct alleged to be inequitable has to so infect the underlying cause of action that to allow the action to go forward "would be violative of conscience. *Pryor v. Pryor, 263 Ga. 153 (1993)*. The record below would not support a conclusion that this high standard has been met in this case.

Appellant's unclean hands defense rests squarely on four municipal citations regarding City code enforcement issues. As has been noted previously, the 2014 citation was disposed of with Appellee's *nolo* plea, with no admission of guilt and with an understanding that further citations would not issue until such time as this litigation **[*38]** had concluded and the parties' rights in the alley had been ascertained. The three 2015 citations were all dismissed with prejudice. Appellant makes no showing that the issues raised by these citations is sufficient to be "violative of conscience". This finding is reinforced by the unrelatedness of Appellee's counterclaims and the citations.

Second, given that numerous cases have concluded that easements were abandoned because of obstructions to alleys, it is easily inferred that the mere facts related to erecting a gate or fence traversing an alley does not equate to conduct "violative of conscience". *Duffy Street SRO v. Mobley, 266 Ga. 849 (1966)*; *Donald Azar, Inc. v. Muche, 326 Ga. App. 726 (2014)*.

C. The trial court correctly denied Appellant's motion for summary judgment on Appellee's claim of prescriptive easement, albeit for incorrect reasons. (Enumeration 2).

The trial court did not err in denying Appellant's summary judgment motion as to Appellee's claim for a prescriptive easement. To the contrary, as Appellee has set forth in its appeal, Appellee established her entitlement to the recognition of a prescriptive easement from the alley across 380 14th to 14th Street, and summary judgment should have been **[*39]** granted in Appellee's favor on this claim.

1. Undisputed facts establish that Appellee has satisfied the elements required for a prescriptive easement.

As to the prescriptive easement claim present in this case, Appellant erects a straw man argument and then proceeds to knock it over. This effort is unavailing in that both undisputed facts and applicable law affirm that the trial court's denial of Appellant's summary judgment motion was required.

Appellant's straw man argument is summarized in the following quotation from its brief that Appellee's "sole contention is that her alleged use of this portion of [Appellant's] property gives her a right to a prescriptive easement." *Appellant's Br. (2098) at p. 14*. Based upon this characterization of the facts, Appellant argues that Appellee's notice of her prescriptive easement was legally insufficient. *Id.* Appellant materially omits that Georgia law allows notice of a prescriptive easement to be given by action, specifically repair of the pathway over which the easement is established. *Keng v. Franklin, 267 Ga. 472 (1997)*; *BMH Real Estate Partnership v. Montgomery, 246 Ga. App. 301, 303-04 (2000)*. It is undisputed that Appellee repaired, made improvements to, and maintained **[*40]** open the pathway which is the subject of her prescriptive easement claim. [R. (2097) 1057, 1099 (p. 33, lines 9-14), 1099-1100 (p.38, line 21 through p. 34, line 4]. Appellee also took affirmative steps to keep the pathway open by supporting a zero-lot line setback. [R. (2097) 1099 (p. 32, 12-24)]. Appellant has presented no evidence refuting Appellant's evidence regarding the notice provided by Appellee through her repair to, and improvements and maintenance of, the pathway. [R. (2097) 1473 (line 12) through 1487 (line 24); 1636 (line 16) through 1642 (line 18)].

2. Based upon these undisputed facts, the trial court was required to deny outright Appellant's motion for summary judgment on Appellee's prescriptive easement counterclaim and correspondingly to grant Appellee's motion on this issue.

The record is clear, contrary to Appellant's assertion, Appellee's prescriptive easement claim is based upon more than use, and the evidence presented below in summary judgment motions required the denial of Appellant's motion on this matter and should have resulted in the entry of summary judgment for Appellee.

PART THREE - CONCLUSION.

In December 2014, the parties to this litigation **[*41]** were engaged in very different activities. Appellee worked to complete and file her motion for summary judgment by the Court ordered deadline. [R. (2097) 89-313]. Leading up to this deadline, Appellee had engaged in research related to the history of the alley that was at the center of the dispute. She went out and obtained numerous affidavits from former property owners, church elders, neighbors and others (several of whom she did not know personally) who were knowledgeable about conditions in the alley as to periods of time going back into the 1960s. [R. (2097) 108-90]. She met the court ordered summary judgment deadline.

By contrast, in December 2014 and the months following Appellee's submission of her numerous supporting affidavits, Appellant was engaged in trying to get the City to issue municipal citations against Appellee, not just for matters related to the alley, but wholly unrelated matters such as Appellee's house and items wholly contained within Appellee's back yard (i.e., a storage shed and drainage channels). [R. (2097) 2156, 2206]. Notwithstanding the court's scheduling order, Appellant did not submit a summary judgment motion. Following this December 2014 deadline, **[*42]** Appellant continued, for months, to lobby the City to issue citations against Appellee. [R. (2097) 2152-53, 2166-70, 2172-73, 2175-78, 2180, 2188, 2191, 2193-94, 2196-97, 2199, 2208-09, 2220-22]. In January 2015, Appellant was finally able to get the City to go back on its agreement with Appellee not to engage in any additional enforcement activity until such time as this litigation was completed. [R. (2097) 2153, 2186]. The City issued a citation to Appellee which was essentially the same citation that had been disposed of by a *nolo contendere* plea a year earlier, and lo and behold, within weeks, Appellant filed a motion for summary judgment citing unclean hands as its theory and relying upon the very citations that it lobbied so hard to bring into existence. [R. (2097) 425, 2153, 2186].

Appellant's unclean hands defense is meritless. Appellee's counterclaims and the City's citations are unrelated. There is no showing of any injury to Appellant arising out of the citations issued to Appellee. Appellee's conduct was not unconscionable or violative of conscience. The authorities cited by Appellant do not provide the support they seek for the unclean hands defense. And the record **[*43]** shows that Appellant itself acted in an inequitable matter in its outrageous harassment of the City and, by extension, of Appellee. The trial court should have granted Appellee's motion for partial summary judgment as to unclean hands.

Finally, Appellant has not created a triable issue of fact as to Appellee's prescriptive easement claim, and its summary judgment motion on this claim was also meritless. Therefore, Appellant's appeal should be denied. This 19th day of July, 2019.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

Pursuant to Rule 6, I hereby certify that there **[*44]** is a prior agreement with counsel for Appellant to allow documents in a .pdf format sent via email to suffice for service. I have this day served a copy of the foregoing ***BRIEF OF APPELLEE LORI SENE SORROW*** by the Court's efile system to the following:

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HERNDON v. CITY OF SANDPOINT

Supreme Court Docket No. 48975-2021

SUPREME COURT OF IDAHO

August 11, 2022

Reporter
2022 ID S. CT. BRIEFS LEXIS 643 *

SCOTT HERNDON, JEFF AVERY, IDAHO SECOND AMENDMENT ALLIANCE, INC., and SECOND AMENDMENT FOUNDATION, INC., Plaintiffs-Appellants, vs. CITY OF SANDPOINT, FESTIVAL AT SANDPOINT, INC., DOES 1 to 100, Defendants-Appellees.

Type: Brief

Prior History: Bonner County District Court. Case No: CV09-20-0692. Appeal from the District Court of the First Judicial District for Bonner County. Honorable Lansing L. Haynes, District Judge, presiding.

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Title

RESPONDENT CITY OF SANDPOINT'S BRIEF

Text

[*1] I. STATEMENT OF THE CASE

A. Nature Of The Case.

This was an action instituted by Plaintiffs-Appellants (hereinafter collectively referred to as "Herndon") stemming from the individual plaintiffs' attempt to enter the 2019 Festival at Sandpoint with firearms. The Festival at Sandpoint is a multi-day summer concert series (the "festival") held at War Memorial Field Park ("War Memorial Field"), a public park owned by the City of Sandpoint (hereinafter the "City"). In 2019, the City leased War Memorial Field to the Festival at Sandpoint, Inc. (hereinafter the "Festival"), a private non-profit corporation, for its use to put on the festival. The Festival has a longstanding policy of prohibiting festival patrons from bringing weapons, including firearms, into the festival. When Scott Herndon and Jeff Avery attempted to enter the Festival on August 9, 2019, while in possession of firearms, they were denied entrance by the Festival's security personnel.

Believing that the City wrongfully delegated its police power to the Festival and neither the City nor the Festival had the legal authority to regulate the possession of firearms on the leased property, Herndon asserted several causes of **[*2]** action arising out of this incident, which included claims for declaratory and injunctive relief, claims pursuant to *42 U.S.C. § 1983* for violations of the Second and *Fourth Amendments to the U.S. Constitution* and the Equal Protection clause, and a federal claim for conspiracy to deprive the individual plaintiffs of their federal rights.

The district court granted summary judgment in favor of the City and the Festival on all claims. Judgment was entered in favor of the City and the Festival, and Herndon timely appealed the summary judgment decision. In addition to their challenge of the district court's dismissal of all claims, Herndon also appeals the award of attorneys' fees to the City and the Festival, despite there being no cognizable legal basis to do so.

B. Course Of Proceedings Below.

On May 29, 2020, Scott Herndon, Jeff Avery, the Idaho Second Amendment Alliance, Inc., and the Second Amendment Foundation, Inc. filed a complaint in the district court for Bonner County. In their complaint, Herndon asserted that the City had entered into a written agreement - a contract or lease - with the Festival to rent War Memorial Field to it for the summer music festival. Herndon **[*3]** believed the denial of entry to the Festival violated both state and federal law, and sought a declaration from the court that either (a) the City lacked the power to convey police powers, and specifically the power to prohibit firearms at War Memorial Field, to the Festival, or (b) that the Festival was bound by the preemption doctrine contained in Idaho Code § 3302J, which prohibits political subdivisions in the state from regulating the possession of firearms in any manner.

Herndon also sought an injunction from the court which would compel the City to insist on contract terms with the Festival that guaranteed compliance with Idaho laws that regulate the possession and carrying of firearms in public or which compelled the Festival to comply with such laws. In addition to the state law claims for relief, Herndon asserted a claim pursuant to *42 U.S.C. § 1985* for an alleged conspiracy between the City and the Festival to violate the right to bear arms as guaranteed by the Idaho and U.S. Constitutions, and three claims pursuant to *42 U.S.C. § 1983* for a violation of the *Second Amendment of the U.S. Constitution*, a violation of the *Fourth Amendment of the U.S. Constitution* for unlawful searches, and a violation of the Equal Protection clause for discriminating against Herndon's access to a public event held on public property based on their exercise of a fundamental right protected by the Idaho and U.S. Constitutions. R. at pp. 9-23.

During the pendency of the case, Herndon never served discovery on either the City or the Festival. All parties filed motions for summary judgment on March 29, 2021. A hearing was held on April 26, 2021, and during oral argument, counsel for Herndon advised they were abandoning the claim for the alleged violation of the Fourth Amendment. Aug. at p. 104. The district court granted summary judgment in favor of the City and the Festival on all of Herndon's claims on June 1, 2021. R. at pp. 676-87. Judgment was entered on June 10, 2021, for the City and June 14, 2021, for the Festival dismissing all claims brought by Herndon with prejudice. R. at pp. 688-91.

Following the entry of judgment, the City and the Festival timely moved for the award of costs and attorneys' fees. R. at pp. 692-745. On July 12, 2021, Herndon filed a Notice of Appeal. R. at pp. 749-53. Herndon did not file an objection to the motions for attorneys' fees until August 31, 2021. Aug. at pp. 2-4. In that objection, Herndon did not contest an award of costs, stated, "Plaintiffs object to both Defendants' request for attorney fees in this matter", and indicated that if the parties were unable to stipulate to a stay of the proceedings on the motions for attorneys' fees, then Herndon would file a formal motion to request relief from their "tardy response" to the motions for attorneys' fees and a formal response. Aug. at p. 3. On September 9, 2021, Herndon filed a Motion for Extension of Time or Relief from Deadline to Object to the City's and the Festival's motions for costs and attorneys' fees along with a supporting memorandum and declarations. Aug. at pp. 5-55. On October 29, 2021, a hearing was held on the City's and the Festival's motions for attorneys' fees and costs, and Herndon's motion for relief. Aug. at pp. 96, 101. Subsequent to the hearing, the City filed a supplemental memorandum of costs and attorneys' fees and supporting affidavit. Aug. at pp. 90-95. Herndon objected to the supplement on November 12, 2021. Aug. at pp. 100-02.

Prior to Herndon's objection, the district court entered an order denying Herndon's motion for extension of time or relief from deadline to object to the City's and the Festival's motions for costs and attorneys' fees since Herndon

had failed to timely object to the requests and therefore waived all objections. Aug. at pp. 96-99. Thereafter, the district court entered its memorandum decision and order awarding costs and attorneys' fees to the City and the Festival. Aug. at pp. 103-09. Amended judgments were entered by the district court on February 7, 2022, for the award of costs and attorneys fees. Aug. at pp. 113-18. A satisfaction of judgment as to the award of costs and attorneys to the Festival was filed on March 17, 2022, and a satisfaction of judgment as to the award of costs and attorneys fees to the City was filed on March 22, 2022. Aug. at pp. 126-31.

C. Statement [*4] Of Facts.

The facts of the case presented to the district court and supported by admissible evidence are undisputed. In July 2019, the City executed a written lease agreement with the Festival for the lease of War Memorial Field from July 28, 2019, through August 15, 2019. During the term of the lease, the Festival put on a series of concerts at War Memorial Field known as The Festival at Sandpoint. R. at p. 358, P 8.

Pursuant to the lease, the City leased and set over unto the Festival the entirety of War Memorial Field for the Festival's occupancy and use, subject to certain considerations, covenants, restrictions, and agreements. The Festival was granted possession, use, and occupancy of War Memorial Field. At the conclusion of the term of the lease, War Memorial Field reverted back to the City. In consideration for the City leasing War Memorial Field to the Festival, the Festival was to pay the sum of $ 1.25 assessed against each ticketed day on multiple-day tickets and $ 1.25 for each single-day ticket sold by the Festival, with payment made to the City after the end of the lease term. The maximum allowable attendance at any concert during the festival was 4,000 people, pursuant to the self-imposed limits established by the Festival. R. at pp. 358-59, 361, PP 9-11,21.

The lease of the property was governed by several agreements contained within the lease. The City and the Festival agreed that the Festival would pay for electrical charges incurred for usage during the term of the lease, the Festival would provide sanitation services which would include collection and disposal of debris, litter, and waste on a daily basis during, and the City would be responsible for the cost of water and sewer. The Festival would provide its own general liability insurance to cover any losses or damage resulting to any persons from the operation and presentation of the festival, would name the City as an additional insured, and such policy would provide coverage of not less than $ 1,000,000. The Festival was prohibited from assigning, selling, transferring, or setting over unto any person(s), business, or group, any or all of the rights to use the leased premises, any interest in the premises, or any rights of the Festival acquired through the lease, without the prior consent of the City. R. at p. 359-61, 1112-13, 17, 22.

As the lessee, the Festival was responsible for the security of the festival, while City police retained responsibility for public safety within the City of Sandpoint. To this end, the Festival would provide adequate security at no cost to the City to protect the property of the City and the property of the Festival. The Festival was to exercise and provide site security during the duration of the festival, and such security personnel were responsible for control measures concerning members of the audience and performers. The provision in the lease requiring the Festival to provide adequate security was explicit so that there was no expectation that the City would provide security for the Festival. While the City's police officers were to provide additional assistance to the Festival's security personnel, the Festival would pay the City for the cost of such police services. R. at pp. 359-60, PP14-16. The City and the Festival also agreed that the Festival would develop a security plan for the duration of the festival with the City's Chief of Police, Corey Coon, and such plan would include traffic management. The security plan, which was to be approved by Chief Coon, outlined the planned start and end times for the concerts, the traffic revisions which would be made during the concerts, and the Festival's needs for police services. The Festival was also responsible for working with the City's police and street departments concerning its parking plan, and the Festival was responsible for arranging public transportation, parking, and proper signage. R. at pp. 359-61, PP14-16, 20.

In accordance with the Festival's security plan, only two police officers were needed as support for the concerts that occurred on Thursday, Friday, and Saturdays nights from 5:30 to 11:00 p.m., and no support from police officers was needed for the Sunday concerts. The City's police officers, and any law enforcement officers assisting the City's police officers, were to have access to the leased premises at any time, and such access was to follow established rules and protocols, pursuant to the U.S. Constitution, Idaho State Constitution, and Idaho Statutes.

The City's police officers that were requested by the Festival as support simply walked the festival grounds, walked through the crowd, and were not stationed at any particular place on the festival grounds, including the gate entrance to the festival. The City and the Festival agreed that the Festival would be solely responsible for ensuring that all activities performed at the festival complied with Idaho law, including compliance with any noise level requirements. R. at pp. 359-61, PP14-16, 19.

Finally, the City and the Festival agreed that the Festival would provide concessions for sale to the public during the festival, the Festival would obtain necessary catering permits, and it would make arrangements for the disposal of waste liquids. The Festival would also work with Chief Coon to design appropriate signage and announcements concerning the consumption of alcohol or the use of any illegal controlled substances. R. at p. 360, P 18.

Prior to 2019, the Festival had a longstanding policy of prohibiting festival patrons from bringing weapons, including firearms, into the festival. This policy had been in place for over twenty years. In 2019, the Festival utilized an additional festival security team to screen festival patrons for weapons, including firearms, as they entered the festival gates. The Festival and the security force utilized by the Festival did not allow festival patrons carrying weapons, including firearms, to enter the festival. The Festival implemented a policy allowing a patron in possession of a firearm or other weapon to return it to their vehicle if they wanted to attend a concert. The decisions related to site and stage security, gate security, the hiring of Crowd Management Services, and the respective responsibilities of each security team were made solely by the Festival. R. at 361-62, PP24-26

In developing the City police's planning and preparation for the festival, representatives of the police department historically have several meetings with representatives of the Festival to discuss the Festival's traffic control, the performers who will be at the festival, alcohol sales and areas within the festival where that will occur, entrance points to the festival, and security. In developing the City police's plan for the 2019 festival, the Festival's prohibition on firearms entering the festival was not a factor. Rather, the focus of the City police's plan was on ensuring public safety. As part of the City police's plan development, Chief Coon instructed City police officers that the prohibition on bringing firearms into the festival was the policy of the Festival and that it was up to the Festival to enforce their policy. No City police officer would assist the Festival in the enforcement of their policy. City police officers would become involved only if and when the Festival's security personnel initiated a citizen's arrest. R. at p. 363, PP29-30.

Mr. Herndon and Mr. Avery, both residents of Idaho, attempted to enter the festival on August 9, 2019, and were denied entrance. Mr. Herndon and Mr. Avery caused a video recording to be made documenting their attempt to enter the festival on August 9, 2019. It is available at *https://www.youtube.com/watch?v=vUtlpU8saSs*. It accurately reflects Mr. Herndon's and Mr. Avery's interactions with the Festival's security personnel, the City Attorney, and a City police officer. R. at pp. 363-64, PP31-34. The following undisputed facts are established in the video:

Mr. Herndon and Mr. Avery purchased tickets to the festival for August 9, 2019. The Festival had a well-publicized prohibition on entering the festival with a firearm. Mr. Herndon and Mr. Avery knew that the Festival prohibited festival patrons from entering the festival with a firearm. Mr. Avery was openly carrying a firearm. Mr. Herndon was carrying a bag, and Mr. Herndon does not indicate whether he is openly carrying a firearm, or whether he is carrying a concealed firearm. R. at p. 364, PP 35(a-c).

Mr. Herndon and Mr. Avery proceeded to the entrance of the festival. The Festival security personnel at the gate wore red shirts with both the Festival's logo and the word 'SECURITY' on the front. A member of the Festival security personnel said to Mr. Herndon and Mr. Avery's group, "Sorry, sir, no firearms." At this time, Mark Ogg, the lead of the gate security team for the Festival, was called over. Mr. Ogg was wearing a red shirt with both the Festival's logo and the word 'SECURITY' on the front. R. at pp. 364-65, 369-70, PP 35(d-e, g-h), 36.

Mr. Ogg, Mr. Herndon, and Mr. Avery engaged in a discussion about the prohibition on brining weapons into the venue. During this discussion, Mr. Ogg informed Mr. Herndon and Mr. Avery that the Festival's rule was that no weapons were allowed in the venue and that he would trespass them from the venue if they insisted on entering the festival with their firearms. During the interaction between Mr. Herndon and Mr. Ogg, other Festival security wearing red shirts with both the Festival's logo and the word 'SECURITY' on the front were standing nearby observing. R. at pp. 365-66, PP 35(i-m).

When Mr. Herndon asked, "If we were black, would you let us into the festival?" Mr. Ogg stated, "Let me get the police officers, they can deal with it." When a uniformed police officer came over to Mr. Ogg and Mr. Herndon, Mr. Ogg informed the officer, "They're refusing to leave." Mr. Herndon indicated he was not refusing to leave, but instead was asking for an explanation of the law. The uniformed police officer stated to Mr. Herndon, "As long as you're not past the gate, you're not my issue." Mr. Herndon tried to speak further with the officer, but the officer walked away without answering Mr. Herndon. R. at p. 366, PP 35(n-p).

Mr. Ogg repeatedly told Mr. Herndon what the rules were and that such rules and policies were made by the Festival. At one point, Mr. Herndon asked if the City Attorney had reviewed the policy. Will Herrington, the City Attorney, was attending the festival on August 9, 2019, as a private person and not as a representative of the City1. [1] Mr. Herrington was wearing a white polo shirt and a hat with the 'Titleist' logo on it. He was not wearing any clothing that identified him as being Festival security personnel or a representative of the City. Mr. Herndon turned to Mr. Herrington who had been observing the interaction with Mr. Ogg and attempted to explain to Mr. Herrington his legal argument of why he believed he could enter the festival with a firearm. Mr. Herndon and Mr. Herrington proceeded to discuss the Festival's prohibition on firearms. Mr. Herrington told Mr. Herndon it was up to the Festival to decide to prohibit firearms. R. at pp. 358, 366-68, 370, PP 5, 35(q-s, u-y), 39.

Mr. Herndon tried to get Mr. Ogg to engage in further discussion about why the Festival prohibited firearms. Mr. Ogg reiterated to Mr. Herndon, "You have a firearm, you're not entering the property." Mr. Herndon asked for an explanation of what the City's position would be if he and Mr. Avery insisted on entering the festival. Mr. Ogg responded to Mr. Herndon that he had answered that already. Mr. Herndon stated that he wanted to "hear it from the City." Mr. Herrington responded that it was his understanding that the Festival would sign a citizen's complaint for trespassing. R. at pp. 368-69, P 35(z, bb).

Mr. Herndon confirmed with Mr. Ogg and Mr. Herrington that if he entered the festival as he believed he could, that the Festival would then sign a citizen's complaint and he would thereafter be prosecuted for trespass. Mr. Herndon and Mr. Avery then thanked Mr. Ogg and Mr. Herrington, and then proceeded with Mr. Ogg to receive refunds for their tickets. R. at p. 369, P 35(ee-ff).

No City police officer denied Mr. Herndon or Mr. Avery entrance to the festival or assisted the Festival in enforcing its policy of prohibiting firearms at the festival. Mr. Herrington did not assist the Festival in enforcing its policy of prohibiting firearms at the festival and he did not have any authority in his personal capacity to turn people away from the festival. At no time did the City require or encourage the Festival to prohibit firearms at the festival. At no time did the City request, advise, require, or include any provision in the lease prohibiting the possession of weapons, including firearms, at War Memorial Field during the term of the Festival's lease. The City has not adopted or enforced any law, rule, regulation, or ordinance which regulates in any manner the possession or carrying of firearms on property leased from the City, including properties leased by the Festival. R. at p. 370, PP 37-42.

The prohibition on weapons, including firearms, was solely the policy of the Festival and no other person or entity and was solely enforced by the Festival and the security personnel utilized by the Festival. The City did not enforce the Festival's policy prohibiting firearms. R. at 370, P 41.

II. ISSUES PRESENTED ON APPEAL

The City restates Herndon's issues on appeal as follows:

A. Whether the district erred when it applied the doctrine of judicial estoppel to prevent Herndon from engaging in impermissible contradictory positions to attack the validity of the lease between the City and the Festival on the basis that Herndon had previously invoked the existence of a valid lease in the Complaint so as to gain entry to the

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[1] Prior to the 2019 Festival, Mr. Herrington became aware that Mr. Herndon desired to enter the festival grounds during a concert in possession of a firearm. The City Attorney is not a policymaker for the City and does not set policy. R. at pp. 358, 362, PP 5, 27.

courts on their claims for a judicial declaration and injunctive relief, and whether **[*5]** Herndon was entitled to a judicial declaration on the status of the lease.

B. Whether the district court erred in dismissing Herndon's claim alleging a violation of the *Second Amendment to the U.S. Constitution* based on its determination that there was insufficient evidence of state action presented by Herndon.

C. Whether the district court erred when it determined that Herndon's Equal Protection clause claim failed as a matter of law because existing case law holds that a claim for the infringement of the Second Amendment is not a cognizable claim under the Equal Protection clause.

D. Whether the district court erred when it denied Herndon's motion for extension of time or relief from deadline to object to the City's and the Festival's motions for costs and attorneys' fees.

E. Whether the City is entitled to an award of costs and attorneys' fees on appeal.

III. ATTORNEYS' FEES ON APPEAL

Pursuant to Idaho Appellate Rule 40, the City requests an award of costs on appeal. Pursuant to Idaho Appellate Rule 41, the City requests an award of attorneys' fees on appeal. The City seeks attorney fees on this appeal pursuant to *Idaho Code § 12-117*. The basis of the City's claim **[*6]** for attorney fees in set forth in Section IV., F. below.

IV. ARGUMENT

Under Idaho law, the Festival, as lessee of War Memorial Field, was entitled to exclude third parties from the premises. Idaho law does not limit the Festival's right to exclude persons carrying firearms from War Memorial Field. The City granted exclusive possession of War Memorial Field to the Festival for the lease term and did not adopt or enforce any law, rule, regulation, or ordinance which regulated the possession or carrying of firearms.

The claims alleged by Herndon were not supported with sufficient admissible evidence or pertinent legal authority. Instead, Herndon proffered unsubstantiated accusations and conclusory arguments, and now contends that the district court erred in not agreeing with their legally flawed and unsupported positions. Herndon did not, and still has not, demonstrated the essential elements of each claim alleged in their case, and summary judgment in favor of the City on all claims was proper. This Court should affirm the ruling of the district court.

A. Standards Of Review.

1. Summary Judgment.

When the Supreme Court reviews a lower court's ruling on a summary judgment **[*7]** motion, it applies the same standard of review the lower court utilized when ruling on the motion. *Idaho First Bank v. Bridges, 164 Idaho 178, 182, 436 P.3d 1278, 1282 (2018)*. A motion for summary judgment is proper when the party bringing the motion proves that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(a). The defendant will be entitled to judgment when the plaintiff fails to make a showing sufficient to establish the existence of an essential element of its claim and on which it bears the burden of proof. *See Thompson v. City of Lewiston, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002)*. Mere denials unaccompanied by facts admissible in evidence, affidavits of counsel based upon hearsay rather than personal knowledge, and conclusory assertions are all insufficient to raise genuine issues of fact. *See Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999)*; *Camp v. Jiminez, 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Idaho App. 1984)*.

2. Judicial Estoppel.

The district court's decision concerning the application of judicial estoppel is reviewed for an abuse of discretion. *Sword v. Sweet, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004)*. In determining whether a district court has abused its discretion, this Court asks (1) whether the district court correctly perceived the issue as one of discretion; (2) whether it **[*8]** acted within the outer boundaries of its discretion; (3) whether it acted consistent with applicable legal standards; and (4) whether it reached its decision by an exercise of reason. *Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)*.

B. War Memorial Field Was Leased To A Private Party That Could Control The Premises And Exclude Others From The Premises. The Festival, As The Lessee Of War Memorial Field, Could Lawfully Exclude Persons Carrying Firearms From Festival Grounds.

1. Nature of Rights of the Festival as Lessee of Real Property.

The authority to lease War Memorial Field is derived from *Idaho Code § 50-301* empowering municipal corporation to "sue and be sued; contract and be contracted with;…acquire, hold, lease, and convey property, real and personal;…and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws of the constitution of the state of Idaho." The power to lease city property is "a purely discretionary function entrusted to the elected officials…and absent a clear abuse of that discretion, any decision made thereunder will not be overturned on appeal." *Bopp v. Sandpoint, 110 Idaho 488, 491, 716 P.2d 1260, 1263 (1986)*. **[*9]**

The lease of real property gives a leasehold interest in realty in exchange for the promise to pay rent periodically. *Krasselt v. Koester, 99 Idaho 124, 125, 578 P.2d 240, 241 (1978)*; *West v. Brenner, 88 Idaho 44, 396 P.2d 115 (1964)*; *Miller v. Belknap, 75 Idaho 46, 266 P.2d 662 (1954)*. The leasehold interest accords the lessee "both contract rights and a limited ownership interest in the real property," *Krasselt, 99 Idaho at 125, 578 P.2d at 241*, and entitles the lessee to exclusive possession of the property. *Devereaux Mortgage Co. v. Walker, 46 Idaho 431, 436, 268 P. 37, 39 (1928)*. While the landlord still owns the real property in fee title and has a reversionary interest, the lessee has the possessory interest. *Bedard & Musser v. City of Boise, 162 Idaho 688, 690, 403 P.3d 632, 634 (2017)*; *Wing v. Martin, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984)*; *Krasselt, 99 Idaho at 125, 578 P.2d at 241*.

The Idaho Supreme Court analyzed the meaning of the term "possessory interest" in *McKay v. Walker*:

> Black's Law Dictionary defines 'possessory interest' as 'the present right to control property, including the right to exclude others, by a person who is not necessarily the owner.' The Restatement (First) of Property states that a possessory interest in land exists where a person has: '(a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society **[*10]** in general from any present occupation of the land . . ..'

160 Idaho 148, 152, 369 P.3d 926, 930 (2016) (citing Black's Law Dictionary 1284 (9th ed. 2009), *Restatement (First) of Property § 7* (1936)). It follows that, during the term of the lease, the lessee is in control of the premises and thereby has control over third parties who enter the premises. *Stiles v. Amundson, 160 Idaho 530, 533, 376 P.3d 734, 737 (2016)*. By having control of the premises, the lessee is deemed, "so far as third parties are concerned, to be the owner." *Id.*

There is nothing in the statutes granting the City the authority to lease its property that indicates that the leasehold interest it conveys is excluded from the applicable existing jurisprudence in Idaho defining the nature of rights of a lessee. *See also discussion infra*. Nothing in the applicable statutory authority or case law indicates that a private lessee of public property enjoys any less or different rights than a private lessee of private property. As the lessee of War Memorial Field, the Festival's leasehold interest entitled the Festival to possession of the property. The Festival had the right to exercise a certain degree of control over War Memorial Field, including the rights to exercise control over third parties and **[*11]** exclude others from War Memorial Field. Under controlling Idaho law, the Festival was essentially the owner of War Memorial Field during the lease term, so far as third parties were concerned.

2. The Idaho Legislature Recognized the Nature of Real Property Rights When It Codified *Idaho Code § 18-3302*. Section 18-3302 Does Not Limit a Private Lessee's Right to Exclude Persons Carrying Firearms on Leased Public Property.

There are two fundamental concepts which underscore the interpretation of *Idaho Code § 18-3302*. One is the understanding of the intersection of the right to bear arms and property rights. The second is the Court's adherence to the primary canons of statutory construction.

While there are no cases in Idaho that interpret Section 18-3302 in the context of a private property owner's or private tenant's right to exclude, and *Article I, § 11 of the Idaho Constitution* has only been interpreted by Idaho courts a handful of times, there is guidance from other courts which this Court may rely upon in deciding the case at bar. One such decision is the Eleventh Circuit case *GeorgiaCarry.Org, Inc. v. Georgia* which arose from a challenge to a Georgia statute which barred **[*12]** the unrestricted carrying of weapons or long guns in eight specific locations, one of which was places of worship. *687 F.3d 1244 (11th Cir. 2012)*, *cert. denied 568 U.S. 1088 (2013)*. While the underlying facts of *GeorgiaCarry* are not particularly germane to this matter, the Eleventh Circuit's analysis of the historical context of the right to bear arms as it relates to property rights illuminates an issue that is central to this Court's decision.

Beginning with an examination of the historical background of the Second Amendment, the court quoted William Blackstone's *Commentaries on the Laws of England*:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

687 F.3d at 1261-62. In that regard, the court reflected that a guest is only able to enter or stay on private property with the owner's permission and is removable at the owner's direction, while also observing that the Georgia statute at issue recognized the right of **[*13]** a private actor in control of property through a lease to forbid the possession of a weapon on the property. *Id. at 1262 n. 37*. As the court noted, an action for trespass flows from the right to exclude, and criminal law principles of trespass "drawn from the common law reinforce the fundamental nature of a property owner's rights." *Id. at 1263*. The court went on to state:

> Property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes. **Quite simply, there is no constitutional infirmity when a private property owner exercises his, her, or its…right to control who may enter, and whether that invited guest can be armed and the State vindicates that right**….
>
> By codifying a pre-existing right, **the Second Amendment did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights**; rather the Second Amendment merely preserved the status quo of the right that existed **[*14]** at the time….
>
> **An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land**. The Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment.

687 F.3d at 1264-65 (emphasis added). The court concluded that the Second Amendment "codified a pre-existing right that was circumscribed by the common law rights of an owner under property law, tort law, and criminal law." *Id. at 1266*.

The pre-existing right to bear arms enshrined in the Second Amendment and *Article I, § 11 of the Idaho Constitution* is fully recognized in Section 18-3302. The statute provides in relevant part:

> No person shall carry concealed weapons on or about his person without a license to carry concealed weapons, except:
>
> …
>
> (b) On property in which the person has any ownership or leasehold interest;
>
> (c) On private property where the person has permission to carry concealed weapons from any person with an ownership **[*15]** or leasehold interest;
>
> (d) Outside the limits of or confines of any city, if the person is eighteen (18) years of age or older and is not otherwise disqualified from being issued a license under subsection (11) of this section.

I.C. § 18-3302(3). Subsection (3), however, is limited by the provisions of subsection (4):

> Subsection (3) of this section shall not apply to restrict or prohibit the carrying or possession of:
>
> (a) Any deadly weapon located in plain view;
>
> (b) Any lawfully possessed shotgun or rifle;
>
> …
>
> (f) Any deadly weapon concealed by a person who is:
>
> (i) Over age eighteen (18) years of age;
>
> (ii) A resident of Idaho or current member of the armed forces of the United States; and
>
> (iii) Is not disqualified from being issued a license under paragraphs (b) through (n) of subsection (11) of this section.

I.C. § 18-3302(4). When read together, these two provisions of Section 18-3302 allow, among other permitted conduct, persons with a license to carry a concealed firearm or persons carrying a firearm in plain view to carry such firearm on public property.

Canons of statutory construction require the Court to give the "literal words" of a statute "their **[*16]** plain, usual, and ordinary meaning" and construe the statute as a whole. *Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011)* (internal quotations and citations omitted). When construing section 18-3302 as a whole, the Court is bound to give effect to subsection (25) which provides, "Nothing in subsection (3) or (4) of this section shall be construed to limit the *existing rights* of a private property owner, *private tenant*, private employer or *private business entity*." (emphasis added).

When considering the language of Section 18-3302(25), the Court must assume that the legislature, when enacting the statute, had "full knowledge of the existing judicial decisions and case law of the state." *George W. Watkins Family v. Messenger, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990)*, *overruled in part on other grounds by Verska, 151 Idaho at 895-96, 265 P.3d at 508-09*. Likewise, the Court presumes that, unless it is plain from an express declaration or the language of the statute does not allow any other interpretation, the legislature does "not intend to overturn long established principles of law." *Id.*

Idaho Code § 18-3302 must be read to encompass the well-established law defining the landlord - tenant relationship, and specifically, the fundamental rights enjoyed by **[*17]** a lessee of real property. The statute explicitly declares that the *existing rights* of a *private tenant* are not limited by subsections (3) or (4), meaning that the legislature unambiguously and expressly recognized the rights of a private tenant to control the leased property, exclude others from the leased property, and to control third parties who enter upon the leased property. These rights of a lessee are undoubtedly as fundamental to preserving the public peace as much as the rights of the owner. *See GeorgiaCarry, 687 F.3d at 1263*. The commonsense interpretation of Section 18-3302 is that the Legislature codified that the right to bear arms was circumscribed by the right to exclude. So far as Herndon and

other third parties are concerned, during the Festival at Sandpoint, the Festival was the owner of the property and had the right to exclude other members of society in general from any occupation of the leased premises.

This Court should also assume that the legislature was fully aware of a municipality's authority to lease public property to private lessees. Thus, the legislature was aware that in some instances, a private lessee would lease public property and have **[*18]** the right to exclude persons carrying firearms from such property. Section 18-3302(25) necessarily subordinates the right of the people to carry firearms to the rights of the private property owner, private tenant, private employer or private business entity. The only logical conclusion to be reached by this Court is that during the lease term of War Memorial Field, the Festival could exclude persons carrying firearms from the property.

Herndon has offered no persuasive and applicable authority to support the argument that a private party leasing public property enjoys any less rights in the property than if the private party leased private property. *Cf.* Mountain States Tel. & Tel. Co. v. City of Boise, 95 Idaho 264, 266, 506 P.2d 832, 834 (1973) ("A municipality may lease its property to a private concern when the lease does not conflict with the public's use or need for the property."). Whatever right the City does not have or the Festival has to exclude persons carrying a firearm from War Memorial Field is by virtue of their respective status as a public or private entity. The Second Amendment, Article I, § 11 of the Idaho Constitution, and Section 18-3302 are meant to protect the right to bear arms from *governmental* ***[*19]*** infringement. The Festival is not a governmental entity, and as more fully discussed below, Herndon failed to provide the district court with any evidence of governmental action.

Herndon's conception of the law leads to the conclusion that a private party is subject to all of the laws and restrictions which only apply to the government if the private party is a lessee of public property. According to Herndon, "Idaho Code § 18-3302J imposes an *encumbrance* on public property in this state, that forbids local governments from burdening the right to self-defense in any way not authorized by the Idaho Legislature." Appellants' Brief at pp. 27-28. That interpretation is simply not supported by law.

The rationale that a private lessee of public property may properly exclude persons carrying firearms from the leased property has already been accepted by our neighboring jurisdiction, the Oregon Court of Appeals. In *Starrett v. City of Portland*, the City of Portland entered a lease with a private company, wherein the private company leased Pioneer Courthouse Square from the City for an event. 196 Or. App. 534, 536, 102 P.3d 728, 730 (2004). The City passed an ordinance authorizing the private company to "adopt and enforce rules **[*20]** of conduct for the event." *Id.* Accordingly, the private company adopted a rule that denied entry to persons who possessed weapons, including firearms, with no exception for persons who were licensed to carry a concealed handgun. 196 Or. App. at 536-37, 102 P.3d at 730.

Under Oregon law, a city is prohibited from regulating the carrying of concealed handguns, pursuant to a license, on public property. ORS 166.170, ORS 166.173; 196 Or. App. at 541, 102 P.3d at 733. The plaintiff, who was licensed to carry a concealed handgun, had planned to attend the event and carry his concealed handgun. 196 Or. App. at 537, 102 P.3d at 730. The plaintiff sued the City of Portland alleging that the City unlawfully allowed private lessees of public property to prohibit people licensed to carry concealed handguns from doing so at events on the leased property. 196 Or. App. at 536, 102 P.3d at 730.

The trial court granted the City's motion for summary judgment, and the Court of Appeals affirmed. 196 Or. App. at 537-38, 544, 102 P.3d at 730-31, 734. In doing so, the Court of Appeals answered the question of "whether the city may lease public property to private parties on terms that permit private parties to decide to prohibit persons licensed to carry concealed handguns from carrying the handguns into the event on the property so leased." 196 Or. App. at 541, 102 P.3d at 732-33. The plaintiff argued that, because the City lacked **[*21]** the authority to enact a regulation prohibiting the licensed concealed carry of a handgun, then the City could not lease public property to private persons on terms that allowed the private lessees to do what the City could not do. 196 Or. App. at 541, 102 P.3d at 733. Specifically, the plaintiff reasoned that "[T]he city 'may not transfer by lease those property rights which are forbidden it by virtue of statutory prohibition…. Simply put, what the city cannot do on its property, the lessee of city property cannot do. This is a function of basic property law. Property rights are a finite "bundle of sticks" and

whatever stick a conveyor of property lacks, the subsequent grantee will lack.'" *196 Or. App. at 541, 543, 102 P.3d at 733, 734*.

The Oregon Court of Appeals disagreed with the plaintiff's position. *196 Or. App. at 542-44, 102 P.3d at 733-34*. The court noted that the relevant statutory provisions [2] limited the City's authority to *enact ordinances* that *regulated* firearms, but those statutes did not limit the right of private parties to exercise control over property they rented, leased, or owned. *196 Or. App. at 542, 102 P.3d at 733*. The court explained that "[a]n ordinance leasing public property to a private person, on terms that permit the private person to decide whether to permit persons carrying concealed **[*23]** handguns (even with a license) to enter the leased property or participate in an event on that property, is not an exercise of governmental regulatory authority." *Id.*

With respect to the plaintiff's "bundle of sticks" line of reasoning, the Court of Appeals concluded that the argument advanced by the plaintiff confused property rights with municipal authority to exercise governmental regulatory power. *196 Or. App. at 543, 102 P.3d at 734*. The court stated:

> Restrictions on a municipality's regulatory authority are not the legal or logical equivalent of restrictions on its property rights. ORS 166.170 and ORS 166.173 do not alter a city's *title* to property. Rather, those statutes limit a city's *regulatory* authority-that is, a city's organic authority as a governmental entity. If a city possesses fee title to property, it can convey fee title to property (assuming, of course, that it has authority to possess and sell property in the first place). Nothing in either ORS 166.170 or ORS 166.173 serves to prevent a private purchaser of formerly public property from both receiving and exercising the full rights of the title conveyed, which would include the right to exclude from the property persons who carry concealed **[*24]** handguns pursuant to a license to do so. The same is true when a city rents or leases property-that is, the statutes do not limit private property rights in property rented or leased from a city or other governmental entity.

196 Or. App. at 543-44, 102 P.3d at 734 (emphasis in original).

Like the plaintiff in *Starrett*, Herndon has confused "property rights with municipal authority to exercise governmental regulatory power." *196 Or. App. at 543, 102 P.3d at 734*. Herndon's position that Section 18-3302J is an encumbrance on public property evidences a clear misunderstanding of the law. Like ORS 166.170 and ORS 166.173, Sections 18-3302 and 18-3302J are limitations on a city's authority to adopt or enforce a law, rule, regulation or ordinance which regulates the possession or carrying of firearms. That limitation of a city's regulatory authority is not a limitation of fundamental property rights. Herndon's conception of the law which solely focuses on

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[2] ORS § 166.170 provides:

(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, *possession*, storage, transportation or *use* of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.

(2) Except as expressly authorized by state **[*22]** statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, *possession*, storage, transportation or *use* of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void. *Cf. I.C. § 18-3302J(2)*.

ORS § 166.173 provides in relevant part:

(1) A city or county may adopt ordinances to regulate, restrict or prohibit the possession of loaded firearms in public places as defined in ORS 161.015.

(2) Ordinances adopted under subsection (1) of this section *do not apply to or affect*:

…

(c) A person licensed to carry a concealed handgun. …

the public ownership of the property to limit the fundamental rights of any party that may lease the property, or even later own the property, is wholly unsupported in the law. [3]

To adopt Herndon's viewpoint that Section 18-3302J is an encumbrance on public property that runs with the land, despite no express language or authority which would support such an interpretation, would mean that if the City conveyed War Memorial Field to a private party, the private party purchaser would receive the property and be unable to exclude persons carrying firearms from the property simply because, in Herndon's view, the City lacked the property right and could not convey such a right. That result is clearly not contemplated anywhere in Idaho law.

Herndon has offered no authority which supports the proposition that the Festival, as a private tenant, could not lawfully exclude persons carrying firearms from the premises it leased. With no cogent argument or authority for such a position, Herndon's argument should not be considered. *Lamprecht v. Jordan, Ltd. Liab. Co., 139 Idaho 182, 187, 75 P.3d 743, 748 (2003)*.

3. The Lease of War Memorial Field to the Festival [*26] was Lawful and Proper. Herndon's Arguments Regarding the Validity of the Lease Are Unsupported in the Law.

Herndon continues to advance the argument that the 2019 lease between the City and the Festival should not be classified as a lease at all because, according to Herndon, the City did not comply with *Idaho Code § 50-1409* when it executed the 2019 lease. Appellants' Brief at pp. 15-18, 24-26. Herndon claims the City could not lease War Memorial Field to "anyone unless its 'Mayor and council…, by resolution, authorizes the lease of the property as not needed for city purposes, and upon such terms as may be just and equitable." Appellants' Brief at p. 16. Herndon contends that in order for the lease of municipally owned property to be valid there must be a resolution, a finding that the property is "not needed for city purposes," and a finding that the lease terms are "just and equitable" and relies on the *Bopp v. Sandpoint* case in support thereof. *Id.*

Idaho Code § 50-1409 provides that the mayor and council are authorized to lease any city property not needed for city purposes, and the city council "may, by resolution, authorize the lease of any property *not needed for* ***[*27]*** *city purposes*, upon such terms as may be just and equitable", "may set apart portions of the public parks, playgrounds or other grounds to be used from time to time for athletic contests, golf links, agricultural exhibits, ball parks, fairs, rodeos, swimming pools and other amusements", and may "make and enter into proper contracts with organizations and associations necessary and proper to carry out the purpose of this provision." (emphasis added).

The provisions of Section 50-1409 cannot be read in isolation nor may particular provisions of the statute be ignored. *Nelson v. Evans, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020)*. Likewise, courts have a duty to ascertain the purpose and intent of the legislature by reading the whole act, without separating one statutory provision from another. *George W. Watkins Family, 118 Idaho at 539, 797 P.2d at 1387*. The court is thus bound to give effect to *Idaho Code § 50-1401* which provides:

> It is the intent of this *chapter* that cities of the state of Idaho shall have general authority to manage real property owned by the city in ways which the judgment of the city council of each city deems to be in the public interest. The city council shall have the power to sell, exchange or convey, by good and sufficient deed **[*28]** or another appropriate instrument in writing, any real property owned by the city *which is underutilized or which is not used for public purposes*.

(emphasis added). The statutory provisions contained in Title 50, Chapter 14 pertain to the requirements for conveying property which is "underutilized or which is not used for public purposes", to wit, a city's surplus property.

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[3] This Court recognizes that the public does not enjoy an unfettered right to enter publicly owned property. Under Idaho's criminal **[*25]** trespass statutes, there is no distinction made between property which is publicly owned as opposed to privately owned; the government may trespass individuals from public property. *See State v. Clark, 161 Idaho 372, 376, 386 P.3d 895, 899 (2016)*; *State v. Korsen, 138 Idaho 706, 713, 69 P.3d 126, 133 (2003)*; *see also State v. Pentico, 151 Idaho 906, 911-12, 265 P.3d 519, 524-25 (Idaho App. 2011)*.

I.C. § 50-1401. Herndon's contention that the City was required to comply with Section 50-1409 by passing a resolution which specifically found that War Memorial Field was not otherwise needed for City purposes and specifically stated that the terms of the lease with the Festival were just and equitable demonstrates a misunderstanding of the law.

To begin with, War Memorial Field is not property which is underutilized, not used for public purposes, or not needed for public purposes. R. at pp. 95-96, 521, P 9. The requirements set forth in Section 50-1409 would appear to be inapplicable to the lease of city property which is used or needed for public purposes. The City could have authorized the lease of War Memorial Filed to the Festival by a specific resolution, but it was not required to do so.

What the City did do was pass Resolution 18-54 on November 20, 2018, which adopted the City's Special Events Policy and Procedures. R. at pp. 122-149. On the same day, the City also amended Title 6, Chapter 6 of the Sandpoint City Code, which amendments set forth the requirements for permitting special events, like concerts, festivals, parades, rallies, and public assemblies pursuant to the adopted Special Events Policy and Procedures. R. at pp. 539-41. For the 2019 festival, the City and the Festival executed the lease on or about July 30, 2019. R. at pp. 524-37. Prior to the execution of the lease, the Festival was issued a Special Event Permit pursuant to City Code and the Special Events Policy and Procedures. R. at pp. 524.

The City exercised its discretion and statutory authority to lease city property through the council-approved Special Events ordinance and Special Events Policy and Procedures, which set forth the standards by which the 2019 festival, or any other special event on City property, could take place. *See* I.C. § 50-301; *Bopp, 110 Idaho at 491, 716 P.2d at 1263*; R. at p. 157, ln. 20-22. The City is authorized to delegate special event permitting, and because of the need to ensure an efficient process in permitting special events which varied in scope, purpose, cost, and complexity, the City created a blanket policy for all special events that occupy streets or other public property managed by the *City. R. at pp. 519-20, P 3*. After the City Council adopted the Special Events ordinance and passed the Special Events Policy and Procedures resolution, the City delegated the authority for permitting special events and such permits were issued administratively. R. at p. 519, P 4. The adoption of the Special Events ordinance and the Special Events Policy and Procedures was the authorization by the City Council to enter into agreements, such as the 2019 lease with the Festival. R. at p. 157, ln. 20-22. The 2019 lease was executed on the authority of the properly adopted ordinance and Special Events Policy and Procedures resolution. *Id.* In accordance with such delegated authority, the City issued a special event permit to the Festival and executed the 2019 lease. R. at pp. 523-37.

An examination of Title 50 further underscores the propriety of the City's actions. *Idaho Code § 50-301* contains the initial grant of broad **[*29]** general authority to lease city property. Thereafter, the statutory provisions relating to leases speak to specific circumstances. *See* §§ 50-220 (lands outside corporate limits); 50-234 (mining property); 50-305 (hospitals); 50-321 (aviation facilities); 50-324, 50-326 (city-owned water, electric, and natural gas systems); 50-1030 (public works systems); 50-1401 *et seq.* (surplus property); 50-1803 (city's water stock); 50-1904 (housing authority); 50-2011, 50-2015 (lease of property by or to urban renewal agency); 50-2623, 50-2624 (property within a business improvement district); 50-2716 (industrial development facility). For these specific circumstances, the specific statute will control. *State v. Roderick, 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962)*. For leases where no specific statute addresses the circumstance, the general statute, Section 50-301, will control. *Id.*

The execution of the 2019 lease with the Festival was lawful and proper. Even if this Court were to agree with Herndon that compliance with Section 50-1409 was required, Herndon has failed to provide any admissible evidence of "glaring informality or illegality in the proceedings" or evidence of a clear abuse of discretion relating to the execution **[*30]** of the lease, and instead has relied solely upon conclusory, unsupported arguments. *Bopp, 110 Idaho at 491, 716 P.2d at 1263* (internal quotations omitted). Contrary to Herndon's position, *Bopp* does not impose any specific requirements in addition to those set forth by statute upon a municipality when leasing city property, whether the property is surplus or not. *See id*. The City adopted an ordinance and passed a resolution to streamline the process for special events. Neither at the district court, nor before this Court, has Herndon presented any legal authority for their conclusion that, absent the specific resolution they contend should have been passed, the contract between the City and the Festival cannot be classified as a lease. *See* *Krasselt, 99 Idaho at 125, 578*

P.2d at 241 ("A lease is a particular kind of contract wherein (generally) a leasehold interest in realty is given in return for a promise to pay rent periodically.").

In any event, Herndon lacked standing to challenge the lease of War Memorial Field in 2019. To have standing, a litigant "must allege or demonstrate an injury in fact and substantial likelihood the relief requested will prevent or redress the claimed injury." Young v. City of Ketchum, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Standing requires a showing **[*31]** of a "distinct palpable injury" and a fairly traceable causal connection between the claimed injury and the challenged conduct." *Id.* Standing is lacking when the asserted harm is "a generalized grievance shared by all or a large class of citizens." *Id.* "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing." Troutner v. Kempthorne, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). Concerning the process of how the 2019 lease was executed, Herndon failed to show that they suffered some injury which was one not generally shared by all residents alike nor did they demonstrate how the district court could remedy any injury.

4. The Lease of War Memorial Field to the Festival Did Not Violate Public Policy.

Herndon advances two theories to argue that the lease of War Memorial Field violated public policy. Appellants' Brief at pp. 30-34. First, it was, or would be, against public policy for the City to make a finding that a public park was not needed for city purposes. *Id.* at p. 31. Second, the City acted contrary to the public interest because the Festival's weapons policy violates the Second Amendment and the City could not circumvent state and federal law through a lease. Id. at pp. 32-34.

Herndon's first argument is nonsensical and unsubstantiated by any law. On the one hand, Herndon argues that the City had to make a finding that War Memorial Field was not needed for City purposes, and **[*32]** then turns and says it would be a "gross violation" of the public trust and a misappropriation of public property for it do so. Appellants' Brief at p. 31. Even if the City had made the determination that War Memorial Field was not needed for City purposes, nothing in Section 50-1409 excepts public property which may honor service members from its purview.

The second argument is legally flawed, flatly wrong, and only supported by superficial analysis and cherry-picked quotations from inapplicable cases. It is evident that Herndon either misunderstands or misinterprets property rights and governmental action.

Nordyke v. Cty. of Santa Clara is inapposite since, in that case, restrictions were imposed on the sale of guns in an addendum to a lease of county fairgrounds (which indisputably did not occur here), and the constitutional infirmity alleged by the plaintiffs was a violation of the First Amendment. 933 F. Supp. 903 (N.D. Cal. 1996); *see* Nordyke v. Santa Clara Cty., 110 F.3d 707 (9th Cir. 1997). There was no Second Amendment analysis by the court, and the analysis of the propriety of including such restrictions in a lease addendum was centered on the curtailment of commercial speech. 933 F. Supp. at 906-09; 110 F.3d at 710-13.

O'Bryant v. Idaho Falls ***[*33]*** concerned an attack on the validity of an ordinance granting an exclusive franchise and has no application to this case. 78 Idaho 313, 303 P.2d 672 (1956). *Mountain States Tel. & Tel. Co. v. Boise* does not support Herndon's position, but the City's. 95 Idaho at 266, 506 P.2d at 834 ("Whether property will or will not be needed for city purposes, presently or in the future, is within the power of the City Council to decide.").

What Herndon continually fails to acknowledge is that not a single provision in the 2019 lease between the City and the Festival speaks to the Festival's weapons prohibition, the City did not adopt or enforce the Festival's rule, the Festival at all times acted as a private entity, and Section 18-3302J does not apply to private actors. The City has repeatedly asserted that the Festival, as a private entity, had the right to exclude people from War Memorial Field, including those in possession of firearms, during the term of its lease, and that such action by the Festival was not proscribed by Section 18-3302J. It cannot be against public policy for the City to recognize the existing property rights of the Festival and to not interfere with those rights when it leased War Memorial Field.

5. Herndon's Unclean Hands Argument Was [*34] Not Argued to the District Court and May Not Be Considered by this Court.

"The unclean hands doctrine stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 273, 371 P.3d 322, 327 (2016)*** (internal citations omitted). On appeal, Herndon argues that the City chose to deal with the Festival through a defective lease which was executed in violation of Idaho law, and such conduct is evidence of unclean hands. Appellants' Brief at pp. 24-26. Herndon made no argument to the district court that it should apply the doctrine of unclean hands against either the City or the Festival. R. at pp. 278-301, 436-99, 556-91, 664-68. It is well established that this Court "will not consider issues raised for the first time on appeal." *ABK, Ltd. Liab. Co. v. Mid-Century Ins. Co., 166 Idaho 92, 101, 454 P.3d 1175, 1184 (2019)* (internal quotations omitted). Herndon may only present theories which were argued to the court below. *Id.*

C. The District Court Correctly Determined That Herndon's Attacks On The Lease Between The City And The Festival Were Improper.

Judicial estoppel is an equitable doctrine intended to protect the dignity of the judicial process which is invoked by a court at its discretion. *Med. Recovery Servs., Ltd. Liab. Co. v. Eddins, Idaho , 494 P.3d 784, 791 (2021)*. Judicial estoppel is not an affirmative defense that must be raised by a defendant in a responsive pleading. *Med. Recovery Servs., Ltd. Liab. Co. v. Siler, 162 Idaho 30, 35, n.2, 394 P.3d 73, 78 (2017)*. Judicial estoppel serves several purposes. It "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Frost v. Gilbert, Idaho , 494 P.3d 798, 817 (2021)* (internal quotations omitted). It is intended to protect against litigants "playing **[*35]** fast and loose with the courts." *McKay v. Owens, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997)*. It is also intended to "prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action." *Eddins, Idaho , 494 P.3d at 791* (internal quotations omitted).

This Court has applied factors from the U.S. Supreme Court which "inform a court on whether to apply judicial estoppel in a particular case". *See Safaris Unlimited, Ltd. Liab. Co. v. Jones, Idaho , 501 P.3d 334, 340 (2021)* (citing *New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001))*. These factors include: "(1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether the party has succeeded in persuading a court to accept the party's earlier position, 'so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled,' and (3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage on the opposing party if not estopped.'" *Id* (quoting *532 U.S. at 750-51*).

Herndon's complaint alleged that, "[t]he City of Sandpoint leases a public park to the Festival at Sandpoint, Inc., every August", and "Currently, and for several decades now, [the City] has entered into a written agreement (contract or lease) with [the Festival] to rent the War Memorial Park for a series of music concerts and art/cultural events (the Festival) for approximately two weeks during the month of August", and "As evidenced by the written agreement between the City [] and the Festival []..." R. at pp. 10, 14, 20. The allegation that the City and the Festival had a written agreement for the rental of War Memorial Field for two weeks during the summer for the music festival was expressly incorporated into every cause of action. R. at pp. 14, 16, 19-22.

In their summary judgment briefing, however, Herndon claimed they were challenging the classification of the agreement between the City and the Festival as a "lease". R. at p. 284. Herndon argued that the City did not comply with Section 50-1409 for the lease of War Memorial Field to the Festival, and so, the City lacked the power to lease War Memorial Field and the Festival could not be a leaseholder. R. at p. 481. As Herndon put it, the "lease" was invalid and the City was unauthorized to lease War Memorial Field to anyone unless it complied with Section 50-1409. R. at p. 461.

Herndon argues that Idaho R. Civ. P. 8 allows the inconsistent factual positions and the courts are required to construe their pleadings so as to do justice. Appellants' **[*36]** Brief at pp. 19-20. While Rule 8 permits a party to

plead inconsistent claims or defenses, it has not been construed as blanket authority for pleading any set of differing facts by a party. *See* Murr v. Odmark, 112 Idaho 606, 608, 733 P.2d 827, 829 (Idaho App. 1987) ("The right to plead alternative or inconsistent facts under Rule 8 does not include a right to plead a set of facts known to be untrue… Rule 8 allows the pleading of differing facts only when there is good faith doubt as to which set of facts ultimately will be found upon the evidence adduced at trial.").

Here, Herndon relied on the representation to the court that the City and the Festival had a written agreement, described as a contract or lease, for the rental of War Memorial Field to seek declaratory and injunctive relief. Nothing in the complaint alleged that the lease was invalid or that the City lacked authority to lease War Memorial Field to the Festival. R. at pp. 9-23. Herndon also was not seeking a judicial determination of the validity of the lease. R. at pp. 14-19. Herndon sought a determination that an alleged provision or agreement in the lease was precluded by Section 18-3302J. R. at pp. 18-19.

Herndon's position at summary judgment is clearly inconsistent with the facts as alleged in the complaint. The two positions - first, that the City leased War Memorial Field to the Festival through a written agreement and had done so for several years, and second, whatever arrangement the City and the Festival had entered into for the Festival's use of War Memorial Field for the summer music festival was not a lease - are incompatible. Herndon did not merely state inconsistent claims in their pleadings; they deliberately advanced inconsistent positions at different stages of litigation. The district court's application of judicial estoppel was proper and it did not abuse **[*37]** its discretion when it determined that Herndon was precluded from attacking the validity of the lease.

Even if the Court determines that the district court should not have applied judicial estoppel, the error was harmless. *See* Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 750, 215 P.3d 457, 470 (2009) ("When a decision is based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the grounds."). As set forth above, Herndon's arguments attacking the validity of the lease were and are factually and legally unsupported, and the district court had no obligation to consider them. Lamprecht, 139 Idaho at 187, 75 P.3d at 748.

D. There Was A Complete Lack of Proof On Which A Deprivation Of Herndon's Federal Constitutional Rights Could Be Found, and Even When the Facts Were Viewed in a Light Most Favorable to Herndon, the Claims Failed as a Matter of Law.

1. Nature of *42 U.S.C. § 1983* Cause of Action.

For a plaintiff to succeed on a § 1983 claim, the plaintiff must establish the violation of a right secured by the Constitution or a federal statutory law, and that such deprivation occurred under color of state law. *Jones v. **[*38]** Williams, 297 F.3d 930, 934 (9th Cir. 2002)*; *see also* Hoagland v. Ada Cty., 154 Idaho 900, 910, 303 P.3d 587, 597 (2013). Accordingly, only those who "represent the state in some capacity, whether they act in accordance with their authority or misuse it", are proper defendants in a § 1983 case. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (internal citations and quotations omitted).

To hold a municipality liable for an alleged constitutional violation requires more than mere employment of a tortfeasor. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691-92 (1978). The Supreme Court recognized that the language of § 1983 only imposes liability when "some official policy 'causes' an employee to violate another's constitutional rights." Id. at 692. Plainly then, a municipality will not be held liable under § 1983 unless the constitutional violation "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Id. at 690.

Alternatively, for a plaintiff to succeed on a municipal liability claim, he must demonstrate that (1) the constitutional tort was the result of a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity;" **[*39]** (2) the tortfeasor was an official whose acts fairly represent official policy such that the challenged action constituted official policy; or (3) an official with final policy-making authority "delegated that authority to, or ratified the decision of, a subordinate." Ulrich v. City & County of San Francisco, 308 F.3d 968, 984-85 (9th Cir. 2002). Whether by pointing to an official policy or a custom, the plaintiff may only seek to hold the

municipality liable for acts which it has officially sanctioned or ordered and not for the acts of its non-policymaking employees. *Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986)*.

2. The State Action Doctrine.

There are important principles underlying the constitutional distinction between state action and purely private conduct. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982)*. Likewise, the state action requirement prevents the government from being held liable for the conduct of private parties for which it cannot be fairly blamed. *Id.* The state action requirement "reflects judicial recognition of the fact that 'most rights secured by the Constitution **[*40]** are protected only against infringement by governments.'" *Id* (quoting *Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978))*

The Supreme Court has applied a variety of tests to aid courts in identifying state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003)* (internal quotations and citations omitted). The "[s]atisfaction of any one test is sufficient to find state action," but "[a]t bottom, the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Rawson v. Recovery Innovations, Inc., 975 F.3d 742, 747-48 (9th Cir. 2020)*. "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Tarkanian, 488 U.S. at 192*. Herndon has claimed that the Festival is a state actor under either the public function or nexus tests, or both. Appellants' Brief at p. 40.

"Under the public function test, when private individuals or groups are endowed by the State **[*41]** with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Lee v. Katz, 276 F.3d 550, 554-55 (9th Cir. 2002)*. The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." *Id. at 555*. The relevant inquiry is whether the private actor was performing a public function at the time of the alleged constitutional violation. *Kirtley, 326 F.3d at 1092*. The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." *Flagg Bros., 436 U.S. at 163*.

Under the nexus text, the relevant question is whether "there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tennessee Secondary Sch. Athletics Ass'n., 531 U.S. 288, 295 (2001)* (quoting *Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974))*. It is ultimately the plaintiff's burden to establish state action under one of the foregoing tests. *Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916, 922 (9th Cir. 2011)*.

3. There was No Governmental Action.

The undisputed **[*42]** facts demonstrated that Herndon could not meet their burden of establishing governmental action in any of the alleged Constitutional violations. The video evidence created by Herndon, standing on its own, foreclosed any possibility of success. Nonetheless, in deciding whether there was state action here, "examples may be the best teachers". *Brentwood, 531 U.S. at 296*.

In *Villegas v. Gilroy Garlic Festival Ass'n*, the Ninth Circuit decided the question of whether attendees at the Gilroy Garlic Festival could hold the City of Gilroy, California and the Gilroy Garlic Festival Association liable in a civil rights action where certain attendees were escorted from the Garlic Festival by a Gilroy police officer for violating the festival's dress code. *541 F.3d 950, 952 (9th Cir. 2008)*. The Garlic Festival was held in a public park in Gilroy for two days in the summer. *Id. at 953*. The Garlic Festival entered into a facility reservation contract with Gilroy, and under the terms of the agreement, the Garlic Festival was required to "understand and agree" that the Gilroy Police Department could require security and traffic control. *Id.*

The Garlic Festival had a chair of security, **[*43]** along with an assistant chair, who were unpaid volunteers; one of these positions was usually a law enforcement officer with Gilroy's Police Department or another law enforcement agency. *Id.* After the festival was over, Gilroy typically submitted a bill to the Garlic Festival for providing city law enforcement officers to staff the festival. *Id.*

The Garlic Festival had an unwritten policy that prohibited attendees from wearing "gang colors or other demonstrative insignia, including motorcycle club insignia." *541 F.3d at 953*. The dress code did not allow persons wearing clothing with gang colors or insignia to remain at the festival; instead, these persons were allowed to attend the festival if they removed such clothing. *Id. at 954*. The dress code policy was adopted in response to increased gang-related violence that had occurred at the festival in the years prior. *Id.*

The plaintiffs, members of a motorcycle club, entered the festival wearing vests with the club's insignia displayed. *Id. at 953, 954*. The plaintiffs were informed by two Gilroy police officers that the Garlic Festival had a dress code policy, and if they refused to remove their vests, then they would be asked to **[*44]** leave and would be refunded their entry fee into the festival. *Id. at 954*. The plaintiffs refused to remove their vests and the police officers escorted them out of the festival to the ticket booth where the plaintiffs were refunded their entry fee. *541 F.3d at 954*.

The plaintiffs filed suit, alleging that the Garlic Festival was a state actor and that Gilroy was liable for enforcing an unconstitutional dress code which it had impliedly adopted. *Id.* In support of these arguments, the plaintiffs relied on the following facts: the festival was held in a public park, owned by Gilroy; Gilroy issued a written permit to the Garlic Festival which was signed by all of the city council members, and which required Gilroy to provide some of its police officers as security for the festival; Gilroy submitted a bill to the Garlic Festival for the use of its police officers; the 'chair of security' for the Garlic Festival was typically a police officer with the Gilroy Police Department; at the time of the incident, the chair of security was an active member of the Gilroy Police Department; and the police officer utilized the command post of the Gilroy Police Department at the festival grounds. **[*45]** *Id. at 955*.

The Ninth Circuit was not persuaded by the plaintiffs' arguments. *Id.* Relying on the factors from *Lugar* and *Brentwood* for determining whether private behavior may be treated as state action, the Court also found support from the Fourth Circuit case *United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995)*. *Id. at 954-56*. The *Villegas* Court concluded that the Garlic Festival was not a state actor for a number of reasons: running festivals was not a traditional municipal function; Gilroy required a permit, which showed that it retained control of the park and provided security services; Gilroy billed the Garlic Festival for its security services; security activity was not a dominant or major purpose of the Garlic Festival; and there was no evidence that Gilroy played a dominant role in controlling the actions of the Garlic Festival or the content of the festival. *Id. at 956*.

The Ninth Circuit also disagreed with the plaintiffs' contention that Gilroy was liable for violating their First Amendment rights by enforcing the Garlic Festival's dress code. *541 F.3d at 957*. The Court observed that "it is generally not a constitutional violation for a police officer to enforce **[*46]** a private entity's rights." *Id.* Finding that there was no constitutional violation, the Court stated that, "if the ability to exclude others from public property during the course of a limited, permitted use were found to be a constitutional violation, every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny." *Id* (internal quotation and citation omitted).

Even assuming that the plaintiffs could establish a constitutional violation, the Ninth Circuit found that they would be unable to establish municipal liability under *Monell. Id.* The Court noted that the plaintiffs pointed to the "fact that the permit requires that the City's police provide a portion of the Festival's security, that the City is reimbursed for providing such security, and that [one of the police officers] complied with the request of the [Garlic Festival's] chair of security to remove individuals who did not comply with [the] dress code." *Id. at 958*. The Court also observed that while the chair of security was a police officer, the plaintiffs had made no showing that the police officer was acting other than in his private capacity **[*47]** as the chair of security. *541 F.3d at 958, n. 5*. In light of these facts, the Court reached the conclusion that the plaintiffs could not establish that Gilroy had a policy or custom of enforcing the dress code, there was no evidence in the record of a custom or official policy of Gilroy to

enforce the dress code, and there was no evidence that any Gilroy officials participated in forming the dress code. *Id. at 958*.

In *Gallagher v. Neil Young Freedom Concert*, the University of Utah leased a campus facility for a concert performed by *Neil Young. 49 F.3d 1442, 1444 (10th Cir. 1995)*. United Concerts, Inc. leased the facility and promoted the concert, and hired a security company to provide certain security services for the concert. *Id. at 1444-45*. As part of the lease of the facility, the University required United Concerts to pay specified rental charges and expenses incurred by the University; the rental charge was a base rental fee and an additional fee calculated as a percentage of gross ticket sales. *Id. at 1445*. For security, the University was to provide personnel for crowd control, building security, public safety and fire control, traffic control, and other services. *Id.* United Concerts would pay the University **[*48]** costs it incurred for providing certain support personnel for the concert, and United Concerts would also pay for security and police services provided by officers from the University's public safety department. *49 F.3d at 1445*.

The decision of which security company was hired for crowd management services was made by United Concerts personnel and not by University officials. *Id.* For its services in providing crowd management for certain concerts, the security company had a policy to always conduct a full pat down search. *Id.* The security also had a policy of prohibiting certain items into events, which included bottles, cans, drugs, and weapons. The security company followed its policies unless it was directed by the hiring party to do otherwise. *Id.* Prior to the concert, in a meeting among University officials, United Concerts, and the security company, United Concerts directed the security company personnel to perform the pat down searches at the upcoming concert. *Id.*

On the day of the concert, the security company's personnel performed pat down searches of concert attendees. *49 F.3d at 1445-46*. The personnel wore yellow jackets with the initials of the security company **[*49]** on the front and the words 'Event Staff' on the back of the jackets. *Id. at 1446*. Uniformed officers from the University's public safety department observed the concert attendees entering the facility, and were approximately six to ten feet away from where the pat down searches were occurring. *Id.* The security company's personnel also distributed fliers to concert attendees that advised them of prohibited items, and that if the individual did not wish to be searched, they could obtain a refund for their ticket. *Id.* After the concert began, the security company personnel assisted University officers with security and crowd control. *Id.*

The plaintiffs filed suit against the Director of the facility, United Concerts, and the security company pursuant to *42 U.S.C. § 1983*, alleging the pat down searches violated the *Fourth Amendment. 49 F.3d at 1444*. The *Gallagher* court applied the nexus, public function, joint action, and symbiotic relationship tests for finding whether there was state action. *Id. at 1448-57*. The court found that under the nexus test, the fact that the University had a duty to provide security, that the Director of the facility was aware of the decision **[*50]** to perform pat down searches, and the observation of the pat down searches by uniformed officers from the University's public safety department were all insufficient to establish the nexus required for finding state action. *Id. at 1449-50*. The court concluded that the plaintiffs could not demonstrate a specific causal link between the pat down searches and a University policy that influenced the formulation or execution of the security company's policy to conduct the pat down searches. *Id. at 1450*.

In applying the symbiotic relationship test, the court was unpersuaded by the plaintiff's arguments focusing on the fact that the pat down searches occurred on University property and that the University profited from the concert. *49 F.3d at 1452*. The court emphasized that merely because objectionable conduct occurs on public property does not establish state action. *Id.* The court also found that the pat down searches did not generate profits that "were indispensable elements in the University's financial success." *Id.* Simply because there were some benefits that resulted from the University leasing the facility to United Concerts, such benefits did not establish state action. **[*51]** *Id.*

When analyzing the joint action test, the court found that even though the Director of the facility had broad authority over security for the center and that the University, United Concerts, and the security company shared a common goal to produce a profitable concert, such facts were insufficient to establish state action. *49 F.3d at 1455-*

56. The court pointed out that the University's policies to provide security were general in nature and left the specific kind of security to be provided by United Concerts to its discretion. Id. at 1455. The court also noted that a common goal to produce a profitable concert was not the same as a common, specific goal to violate a person's constitutional rights by engaging in a particular course of action, which was what was required to show concerted action. *Id.* Reiterating that the pat down search policy was adopted by the security company and approved by United Concerts, the court found that there was no evidence that such policy was influenced in any manner by a University official. *Id.* Additionally, the court disagreed with the plaintiff's contention that the observation of the pat down searches by the University officers could **[*52]** establish state action, explaining that the officers' mere presence at the scene with no participation or assistance did not transform the private act into a public one. 49 F.3d at 1455.

Finally, under the public function test, the court concluded that "providing security for a company that leases a government-owned facility for an evening" did not constitute a traditionally exclusive state function, even when the government required security measures to be taken, and thus the plaintiffs did not satisfy the requirements for establishing state action. Id. at 1457.

Turning to the instant case, Herndon has argued that the City and the Festival engaged in profit sharing, arranged their affairs and implemented mutually reinforcing policies, acted as if they were partners in the music festival, and actually were partners in the music festival. Appellants' Brief at pp. 39-40. Herndon concludes with cursory references to legal authority that state action was clearly established under either the nexus or public function tests. Id. at pp. 39-43. Herndon has never provided any legal support or evidence that the City and the Festival engaged in profit sharing, acted as partners, or engaged in collusion. R. at pp. 89-274, 278-301, 436-99, 556-91, 664-68. To support the claim that there was state action, Herndon has proffered the following assertions as evidence of such:

. The Festival, as an Idaho non-profit corporation, is bound by Art. I, Sec. 11 and Art. XII, Sec. 2 of the Idaho Constitution and is foreclosed **[*53]** from banning guns at War Memorial Field;

. The City and the Festival sought to establish War Memorial Field as a gun-free zone during the music festival because that is what the artists wanted;

. The City received a "cut" of the gate;

. The City and the Festival shared certain utility costs, and the City paid for water and sewer utilities; the security agreements were "intertwined" with the Festival responsible for security and payment to the City for additional assistance from City police officers; the Festival's security plans had to be approved by the City's Chief of Police and the Festival had to permit City police officers complete access to War Memorial Field at all times during concerts; the City's Chief of Police was to approve signage for the consumption of intoxicating beverages; the sound levels of music were regulated; the City and the Festival cooperated to maintain traffic control and parking facilities;

. Mr. Herndon and Mr. Avery were "threatened" by the Festival security and City police officers with a charge of criminal trespass if they insisted on entering War Memorial Field while armed; a City police officer told Mr. Herndon and Mr. Avery, "As long as **[*54]** you're out past the gate, you're not my issue," and "don't pass the gate"; the City Attorney "got in on the act";

. The Festival claimed to have the power to search people.

Appellants' Brief at pp. 34-35, 40-43. Herndon claims that the district court's finding that the lease between the City and the Festival allowed the festival to provide its own security with police officers standing by in case Festival security made a citizen's arrest is a disputed fact. Id. at p. 41.

The district correctly found that Herndon provided insufficient evidence of state action, even when the record was viewed in the light most favorable to Herndon. The record before the district court demonstrates that Herndon disregarded the law and advanced legal theories unsupported by well-established law, ignored the City's Special

Events Policy and Procedures, distorted the events of August 9, 2019, and failed to provide admissible evidence to support their contentions.

Like the City of Gilroy in *Villegas*, the City here contracted with the Festival for its use of War Memorial Field, the City required the Festival to have plans for security and traffic control, had police officers on scene at the **[*55]** 2019 festival that were paid for by the Festival, and similar to the Gilroy police officer, Mr. Herrington was at the 2019 in his personal capacity and was not acting other than in his private capacity. 541 F.3d at 953-54, 956, 958 n. 5; R. at pp. 358-61, 370, PP 6-23, 37; R. at pp. 383-88.

In accordance with the City's Special Events Policy and Procedures, the Festival, like any other event applying for a special event permit, was required to submit a detailed event plan, which provided information to the City relating to the event's parking and traffic control, the police and fire protection needed, the event's electricity plan, road closures and barricades needed, and the event's plans for security and clean up. R. at pp. 122-147. The Special Events Policy and Procedures informs event applicants of the necessity for parking and traffic control plans, and the event organizer's responsibilities relating to security. Id. at pp. 136-38. Specifically, event organizers are to ensure their event is safe and secure and it is their responsibility to hire security. Id. at p. 137. While City police officers may be present at the event, it is not the City's responsibility to provide the services of private security; the police officers are there to enforce the law [4]. Id. at pp. 137-38. Such actions do not support a finding of state action. Villegas, 541 F.3d at 958; *see also* Lansing v. City of Memphis, 202 F.3d 821, 829-34 (6th Cir. 2000) (no state action on similar facts as instant case).

Likewise, there are other similarities to the *Villegas* case: running festivals is not a traditional municipal function, security activity was not a dominant or major purpose of the Festival, and the City did not play a dominant role in controlling the actions of the Festival or the content of the 2019 festival. *See* 541 F.3d at 956; R. at pp. 358-63, 370, PP 6-23, 25-26, 28-30, 38-42. Such actions did not amount to state action in *Villegas* ***[*56]*** nor did such actions subject the City of Gilroy to liability. Id. at 956, 958. Those same actions in this case do not support a finding of state action or that such actions subject the City to liability.

The *Gallagher* case is also instructive. Like the security company personnel there, the security personnel at the 2019 festival wore shirts that identified them as representatives of the Festival at Sandpoint and had the word 'SECURITY' on the front; the security personnel for the Festival performed the searches outside the entrance gates to the festival, and no City police officers participated; and decisions related to the Festival's security personnel were made by the Festival. 49 F.3d at 1445-46; R. at pp. 359-69, PP 14-16, 25-26, 29-35(a-ff). Additionally, merely because the searches performed by the Festival security personnel may have been observed by a City official with no participation or assistance does not transform that private act into a public one. 49 F.3d at 1449-50; *see* Lansing, 202 F.3d at 831 (mere approval or acquiescence of the state in private activity does not render a private entity a state actor or justify holding state responsible for the private activity).

With respect to rules for the consumption of alcohol and noise levels, such requirements are found in the Sandpoint City Code, and regardless of whether an event is held on public or private property, such ordinances remain in effect. R. at pp. 542-52. Likewise, event organizers must comply with laws pertaining to use and distribution of electrical power. R. at pp. 139-40. For all events, and not just the Festival, the City pays for water and sewer utilities. Id. at p. 140. Finally, the "cut of the gate" is not profit sharing. R. at p. 375, P 12. The Festival pays a portion of each ticket sold as consideration for the lease of the property. R. at pp. 404-13; R. at p. 375, P 12. The manner in which the Festival pays for the lease of War Memorial Field is based on the City's fee schedule which applies to all other special events using City property. R. at pp. 112, 129. As the Court can easily verify, the terms of

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[4] In any event, it would not be a constitutional violation for the City to enforce a private entity's rights, meaning it would not be a constitutional violation for the City to enforce the Festival's rights. 541 F.3d at 957. The *Villegas* court recognized that, "if the ability to exclude others from public property during the course of a limited, permitted use were found to be a constitutional violation, every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny." *Id.*

the 2019 Lease reflected the policies set forth in the City's Special Events Policy and Procedures. None of these facts support a finding of state action. *See* Lansing, 202 F.3d at 829-32 (state regulation, utilization of public services, mere economic benefit to public entity, lease of public facility, and coordination of traffic control and security all insufficient to satisfy state action test).

The City, just like any other private property owner leasing its property, has the power to preserve its property for the use to which it is lawfully dedicated. *See* Greer v. Spock, 424 U.S. 828, 836-37 (1976). The Special Events Policy and Procedures and the terms of the 2019 lease reflect such prudence. That the City requires private parties using its public property for events to have security plans, or comply with City ordinances and state law, or cooperate with the City to develop a traffic control and parking plan are not indications that the City and the private party are joint actors, but evidence of the City's **[*57]** intent to establish respective roles and expectations of the parties. The City is responsible for public safety regardless of whether a special event is being held on its property. *See* Lansing, 202 F.3d at 832 (conditioning the lease, use agreement, and council resolution on private entity's compliance with city regulations, city and private entity "clearly established separate spheres of responsibility".).

None of the actions relied upon by Herndon amount to state action under any test. Herndon's reasoning that the Festival is bound by Art. I, Sec. 11 and Art. XII, Sec. 2 and is thereby a state actor is plainly unsound. The suggestion that searches for contraband are only authorized if the entity is statutorily authorized to conduct such activities is erroneous, as is the contention that the search policy of the Festival constituted state action.

The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." Lee, 276 F.3d at 555. Herndon cites a 1977 Fifth Circuit case that indicates that "parks" are a function usually reserved to the state in support of their conclusion that the Festival was a state **[*58]** actor under the public function test. Appellants' Brief at p. 43; *see* Roberts v. Cameron-Brown Co., 556 F.2d 356, 358 (5th Cir. 1977). The idea that the operation of parks is traditionally and exclusively a governmental function has long been disavowed by the U.S. Supreme Court and Circuit courts. *See* Flagg Bros., 436 U.S. at 159 n.8; Villegas, 541 F.3d at 955-56; United Auto Workers, 43 F.3d at 908. The district court correctly found that conducting a music festival was in no way a governmental function.

With respect to the nexus test, the private conduct may be treated as that of the state itself when the plaintiff can establish a close nexus between the state and the challenged action. Brentwood, 531 U.S. at 295. As discussed above, the *Villegas* case applied the nexus test and on markedly similar facts, found no state action. The district court heeded the rationale in *Villegas* and properly determined that Herndon had not presented sufficient evidence to establish the required nexus.

The facts here do not support a finding that the conduct of the Festival may be treated as that of the City. The City and the Festival had defined roles and responsibilities; the Festival put on the concert series; **[*59]** the Festival was responsible for security; the Festival was responsible for parking and traffic; the Festival promulgated and solely enforced the policy of prohibiting festival patrons from bringing firearms into the festival; and the Festival's security team did not allow Mr. Herndon and Mr. Avery to enter the festival. Furthermore, Herndon did not and cannot establish that the City had a policy or custom of enforcing the Festival's firearms prohibition, there is no evidence of a custom or policy of the City to enforce the Festival's firearms prohibition, and there is no evidence that any City official participated in forming the Festival's firearms prohibition. 541 F.3d at 958.

For Herndon to have succeeded on their § 1983 claims, they were required to demonstrate (1) the violation of a right secured by the Constitution or a federal statutory law, and (2) that such deprivation occurred under color of state law. *Jones, 297 F.3d at 934*. Herndon failed to establish the necessary state involvement to succeed on their claim. For this reason alone, all of their federal claims failed. Notwithstanding that there was no deprivation of a constitutional right under color of state law, **[*60]** Herndon's federal claims were also properly dismissed because there was no violation of any right secured by the U.S. Constitution or a federal statutory law.

4. There Was No Deprivation of Herndon's Second Amendment Rights.

Herndon claimed that they were denied access to a public event, on public property, based on their exercise of a fundamental right to bear arms in public for self-defense purposes, and thus their Second Amendment right secured by the U.S. Constitution was infringed. R. at p. 21. The *Second Amendment of the U.S. Constitution* protects "the right of the people to keep and bear Arms." The U.S. Supreme Court [5] has recognized that the Second Amendment guarantees an individual right to possess and keep a firearm in one's home for self-defense. *McDonald v. City of Chicago, 561 U.S. 742 (2010)*; *District of Columbia v. Heller, 554 U.S. 570 (2008)*. The right to keep and bear arms is not unlimited, however. *554 U.S. at 626*. The Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.*

In 2019, there was no clearly established right guaranteeing Mr. Herndon or Mr. Avery the right to openly carry a firearm in public for their individual self-defense, nor was there a clearly established right to carry a concealed firearm in public. *Young v. Hawaii, 992 F.3d 765, 821 (2021)*; *Peruta v. Cty. of San Diego, 824 F.3d 919, 927 (9th Cir. 2016)*, *cert. denied* *Peruta v. California, 137 S. Ct. 1995 (2017)*. Notably, while the Idaho Constitution recognizes **[*61]** the "right to keep and bear arms," there is nothing in Article I, § 11 which grants a person a constitutional right to carry a concealed weapon. *I.C. § 18-3302(1)* [6]; Idaho Attorney General Opinion 90-03.

Herndon's claim for violations of their Second Amendment rights fails as a matter of law. In 2019, there was no guaranteed right under the Second Amendment which would allow Mr. Herndon or Mr. Avery to carry a firearm, whether openly or concealed, into the *2019 Festival. Young, 992 F.3d at 821*; *Peruta, 824 F.3d at 939*. Where there is no violation of a right secured by the Constitution, there can be no liability under § 1983. *Jones, 297 F.3d at 934*

5. Existing Case Law Precludes Herndon's Equal Protection Clause Claim.

Herndon contended that the City and the Festival violated the Equal Protection clause of the Fourteenth Amendment by discriminating against their access to a public event, on public property, based on their exercise of a fundamental right protected by the Idaho and United States Constitution. R. at p. 22. Herndon's claim is primarily a Second Amendment claim, not a viable Equal Protection clause claim, and was properly dismissed.

The Ninth Circuit has previously addressed such "Second Amendment claim[s] dressed in equal protection clothing". *Teixeira v. Cty. of Alameda, 822 F.3d 1047, 1052 (9th Cir. 2016)*, *vacated in part by*, *854 F.3d 1046 (9th Cir. 2016)*, *and reh'g en banc*, *873 F.3d 670 (9th Cir. 2017)* (affirming dismissal of Equal Protection clause claims), *cert. denied*, *138 S. Ct. **[*62]** 1988 (2018)*. In *Teixeira*, the Court noted that "[m]erely infringing on a fundamental right" does not implicate the Equal Protection clause, and "because the right to keep and bear arms is not only a fundamental right…but an enumerated one, it is more appropriately analyzed under the Second Amendment than the Equal Protection Clause." *822 F.3d at 1052* (citing *Albright v. Oliver, 510 U.S. 266, 273 (1994)*; *Graham v. Connor, 490 U.S. 386, 395 (1989)*). The *Teixeira* court concluded that an equal protection challenge based on the alleged infringement of the Second Amendment was "subsumed by, and coextensive with" the Second Amendment claim and therefore was not a cognizable claim under the Equal Protection clause. *822 F.3d at 1052*.

The claim for a violation of the Equal Protection clause is entirely duplicative of the Second Amendment claim, and Herndon cannot simply recharacterize their Second Amendment claim as an Equal Protection clause claim. Furthermore, Herndon has failed to identify what fundamental right they have been denied while others were

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[5] The Second Amendment analysis provided in this brief reflects the applicable law in August 2019, and does not incorporate analysis of the recent U.S. Supreme Court decision *New York State Rifle & Pistol Association, Inc. v. Bruen, S. Ct. , 2022 U.S. LEXIS 3055 (2022)*, since *Bruen* cannot be considered clearly established law for purposes of this Court's analysis. *See* *Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1160 (9th Cir. 2014)* (right allegedly violated must be clearly established at the time of the alleged violation).

[6] In any event, Herndon's § 1983 claims cannot be based on alleged violations of state law. *Smith v. City & Cty. of Honolulu, 887 F.3d 944, 952 (9th Cir. 2018)*.

permitted to exercise such right. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). There is no legal authority which guarantees Herndon the right to "equal access to the public parks in Sandpoint" or a right **[*63]** to "full participation in the arts and culture" of Sandpoint. Appellants' Brief at p. 45. For these reasons, Herndon's Equal Protection clause claim was properly dismissed by the district court.

6. Herndon Failed to Present Any Argument or Authority in Support of the Conspiracy Claim and Has Waived the Issue.

Herndon has alleged that the City and the Festival conspired to deprive them of the equal protection of the laws, and/or equal privileges and immunities under the law, based on their exercise of the fundamental right to bear arms as guaranteed by the Second Amendment, and alleged such claim pursuant to 42 U.S.C. § 1985(3). R. at pp. 20-21. In order for Herndon to prove the claim, they were required to show "(1) that some racial, or perhaps otherwise class-based, invidiously discriminatory animus lay behind the conspirators' action and (2) that the conspiracy aimed at interfering with rights that are protected against private as well as official encroachment." Butler v. Elle, 281 F.3d 1014, 1028 (9th Cir. 2002) (internal quotations and citations omitted) (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993).

The claim fails as a matter of law for numerous reasons. "The Supreme Court has not defined the parameters of a class beyond race, but the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." Butler, 281 F.3d at 1028. Herndon has failed to present any factual basis or legal authority to support that they were members of a suspect or quasi-suspect class to be afforded special scrutiny or protection. **[*64]** *See* Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992). Herndon has likewise failed to provide any evidence that the actions of the City and the Festival were aimed at depriving Herndon of any constitutional rights. *See* Butler, 281 F.3d at 1028.

Notably, the guarantees of the Second Amendment are not insulated from private infringement. *See* McDonald, 561 U.S. at 753, 778-91 (recognizing that the Second Amendment originally applied only to the federal government in its holding that the Second Amendment was made applicable to the States through the Fourteenth Amendment). The failure to establish a violation of the Second Amendment, Fourth Amendment, or the Equal Protection clause forecloses any chance of success on the § 1985 claim. Caldeira v. Cty. of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) ("The absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations.").

On appeal, Herndon proffers a passing argument in support of the conspiracy claim mixed in with their argument on the Equal Protection clause claim. Conclusory statements that there was a conspiracy are wholly insufficient. Herndon has thus waived the claim and the Court should affirm the lower court's dismissal. Hodge v. Waggoner ***[*65]*** , 164 Idaho 89, 92 n.4, 425 P.3d 1232, 1235 (2018); Gallagher v. State, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005).

E. Herndon Failed to Timely Object to the City's and the Festival's Motions for Costs and Attorneys' Fee and Thus Waived Any and All Objections. Herndon Voluntarily Paid the Judgments and Rendered the Issue Moot.

Following the district court's entry of judgment, the City filed its motion for costs and attorneys' fees, along with the memorandum of costs and supporting affidavit of counsel on June 24, 2021. R. at pp. 692-720. In accordance with Rule 54, Herndon should have filed their objection to the motion on July 8, 2021. Herndon did not file an objection until August 31, 2021. Aug. at pp. 2-4. In that filing, Herndon only stated that they objected to both the City's and the Festival's requests for attorney fees, and advised that they would file a "formal motion" to request relief from their "tardy response" if needed. *Id.* On September 9, 2021, Herndon filed a memorandum of points and authorities in support of a motion for extension of time or relief from the deadline to object to the City's and the Festival's motions for attorney fees and costs, citing Idaho Rules of Civil Procedure 2.2, 55, and 60 in support thereof. Aug. at pp. 5-55.

The district court heard Herndon's motion on October 29, 2021, and denied the motion. Aug. at pp. 96-99. The district court found that Herndon's objection was untimely, the reasons presented for their failure to timely object unsatisfactorily explained the late filing, and Herndon had thus waived their right to object. *Id.*

Idaho Rules of Civil Procedure 54(d)(4) and (e)(5) require the prevailing party to file and serve its memorandum of costs and attorney fees on the adverse party within 14 days of the entry of judgment. If the prevailing party fails to timely file a memorandum of costs, the party waives its right to costs. I.R.C.P. 54(d)(4). The adverse party may object to the memorandum of costs and attorney fees by filing and serving a motion to disallow costs within 14 days of service of the prevailing party's memorandum. I.R.C.P. 54(d)(5), (e)(6). Similar to Rule 54(d)(4), if the adverse party fails to timely object to the memorandum of costs and attorney fees, such failure constitutes a waiver of the party's right to contest the award of attorney fees. I.R.C.P. 54(e)(6); *Siler, 162 Idaho at 35, 394 P.3d at 78*. The district court's denial of Herndon's motion was proper since it was clear that appellants had failed to object in a timely manner in accordance with Rule 54.

The failure **[*66]** to timely object at the trial court also precludes a challenge on appeal. *See Conner v. Dake, 103 Idaho 761, 761, 653 P.2d 1173, 1173 (1982)* (The failure to timely object waives the "right to further contest the award of attorney fees."); *Long v. Hendricks, 114 Idaho 157, 162, 754 P.2d 1194, 1199 (Idaho App. 1988)* ("Lack of a timely objection precludes a party against whom fees are awarded from challenging the award on appeal."). Not only has Herndon waived the right to any and all objections at the lower court, but Herndon is also precluded from objecting at this Court.

Notwithstanding the preceding, the issue is now moot because Herndon voluntarily paid the judgment. "When a judgment debtor voluntarily pays the judgment, the debtor's appeal becomes moot, and it will be dismissed." *Frantz v. Osborn, 167 Idaho 176, 180, 468 P.3d 306, 310 (2020)* (quoting *Quillin v. Quillin, 141 Idaho 200, 202, 108 P.3d 347, 349 (2005))*. Even if Herndon had timely objected to the requests for attorneys' fees, Herndon would have had to pay the judgment to the clerk of the court pursuant to *Idaho Code § 10-1115* in order to have preserved the issue on appeal. *Id.* This Herndon did not do. Aug. at pp. 126-31. Instead, Herndon tendered payment to the City in the amount of the judgment awarded plus accrued post-judgment interest in the amount of $ 32,208.65. Aug. at pp. 129-31. The City filed a Satisfaction of Judgment on March 22, 2022. *Id.* Upon the filing of the Satisfaction of Judgment, Herndon's appeal was rendered moot. *Frantz, 167 Idaho at 181, 468 P.3d at 311*. Since the issue is moot, the Court need not consider any of Herndon's arguments regarding the appropriateness of the attorney fee award by the district court. *Id.*

F. The City Should Be Awarded Costs and Attorneys' Fees on Appeal.

Idaho Appellate Rules 40 and 41 permit an award of costs and attorney fees, respectively, to the prevailing party on appeal. An award to the City **[*67]** of costs and attorneys' fees is provided for in *Idaho Code § 12-117(1)*. Under that section, attorney's fees, witness fees, and other reasonable expenses shall be awarded to the prevailing party when the Court finds that the nonprevailing party acted without a reasonable basis in fact or law. *I.C. § 12-117(1)*.

Typically, attorney fees are not awarded in matters of first impression. *Ada Cty. v. Browning, 168 Idaho 856, 861, 489 P.3d 443, 448 (2021)*; *Arnold v. City of Stanley, 158 Idaho 218, 224, 345 P.3d 1008, 1014 (2015)*; *Saint Alphonsus Reg'l Med. Ctr. v. Ada Cnty., 146 Idaho 862, 863, 204 P.3d 502, 503 (2009)*. However, an award of attorney fees on issues of first impression is appropriate in certain circumstances. *Wagner v. Wagner, 160 Idaho 294, 302, 371 P.3d 807, 815 (2016)*; *see Browning, 168 Idaho at 861-63, 489 P.3d at 448-50*; *Arnold, 158 Idaho at 223-24, 345 P.3d at 1013-14*.

A "matter of first impression" may be an "issue that 'has never been addressed by an Idaho appellate court.'" *Browning, 168 Idaho at 861, 489 P.3d at 448* (quoting *Wheeler v. Idaho Dep't of Health & Welfare, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009))*. Even when a case involves a matter of impression, litigants do not get a "'free pass' to bring issues based on unreasonable arguments." *Id.* (quoting *Arnold, 158 Idaho at 224, 345 P.3d at 1014*) (cleaned up). "The purpose of *I.C. § 12-117* is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against

groundless **[*68]** charges or attempting to correct mistakes agencies should never have made." *Canal/Norcrest/Columbus Action Comm. v. City of Boise, 136 Idaho 666, 671, 39 P.3d 606, 611 (2001)*.

The "touchstone" of this Court's analysis under Section 12-117(1) must be whether the nonprevailing party "acted reasonably in bringing suit and through its arguments." *Browning, 168 Idaho at 861, 489 P.3d at 448*. The Supreme Court has found that a nonprevailing party acts unreasonably when the party's position contradicts the plain reading of a statute; where the nonprevailing party does not appear to have suffered actual harm from the prevailing party's actions; where the nonprevailing party advances an argument unsupported by a factual basis in the record; where the nonprevailing party advances an argument with no basis in law, fact, or common sense; where the non-prevailing party takes a position contrary to well-settled law and does not support that position with facts or law; where the nonprevailing party mischaracterizes and misapplies the law; and where the nonprevailing party pursues an unsuccessful test case despite clearly established law. *See Browning, 168 Idaho at 861, 489 P.3d at 448*; *Idaho Dep't of Envtl. Quality v. Gibson, 166 Idaho 424, 448, 461 P.3d 706, 730 (2020)*; *Arnold, 158 Idaho at 224, 345 P.3d at 1014*; *Rammell v. State, 154 Idaho 669, 678, 302 P.3d 9, 18 (2012)*.

Herndon has exhibited a pattern of advancing unreasonable arguments throughout the litigation of this case. R. at pp. 700-09. On appeal, Herndon relies on the same baseless arguments proffered to the district court, essentially doubling down on their legally flawed and unsupported positions. Herndon again advances the contradictory argument that the lease was not a "lease" and ignores the body of law applicable to the leasing of municipal property. Appellants' Brief at pp. 15-18, 24-34; R. at pp. 701-02. The state action arguments are near verbatim recitations of the factually unsupported claims argued to the district court which were contrary to well-settled law and relied upon mischaracterizations and the misapplication of the law. Appellants' Brief at pp. 7, 9, 30, 40-43; R. at pp. 702-04. Herndon's claims of collusion, profit sharing, and the Respondents acting as partners are unsupported by any admissible evidence. The material facts of the August 2019 incident are misstated throughout brief and are contradicted by Herndon's own video evidence.

Herndon again disregards that the Festival **[*69]** is a private entity and not subject to the constraints of *Art. I, § 11 of the Idaho Constitution*, *Idaho Code § 18-3302J*, or the Second and Fourth Amendments which apply to governmental entities. Herndon posits that the Fourth Amendment claim, even though clearly abandoned at the district court and not even addressed on appeal, is still viable. The arguments proffered in support of the Equal Protection clause and § 1985 conspiracy claims, again, have no support in the facts or the law. Herndon continues to deliberately mischaracterize the operative provisions of *Idaho Code §§ 18-3302(25)* and *18-3302J*.

Herndon's opening brief provides this Court with an ample basis upon which an award of attorneys' fees to the City is proper. Herndon has taken positions which contradict the plain reading of the U.S. and Idaho Constitutions, and *Idaho Code §§ 18-3302*, *18-3302J*; advanced arguments unsupported by a factual basis in the record; advanced arguments with no basis in law, fact, or common sense; taken positions contrary to well-settled law without supporting that position with facts or law; and mischaracterized and misapplied the law. On top of these actions, Herndon has not suffered actual **[*70]** harm. The record demonstrates that Herndon has acted without a reasonable basis in fact or law. Should the City prevail, it is entitled to an award of attorneys' fees pursuant to *Idaho Code § 12-117(1)*.

V. COMMENT ON AMICUS CURIAE BRIEF

Amicus Curiae commit several of the same errors as Herndon. *Idaho Code § 18-3302(25)* is misstated. The well-settled law pertaining to the existing rights of a lessee is disregarded. Speculative arguments are proffered without any evidentiary support. The fact that the lease does not contain a single provision regarding firearms is purposely omitted.

The analogy that a similar lease between another public entity and a private party could be used to discriminate against a protected class is flawed as well. Private entities are not free to discriminate against people based on race, color, religion, ethnicity, national origin, sex, or disability. *See 42 U.S.C. § 2000a et seq.*; *42 U.S.C. § 12181*

et seq.; *I.C. § 67-5909*. The Second Amendment, however, is only protected from governmental infringement. The Legislature understood this.

As the City pointed out to the district court, when Section 18-3302 was amended in 2015 to include the language in subsection 25, the State Affairs Committee specifically discussed the preservation of private property rights. R. at p. 597. Prior to H 301 [7] being introduced, Senators Werk and Hill, serving on the Senate State Affairs Committee, both expressed their concerns that the amended version of Section 18-3302 would infringe on "private interest's ability to restrict" and "impose on the rights of the property owner to restrict weapons being brought on his private property." R. at pp. 634-36. After the bill was passed in the House, it was referred to the Senate State Affairs Committee, where the committee further discussed how the amendments would affect property rights. R. at pp. 639-48. In the committee meeting minutes, it is noted that the language in subsection 25 was "inserted to provide clear direction that private property owners and *persons with a legal interest in real property retain all* ***[*71]*** *rights and remedies that exist under current law* ." R. at p. 654.

The plain language of the statute reflects such intent. The words "private property" do not modify "private tenant," "private employer," or "private business entity." If the Legislature had meant for the statute to state a "tenant of private property" it would have done so. The statute expresses the clear intent of the Legislature to protect the property rights of any private party, and that it was not just concerned with the rights of the private property owner. This is evident by the choice to identify private persons and entities with a legal interest in real property as retaining "all rights and remedies that exist under current law", and not merely the rights that exist for the owner of private property.

This Court has repeatedly adhered to the principal that, when interpreting a statute, it must give effect to the clear expressed intent of the legislature. *Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho at 895, 265 P.3d at 508*. Section 18-3302(25) is plain, clear, and unambiguous, and any argument that a private tenant leasing public property has any less right to exclude is unsupported by the Legislature's own findings.

VI. CONCLUSION

For the reasons **[*72]** set forth herein, the City respectfully requests this Court to affirm the decision of the district court.

RESPECTFULLY SUBMITTED this 29th day of July, 2022.

LAKE CITY LAW GROUP PLLC

/s/ Katharine B. Brereton
KATHARINE B. BRERETON

Attorney for Appellee City of Sandpoint

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2022, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Attorneys for Appellants:

Alexandria C. Kincaid
Alex Kincaid Law
709 S. Washington Ave.

[7] H 301 was the bill to amend *Idaho Code § 18-3302*.

Emmett, ID 83617

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I declare under penalty of perjury under the laws of Idaho and the United States of America, that the foregoing is true and correct of my own personal knowledge, and that this declaration for Certificate **[*73]** of Service was executed on July 29th, 2022.

/s/ Katharine B. Brereton

Attorney for Appellee City of Sandpoint

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PORCELLO v. The Estate of ANTHONY J. PORCELLO

Supreme Court Docket No. 46443-2018

SUPREME COURT OF IDAHO

October 18, 2019

Reporter
2019 ID S. CT. BRIEFS LEXIS 1699 *

JENNIFER PORCELLO, Plaintiff-Counterdefendant-Respondent, vs. The Estate of ANTHONY J. PORCELLO, the Estate of ANNIE C. PORCELLO and KALYN M. PORCELLO, as Personal Representative, Defendants-Counterclaimants-Appellants. The Estate of ANTHONY J. PORCELLO, the Estate of ANNIE C. PORCELLO and KALYN M. PORCELLO, as Personal Representative, Third Party Plaintiffs-Appellants, vs. MARK PORCELLO, Third Party Defendant-Respondent.

Type: Brief

Prior History: Appeal from the First Judicial District for Kootenai County. Case No. CV-16-7343. The Honorable Cynthia C.K. Meyer, District Judge.

Counsel

For Appellant Estates of Anthony J. Porcello and Annie C. Porcello and Kalyn M. Porcello, as Personal Representative: W. Christopher Pooser, ISB No. 5525, Anna E. Courtney, ISB No. 9279, STOEL RIVES LLP, Boise, Idaho.

For Respondent Jennifer Porcelloz, Terrance R. Harris, ISB No. 5484, Michael E. Ramsden, ISB No. 2368, RAMSDEN MARFICE EALY & HARRIS LLP, Coeur d'Alene, Idaho.

For Respondent Mark Porcelloz, Peter J. Smith, ISB No. 6997, Jillian H. Caires, ISB No. 9130, Smith + Malek, PLLC, Coeur d'Alene, Idaho.

Title

RESPONDENT JENNIFER PORCELLO'S BRIEF

Text

[*1] . I. STATEMENT OF THE CASE

A. Nature of the Case.

Jennifer Maggard formerly Porcello ("Jennifer") filed a declaratory judgment action asking the district court to determine the amount owing on the Promissory Note at issue (the "Note") (Joint Exhibit F), because it is an unliquidated and disputed obligation, and Jennifer contends that the Note has been satisfied in full. Jennifer asked the district court for a judicial determination of her rights and duties under the Note and Deed of Trust. Jennifer also asked for a $ 150,000 setoff against any obligation the district court determined that Jennifer owed to the defendants, which are now The Estate of Anthony J. Porcello and The Estate of Annie C. Porcello, Kalyn M. Porcello, Personal Representative ("Tony" and "Annie"). *See generally* the Verified Complaint for Declaratory Judgment. R., pp. 23-50.

B. Statement of Facts and Course of the Proceedings.

Jennifer agrees with Tony and Annie's recitation of the course of proceedings. Appellants' Brief pp. 22-23.

Jennifer agrees with Tony and Annie's statement of the facts, subject to the following particulars:

Jennifer, Mark Porcello ("Mark") and Kalyn Porcello ("Kalyn") all **[*2]** testified consistently that the plan for paying off the hard money short-term Legacy Group Capital ("LGC") loan was to sell the Woodinville home as soon as possible and use the proceeds to pay off the LGC loan. Tr., Vol. I, p. 156, L. 11 - p. 157, L. 3; Tr., Vol. IV, p. 738, L. 5 - p. 739, L. 22; Tr. Vol. VII, p. 1156, L. 3-16.

Scott Rerucha testified that he talked to Annie, Tony and Mark about the plan to sell the Woodinville home to pay off the LGC loan. *Dep. of Rerucha*, p. 110, L. 14 - p. 111, L. 5.

The only person who apparently did not know the plan for paying off the LGC loan was Tony and Annie's lawyer Joe Mijich. *Dep. of Mijich*, p. 116, L. 18 - p. 118, L. 6. Mijich testified that he was concerned about how his clients Tony and Annie were going to repay the LGC loan. *Dep. of Mijich*, p. 118, L. 8 - p. 119, L. 11.

Kalyn, Kim Parker and Mijich all testified consistently that the Note Mijich drafted for Mark and Jennifer to sign was the mirror image of the note that Tony and Annie signed for the LGC loan. Tr., Vol V., p. 756, LI. 2 -21; Tr., Vol. VI., p. 969, L. 19 - p. 97-, L. 6; p. 996, L. 22-997.L. 24; p. 999, L. 25-p. 1000, L. 9; *Dep. of Mijich*, p. 110, L. **[*3]** 12-p. 114, L. 14.

Jennifer and Mark went to Pioneer Title late in the afternoon of September 3, 2014, to sign the closing paperwork on the Hayden Lake home. This was the first time that Jennifer reviewed the Note and Deed of Trust prepared by Mijich. Prior to that, Jennifer thought she and Mark were borrowing the funds to close on the Hayden Lake home directly from LGC. Jennifer was shocked and upset that the Note was for $ 648,500 when all they were borrowing was $ 312,044.32. Jennifer refused to sign the Note and Deed of Trust and Jennifer and Mark left Pioneer Title shortly after 5:00 p.m. Tr. Vol. I, p. 158, L. 5-p. 165, L. 11.

The closing agent at Pioneer Title sent an email to Mijich and Kim Parker on September 3, 2014 at 5:15 p.m. advising them that Jennifer refused to sign the Note and Deed of Trust and that Mark would be calling Mijich to go over the Note. *Plaintiff's Ex. 8*.

Jennifer and Mark both testified consistently that after leaving Pioneer Title by car, they pulled over and made a couple of phone calls. The first call was to Tony who told them to talk to Mijich with any questions about the Note. The second call was to Mijich. When they asked Mijich why **[*4]** the Note was for $ 648,500 instead of the amount they were actually borrowing, Mr. Mijich told them that Tony and Annie wanted it for that amount since that was the amount of the LGC note, but that it didn't matter because once the Woodinville home sold the proceeds would pay off the LGC note and Jennifer and Mark would own the Hayden Lake home free and clear. R., p. 166, L. 17-p. 171, L. 5; r. p. 478, L. 5 - p. 483, L. 7; R., p. 979, L. 13-p. 982, L. 15 (Kim).

Mijich testified that he only spoke with Mark one time on September 3, 2014 at 3:35 p.m., and he knew that because he reviewed a copy of his landline telephone records from Comcast for phone number 206-621-8691, and those records only showed the one call. Those records became unusable and Mijich has been unable to get additional copies of the Comcast phone records. *Dep. of Mijich*, p. 51, 1. 7 - p. 61, 1. 13. No Comcast phone records were offered at trial.

Mijich acknowledged that he had a cell phone in September 2014, and that his cell phone number was 206-412-9400. *Dep. of Mijich*, p. 125, l. 25 - p. 126, l. 21. Kim Parker also testified that Mr. Mijich had a cell phone with the number 206-412-9400. Tr., Vol. VI., **[*5]** p. 1015, LI. 15-20.

Mark's cell phone records show that he called 206-412-9400 three times on September 3, 2014, and that the three calls combined were 25 minutes in duration. One of the calls was at 5:24 p.m. and lasted 10 minutes. This matches exactly the timeframe when Mark and Jennifer testified they spoke with Mr. Mijich after leaving Pioneer Title. *Plaintiff's Ex's. 20, 21 & 22*.

Jennifer and Mark spoke with Mijich on September 3, 2104 at 5:24 p.m. by calling him on his cell phone. Jennifer and Mark both testified clearly that Mijich told them in that conversation that when the Woodinville home sold, the proceeds would be used to pay off the LGC loan and they would own the Hayden Lake home free of any further obligation to Tony and Annie. Mijich claims the call never happened, but he based that testimony on his review of Comcast phone records for his landline. Mijich never reviewed his cell phone records. The non-party documentary evidence consisting of the email from Pioneer Title and the Sprint records for Mark's cell phone all support the testimony of Jennifer and Mark that the call happened when they said it happened.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Whether **[*6]** Jennifer is entitled to a credit against any sums determined by this Court to be owing on the Note and Deed of Trust in the amount of $ 150,000 (*Plaintiff's Exhibit 6.)*

III. ATTORNEY FEES ON APPEAL

Jennifer claims attorney fees on appeal.

TV. STANDARD OF REVTEW

Jennifer agrees with Tony and Annie's recitation of the standard of review with the following additions.

Where an order of the district court is correct but based on an erroneous theory, the Idaho Supreme Court will affirm upon the correct theory. *Idaho Sch. for Equal Educ. Opportunity v. Evans, 123 Idaho 573, 577, 850 P.2d 724, 728 (1993)*; *Andre v. Morrow, 106 Idaho 455*. 459, *680 P.2d 1355, 1359 (1984)*. This doctrine is sometimes called the "right result-wrong theory" rule.

Issues not raised before the trial court will not be considered for the first time on appeal. *Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 429-430, 95 P.3d 34 (2004)*; *Highland Enters., Inc. v. Barker, 133 Idaho 330, 341, 986 P.2d 996 (1999)* (citing *Schiewe v. Farwell, 125 Idaho 46, 49, 867 P.2d 920, 923 (1993))*.

V. ARGUMENT

A. <u>After the district court decided Tony and Annie's motion for summary judgment, Tony and Annie waived the parol evidence rule defense to Jennifer's action and engaged in the fight over parol evidence to interpret the Note and the Deed of Trust</u>.

Tony and Annie cannot be heard to complain that **[*7]** the district court weighed the parol evidence against them. Tony and Annie argued in the motion for summary judgment they filed that the Note and Deed of Trust were complete agreements and that parol evidence could not be considered to alter the terms of those agreements. R., p. 208. Although the district court did not determine the motion for summary judgment based on the parol evidence rule, the district court did address the arguments and points of law made by the parties "in the hope that it may aid the parties in resolving the declaratory judgment action." R., p. 216.

The district court's analysis of the parol evidence issue correctly determined that fraud in the inducement is always admissible to show that representations by one party were a material part of the bargain (*Thomas v. Campbell, 107 Idaho 398, 402, 690 P.2d 333, 337 (1984))* or to averments of fraud, misrepresentation, mutual mistake or other matters which render a contract void or voidable (*Tusch Enterprises v. Coffin, 113 Idaho 37, 45 n.5, 740 P.2d 1022, 1030 n.5 (1987))*. The court also observed that the Note did not contain a merger clause. R., p. 217.

From that time forward through the trial and the written closing arguments, Tony and Annie made no mention of the parol evidence rule as a bar to any of **[*8]** the evidence. Instead, Tony and Annie spent their trial time attempting to show that Mijich did not have a conversation with Mark and Jennifer; that he did not say what they say he did; that the statement attributed to Mijich was impossible as the sale of the Woodinville house could not pay off the LGC loan. This tactical decision and offer of substantial evidence on the issue is a waiver of their objection

based on the parol evidence rule. *Cf.* Kraly v. Kraly, 147 Idaho 299, 303, 208 P.3d. 281, 285 (2009) (failure to object to parol evidence is a waiver). This was not lost on the district court at the time of the memorandum decision. R., p. 472.

B. The district court properly considered parol evidence to interpret the Note and the Deed of Trust.

1. Parol evidence was admissible to show that Tony and Annie through Mijich misrepresented the Note and Deed of Trust as an inducement for Jennifer to sign them and close.

Tony and Annie argue that the district court improperly relied on Mijich's statement that Mark and Jennifer would own the Hayden Lake house "free and clear" when the Woodinville home sold and the LGC loan was paid in full. R. p. 473-478. They argue that this evidence added "new conditions" to an unambiguous **[*9]** note and deed of trust that were prohibited by the parol evidence rule. *Appellants' Brief at 25-26*.

First, Tony and Annie do not attempt to address the availability of parol evidence to show fraud or misrepresentation in the inducement, presumably because the district court did not state this as a basis in the memorandum decision. However, the evidence certainly supported that Jennifer was not going to sign a note and deed of trust that obligated her to borrow more than 200% of the amount she expected to finance on the Hayden Lake house without some explanation. Mijich's explanation, as an agent of Tony and Annie, induced her to sign and close the transaction. Parol evidence certainly was admissible for this purpose. That Tony, Annie and Mijich disavow this statement reveals its materiality and that it worked as an inducement to Jennifer to sign and close. Jennifer was going to obligate herself for $ 648,500, an amount coterminous with the LCG loan that encumbered the Woodinville house. This was the house in which Annie and Tony had previously contested Jennifer's interest and had received an arbitration award confirming that she had no interest in the Woodinville house.

2. **[*10]** Tony and Annie argue that the district court did not justify using parol evidence because the contracts were not integrated agreements and did not find fraud or mutual mistake.

Parol evidence is admissible where a written contract is not final or integrated. Nysingh v. Warren, 94 Idaho 384, 385, 488 P.2d 355, 356 (1971). It doesn't make sense when the maker of a note and the grantor on a deed of trust obligates herself to more than 200% of the amount she borrowed to finance a house. That's a pretty clear signal that the agreements are neither final nor integrated. Thus, the district court made the observation in the determination that parol evidence was admissible, "It is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense. Thus, it is appropriate for the Court to consider extrinsic evidence to determine the parties' intent at the time the Note and Deed of Trust were signed. All of the parties presented extrinsic evidence of the parties" intent." R. p. 472 (Emphasis added).

Testimony at trial amply supports the proposition that the agreements were neither final nor integrated. Mijich testified that he expected **[*11]** that the amount of the Note and Deed of Trust would be adjusted by the sale of the Woodinville house and the payment of the LGC loan encumbering it. Dep. Mijich, p. 97, L. 10 - p. 103, L. 25. Kalyn's testimony was to the same effect. Tr., Vol. VIII, p. 1329, L. 2 - p. 1330, L. 4. This was a loan, consisting of a note and deed of trust signed by Tony and Annie. Jennifer was a stranger to this note and deed of trust that encumbered real property in which she had no interest. *Defendants' Exhibit AAA*.

It is obvious that the agreements "do not make sense" to the district court, because they were not complete. Tony and Annie struggle with a false premise: that because the district court did not find that the contracts were unintegrated and not final, they weren't. Indeed, the contracts were unintegrated because they specifically were acknowledged by Tony and Annie to be mirror images of the note and deed of trust Tony and Annie had signed with the LGC for the Woodinville house. It stands to reason that if the LGC loan, which would include the loan by Tony and Annie to Mark and Jennifer on the Hayden Lake house were paid, Mark and Jennie would receive the Hayden Lake house free and clear. **[*12]**

It was only the intervening loans that changed this complexion: the new loan on the Woodinville house through Evergreen; the new loan on the Via Venito house. However, there was just no attempt to inform Jennifer of these

transactions; indeed, she found out when she received the notice of default and notice of sale in the nonjudicial foreclosure in the first quarter of 2016. Tr., Vol. IV, p. 573, L1. 1-12; Tr. Vol. V, p. 753, L1. 1-6.

3. The district court properly interpreted the Note and Deed of Trust as latently ambiguous.

It was obvious to the district court that the Note and Deed of Trust were not the entire agreement between Mark and Jennifer as borrowers and Tony and Annie as lenders. As the district court concluded the transaction did not make sense. Tony and Annie seek to narrow the district court's opportunity to find a latent ambiguity, whether the contracts are an integrated whole, to a term contained in the contracts that has different but reasonable meanings. Tony and Annie construe *Knipe Land Co. v. Robertson, 151 Idaho 449, 259 P.3d 595 (2011)* and *Cool v. Mountainview Landowners Co-operative Association, 139 Idaho 770, 86 P.3d 484 (2004)* to limit latent ambiguities to those situations where a term is susceptible of more than **[*13]** one reasonable meaning. That is not so. *Knipe* states the test for latent ambiguity as follows:

> As provided by this Court in *Potlatch Education Ass'n v. Potlatch School District No. 285*:
>
> When interpreting a contract, this Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.

148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) (internal citations and quotations omitted).

Knipe Land Co. v. Robertson, 151 Idaho 449, 454-455 (2011). Under the *Knipe* test, "A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical."

An example of a case where the language of the contract is nonsensical is *Canyon County Highway Dist. No. 4 v. Canyon County, 107 Idaho 995, 695 P.2d 380 (1985)*. In that case, the county **[*14]** commissioners divided the county into four highway districts. The county abolished the road and bridge department in favor of the highway district. During the existence of the road and bridge department, all taxes levied for the purpose of secondary road maintenance within the county were maintained in a separate dedicated fund. Supported by an attorney general opinion, the county reasoned that the highway district was not created until January 1, 1981 and laid claim to all monies remitted to the county from the sales tax fund before that date. The highway district filed a complaint seeking its proportionate share of sales tax refund moneys for 1979. On summary judgment, the district court determined that the highway district essentially replaced the road and bridge department, merely an administrative change, and that the highway district should be entitled to a portion of the sales tax refund monies. The county appealed and based its appeal on the interpretation of a statute that each taxing district's share of sales tax moneys for 1979 should be distributed to the county for distribution to each taxing district. The trial court determined:

> "[Although] the wording of I.C. § 36-3638 **[*15]** , as amended, appears unambiguous on its face, the court concludes that there is a latent ambiguity when that section is applied to the facts of this case. Canyon Highway District No. 4 took over substantially the same secondary road system that had been administered by Canyon County through its Road and Bridge Department. After its formation, Canyon Highway District No. 4 took charge of the same equipment, employees and budget that had been used by Canyon County in the operation of the Road and Bridge Department. The same people and the same government function are served by Canyon Highway District No. 4, as had been served by Canyon County."

Id. at 997, 383. The district court then concluded that the electorate's decision to reorganize a governmental function merely resulted in a change of administration, and that the latent ambiguity should permit the interpretation of the statute to remit the money to the highway district. The Idaho Supreme Court agreed, holding, "It would not be reasonable to assume that the legislature intended to allow the county commissioners to turn the responsibility for road maintenance over to the highway district while retaining the sales tax moneys which were used **[*16]** by the

county commissioners when they were discharging that responsibility. The more reasonable interpretation is that the sales tax money should follow the responsibility." *Id.*

So, a latent ambiguity need not only be based on the existence of a term in the contract that is susceptible of more than one reasonable meaning. The district court applied the correct test. There is another basis for finding a latent ambiguity. The terms of the Note and Deed of Trust, applied to the known facts, do not make sense. R., p. 471. That is what the district court did in this case. It is a proper application of the latent ambiguity doctrine. "It is clear that the Note and Deed of Trust do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense. Thus, it is appropriate for the Court to consider extrinsic evidence to determine the parties, intent at the time the Note and Deed of Trust were signed. All of the parties in this litigation presented extrinsic evidence of the parties, intent." R., p. 472.

4. Tony and Annie argue that the district court erred in relying on the perceived unfairness of the Note and Deed of Trust to find a latent **[*17]** ambiguity.

In *Knipe Land Co.*, the Court determined that where the language of employment agreements that defined a real estate agent's commission when the buyer forfeited the earnest money gave the real estate agent a higher percentage of the forfeited earnest money than he would earn if the transaction closed and the commission were split between the buyer's and seller's agent, no latent ambiguity was created.

In this case, the district court did not rely on the perceived unfairness of the Note and Deed of Trust; instead, the district court observed that the principal amount due under the Note was more than double the amount needed to purchase the Hayden Lake house. The district court didn't say this was unfair. Rather the district court felt that the Note and Deed of Trust "do not reflect the entire agreement of the parties because the Note and Deed of Trust, on their face, do not make sense." Therefore, the rejection of the unfairness argument in *Knipe Land Co*. is unavailing to Tony and Annie here.

5. Tony and Annie argue that the district court erred in using parol evidence to interpret the Note and Deed of Trust to include new conditions.

Tony and Annie read the **[*18]** district court's interpretation of the Note and Deed of Trust too narrowly when they argue that the district court relied on parol evidence to include new conditions. The court determined that the Note and Deed of Trust did not reflect the entire agreement of the parties. The parol evidence rule does not apply to unintegrated agreements. *Valley Bank v. Christensen, 119 Idaho 496, 498, 808 P.2d 415, 47 (1991)*. The Note and Deed of Trust were not integrated agreements and contemplated separate agreements to make sense.

So, when the district court relied on the Mijich telephone call, the Mijich deposition testimony, Kaylin's testimony that the amount of the Note and the Deed of Trust would be adjusted by payment on the LGC note, it makes consistent Jennifer and Mark's testimony that when the Woodinville house sold and the LGC note was paid they would receive the Hayden Lake house "free and clear." R., p. 1164. May 23, 2018, p. 54. When the LGC loan was paid, it paid for the Hayden Lake house debt. R., p. 1184. 5/23 p. 74.

6. *Idaho Code § 28-3-117* was properly employed by the district court to interpret the agreements.

Tony and Annie argue that because the parol evidence rule applies to bar evidence of prior or contemporaneous **[*19]** agreements to interpret the Note and Deed of Trust, the first clause of Section 28-3-117 applies to bar it too. This brief has shown the Court that Tony and Annie abandoned their argument about the parol evidence rule after the decision on summary judgment, never mentioned it again to the trial court during or after trial. Tony and Annie waived the parol evidence rule argument. This brief also has shown the Court that the district court did not consider the Note and Deed of Trust to be integrated agreements, because they did not make sense. Thus, the parol evidence rule did not apply. This brief has shown the Court that the district court correctly applied the latent ambiguity analysis to the Note and Deed of Trust and received parol evidence about the parties' intent.

For these reasons, the first clause of Section 28-3-117 does not apply. Therefore, the section explicitly allows the supplementation or nullification by a separate agreement "if the instrument issued or the obligation is incurred in

reliance on the agreement as part of the same transaction giving rise to the agreement." The separate agreement under this section is a defense to the obligation. Idaho Code § 28-3-117 **[*20]** .

Tony and Annie also argue that the district court misapplied Section 28-3-117 because it didn't find a separate agreement to be a defense to their obligation to pay the Note. The district court was clear. The statement attributed to Mijich as Tony and Annie's agent that the Note and Deed of Trust would be paid upon the payment of the LGC loan was consistent with the cross-collateral scheme, with Jennifer and Mark's understanding, and with Kalyn's understanding of what was going on. The district court placed stock in the consistency of Jennifer and Mark's reports of this. R., pp. 458, 473.

7. The statute of frauds does not preclude an oral, separate agreement under Idaho Code § 28-3-117.

For the first time on appeal, Tony and Annie raise the statute of frauds as a defense to the "separate agreement" encompassed in Mijich's statement that the Note would be paid upon the sale of the Woodinville house and the payment in full of the LGC loan. Tony and Annie have waived the defense.

Before trial, Tony and Annie raised the statute of frauds as a defense to Plaintiff's Exhibit 6, Annie's $ 150,000 note. R., p. 220 - 222. While not the basis for denying Tony and Annie's motion **[*21]** for summary judgment, the district court dispatched of the statute of frauds objection to Plaintiff's Exhibit 6.

Thereafter, Tony and Annie argued in their trial brief that the statute of frauds would negate a gift of the Hayden Lake home or bar Plaintiff's Exhibit 6. R., p. 285 - 286. Tony and Annie took up the application of the statute of frauds to Plaintiff's Exhibit 6 again in their written closing argument. R., pp. 392 - 394; 399 - 402.

Nowhere did Tony and Annie raise the statute of frauds as a defense to the statement by Mijich. The statute of frauds was not even mentioned in the trial transcript. Tony and Annie did not raise the statute of frauds before the trial court to exclude the Mijich statement. They cannot raise it for the first time on appeal. Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 429-430, 95 P.3d 34 (2004); Highland Enters., Inc. v. Barker, 133 Idaho 330, 341, 986 P.2d 996 (1999) (citing Schiewe v. Farwell, 125 Idaho 46, 49, 867 P.2d 920, 923 (1993)).

8. The district court properly utilized Idaho Code § 28-3-117 to take evidence of separate agreements.

The Note at issue is a negotiable instrument as defined by Idaho Code § 28-3-104(1). As such, it is governed by the Uniform Commercial Code ("UCC") § 28-1-101 *et seq.* and, to the extent that the UCC does not displace **[*22]** it, principles of common contract law and equity. Idaho Code § 28-1-103.

Particularly relevant is Idaho Code § 28-3-117, which provides as follows:

> 28-3-117. Other agreements affecting instrument. Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented or nullified by an agreement under this section, the agreement is a defense to the obligation.

The official comment to Idaho Code § 28-3-117 clearly illustrates the concept:

> 1. The separate agreement might be a security agreement or mortgage or it might be an agreement that contradicts the terms of the instrument. For example, a person may be induced to sign an instrument under an agreement that the signer will not be liable on the instrument unless certain conditions are met. Suppose X requested **[*23]** credit from Creditor who is willing to give the credit only if an acceptable accommodation party will sign the note of X as co-maker. Y agrees to sign as co-maker on the condition that Creditor also obtain the signature of Z as co-maker. Creditor agrees and Y signs as co-maker with X. Creditor fails to obtain the signature of Z on the note. Under Sections 3-412 and 3-419(b), Y is obliged to pay the note, but Section 3-117 applies. In this case, the agreement modifies the terms of the note by stating a condition to the obligation of Y to pay the note. This case is essentially similar to a case in which a

> maker of a note is induced to sign the note by fraud of the holder. Although the agreement that Y not be liable on the note unless Z also signs may not have been fraudulently made, a subsequent attempt by Creditor to require Y to pay the note in violation of the agreement is a bad faith act. . . .

This appears to be a codification of the common law of contracts as illustrated in *Thomas v. Campbell, 107 Idaho 398, 690 P.2d 333 (1984)*, and *Mikesell v. Newworld Dev. Corp., 122 Idaho 868, 840 P.2d 1090 (1992)*. In *Thomas*, the Court stated:

> The dispute is not over the meaning of certain terms in the Thomas-Campbell agreement, but rather concerns the **[*24]** representations of a seller made to a buyer to induce the buyer to purchase the land in question. Fraud in the inducement is always admissible to show that representations by one party were a material part of the bargain. *Glenn Dick Equipment Co. v. Galey Construction, Inc., 97 Idaho 216, 223, 541 P.2d 1184, 1191 (1975)*; *Utilities Engineering Institute v. Criddle, 65 Idaho 201, 141 P.2d 981 (1943)*; *Kloppenburg v. Mays, 60 Idaho 19, 34, 88 P.2d 513, 519 (1939)*; *Wollan v. McKay, 24 Idaho 691, 135 P. 832 (1913)*. Hence, the trial court erred in ruling that the parol evidence rule would preclude admission of evidence which the Thomases offered to establish representations allegedly made fraudulently with the purpose of inducing them into the transaction.

Thomas v. Campbell, 107 Idaho 398, 402, 690 P.2d 333, 337 (1984).

Likewise, in *Mikesell* the Court stated that:

> "When fraud induces a variance between a written contract and the agreement between the parties, the latter will prevail and the trial court is empowered to reform the written instrument to conform to the agreement." *Nab v. Hills, 92 Idaho 877, 883, 452 P.2d 981, 987 (1969)* (quoting *McKelvie v. Hackney, 58 Wash.2d 23, 360 P.2d 746 (1961)*). In this case, the trial court found that the fraudulent representations of Rockland Judd induced a variance between the written deed and the agreement of the parties. That finding is supported by substantial competent evidence and will not be disturbed. **[*25]** Based on that finding the trial court had authority to reform the deed to conform to the agreement actually reached between the Burgesses and Judd.

Mikesell v. Newworld Dev. Corp., 122 Idaho 868, 876-77, 840 P.2d 1090, 1098-99 (Ct. App. 1992).

That modification of the Note is based on representations made by Mijich-instead of representations made directly by Tony and Annie-is of no moment. It is well-settled in Idaho that a principal can be liable for the contract made by his or her agent. See *Wolford v. Tankersley, 107 Idaho 1062, 1066, 695 P.2d 1201, 1205 (1984)*, citing *General Motors Acceptance Corp. v. Turner Insurance Agency, Inc., 96 Idaho 691, 535 P.2d 664 (1975)*. Here, Mijich was acting as the authorized agent of Tony and Annie when he made the representations to Jennifer and Mark. In fact, Jennifer and Mark called and spoke to Mijich after 5:00 p.m. on September 3, 2014, based on Tony telling them to talk to Mijich with any questions about the Note. Tr., Vol. I, p. 165, L. 25 - p. 166, L. 10. The district correctly determined that Mijich's statements bound Tony and Annie. R., p. 474.

The representations may not have been fraudulent when Mijich prepared the Note in September 2014. Mijich, Tony and Annie may have all intended at that time that when the Woodinville home sold, its proceeds would pay off the LGC loan **[*26]** and that would satisfy the Note. But, those representations became fraudulent when as the circumstances developed, the Woodinville house did not sell. Mark reached out to Tony and Annie to obtain new financing.

Jennifer had no involvement in these subsequent transactions. When the Woodinville home finally sold in July 2015, Mark needed $ 400,000 to complete his contract to purchase the Bellevue home from Darrel Bohner. Mark convinced Tony and Annie to borrow $ 417,000 from Evergreen using the Via Venito home as collateral, and to provide Mark the loan proceeds for the Bellevue home transaction. The Woodinville sale was supposed to close before the Via Venito transaction. Tr., Vol. I, p. 205, LI. 3-15. The Woodinville home closing was delayed, which resulted in the $ 417,000 loan from Evergreen closing before the Woodinville home closed. As a result, $ 198,000 of the Evergreen loan proceeds went to pay off the LGC loan. Tr. Vol. I, p. 188, L. 10-p. 189, L. 6; Vol II, p. 313, L.

23-p. 315, L. 7. As a result, Mark was short of the $ 400,000 he needed to close on the Bellevue home. Mark then convinced Tony to pay him the $ 157,000 proceeds from the sale of the Woodinville home so he **[*27]** could use that for the Bellevue home. Tr., Vol. II, p. 313, L. 23 - p. 315, L. 7.

According to Kalyn and Tony, Mark's agreement with Tony for the $ 417,000 loan from Evergreen and the $ 157,000 proceeds from the Woodinville home was that he would pay all of that back when he sold the Bellevue home. Mark also agreed that he would pay Tony and Annie back the money they had put into the Woodinville home when he sold the Bellevue home. Mark sold the Bellevue home for $ 1.6 million in 2017. Mark allegedly did not repay Tony or Annie any of the money they loaned him to purchase the Bellevue home or the money that Tony and Annie put into the Woodinville home. There is no explanation in the record why Tony and Annie did not secure Tony's obligation on these other transactions.

Tony and Annie now argue that all of the additional transfers of cash to Mark so that he could purchase the Bellevue home are somehow linked together with the original Note Jennifer and Mark signed back in September 2014. The district court determined that Tony and Annie failed to develop this argument during trial or in their written closing argument. R., p. 476. As Annie and Tony seek to enforce the Note in violation **[*28]** of the prior agreement that it would be satisfied upon the sale of the Woodinville house and the satisfaction of the LGC loan, *Tony and Annie's actions have become both fraudulent and a "bad faith act."* *Idaho Code § 28-3-117*, Comment 1.

It took longer than anticipated for the Woodinville home to be sold. Mark was paying all of the interest only payments on the LCG loan while they were attempting to sell the Woodinville home. The $ 480,000 borrowed from Evergreen in May 2015, and the net proceeds of $ 472,000 were used to pay down the LGC loan. Kalyn described this as simply transferring part of the LGC loan to Evergreen. The $ 480,000 Evergreen loan was paid off when the Woodinville home closed. Approximately $ 198,000 was used from the second Evergreen loan to pay off the LGC loan. The LGC loan was paid in full at that time (July 2015). Mark continues to make the monthly payments on the second Evergreen loan (and is living in the Via Venito property which is the collateral for the second Evergreen loan). The purpose for that loan was to provide Mark money for the Bellevue home.

The agreement that the Woodinville home would be sold and the proceeds used to pay off the LGC loan; **[*29]** which in turn would satisfy any obligation owing by Mark and Jennifer on the Note, became part of the bargain that underlies the Note by operation of *Idaho Code § 28-3-117* and the common law of contracts. Accordingly, since the Woodinville home has sold and the LGC loan has been paid off, the Note was satisfied. The subsequent loans Tony and Annie made to Mark to purchase the Bellevue home have nothing to do with the Note. Tony and Annie's argument to the contract demonstrates that they induced Mark and Jennifer to sign the Note and Deed of Trust based on fraud. The district court properly weighed the substantial and competent evidence and supported its decision after finding that the parties agreed that the Note and Deed of Trust were discharged upon sale of the Woodinville house.

9. The district court did not err in finding that Mark and Jennifer were not in default.

Tony and Annie argue that Mark and Jennifer were in default on the Note, which by its terms came due 90 days after closing. The Note was interest only. After the Note matured, Mark continued to make the interest payments until the Woodinville house sold and the LGC loan was paid in full. Tony and Annie did not **[*30]** declare the loan in default until after Mark and Jennifer were divorced and Mark prompted them to declare a default and give notice of trustee's sale. Mijich testified that it happened. Mark denied it. Tr., Vol. II, p. 255, L. 6 - p. 257, L. 12. There is no merit in the argument that Mark and Jennifer were in default at any time before the Woodinville house sold and the LGC loan was paid in full.

C. The district court's interpretation of the parties' intent under the Note and Deed of Trust is supported by substantial and competent evidence.

Tony and Annie posit that the district court did not have substantial evidence to conclude that they were not out of pocket on the Hayden Lake house but borrowed money to allow Jennifer and Mark to purchase the Hayden Lake house and the loan Annie and Tony obtained was paid. R., p. 477. The parties intended for the Woodinville house,

once sold, to satisfy the debt owed on the LGC loan. Implicit in this argument, Tony and Annie take the position that the equity in the Woodinville house was insufficient to pay of the LGC loan. Tony and Annie's calculations of the equity in the Woodinville house and the amount necessary to repay the LGC loan, **[*31]** leaving aside Mark's later requests for refinance and new loans involving the Woodinville and Via Venito houses ignores the acquittal by Tony and Annie of $ 150,000 at the time the Woodinville house sold. *Plaintiff's Exhibit 6*. It was properly admitted and the failure of Tony and Annie to calculate it into their analysis is fatal to their position that the district court's conclusion is not supported by substantial and competent evidence.

D. The district court did not err in finding the Deed of Trust does not cover future advances.

Tony and Annie claimed that all of the additional loans from Tony and Annie to Mark so that he could acquire the Bellevue home are somehow linked together with the original Note Jennifer and Mark signed back in September 2014.

The following testimony and exhibits were produced at trial:

. Kalyn testified that prior to September 4, 2014, in her meetings with Mark, Annie, Tony and Scott Rerucha about the LGC loan; there was no discussion about refinancing the LGC loan. Tr., Vol. VIII, p. 1351, L. 6-25.

. Kalyn testified that prior to September 4, 2014, in her meetings with Mark, Annie, Tony and Scott Rerucha about the LGC loan; there was no discussion **[*32]** about loaning Mark additional funds to purchase the Bellevue home.*Id.*

. Kalyn testified that Jennifer was not present at any of the meetings she attended with Mark, Annie, Tony and Scott Rerucha to discuss the LGC loan and repayment of the same.*Id.*

. Mijich testified that there was no discussion about refinancing the LGC loan during the 90 day maturity period of the Note.*Dep. of Mijich*, p. 119, l. 13-15.

. Mijich testified that there was no discussion about Tony and Annie making future loans to Mark and Jennifer.*Dep. of Mijich*, p. 136, L. 14 - p. 137, L. 21.

. The Note by its express terms does not provide for any future advances of loan funds or any additional loans to be made in the future.*Joint Exhibit F*.

It wasn't until July 2015-approximately ten months after the Note was signed and seven months after the Note matured-that Mark convinced Tony and Annie to borrow funds from Evergreen using the Via Venito property as collateral, and to loan those funds to Mark to be used to purchase the Bellevue home. *Defendants' Exhibit Z. This transaction had nothing to do with the Hayden Lake home or the Woodinville home*. Due to a delay in closing of the Woodinville home, the Evergreen loan **[*33]** closed first and $ 198,000 of the loan proceeds were unexpectedly used to pay off the LGC loan. Mark then convinced Tony to provide him the $ 157,000 proceeds from the sale of the Woodinville home to make up for the missing $ 198,000 because he needed that money to purchase the Bellevue home. These were new loans, completely unrelated to the Note at issue, for which Mark allegedly promised to repay Tony and Annie from the proceeds of the sale of the Bellevue home.

The district court correctly observed that Tony and Annie's attempts to link all of these loans together and relate them back to the Note Jennifer signed on September 4, 2014 did not make sense. The district court correctly observed that there was no evidence of intent to cover future advance in the mortgage, particularly when Jennifer had no inkling of them and the loans were for Mark's own interests. The trial court correctly distinguished *Biersdorff v. Brumfield, 93 Idaho 569, 572, 468 P.2d 301, 304 (1970)*, citing the lack of credible evidence that the Hayden Lake house would be used to secure subsequent refinances of the Via Venito or Woodinville properties for Mark's own interest. There were no discussions regarding refinancing the LGC loan before the closing **[*34]** on the Hayden Lake Home, nor after the 90 day repayment period had expired and Mark had made interest payment for many months. Tr., Vol. VIII, p. 1351, L. 6-25. The district court also observed that during trial and in written closing argument, Tony and Annie failed to develop the advancement argument, other than to make a conclusory statement that Mark and Jennifer failed to satisfy the terms of the Note and Deed of Trust. R., p. 476. The district

court also distinguished ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 327 (2016)***, where the Court took up an erroneous deed of reconveyance and whether it would unjustly enrich the borrower if he were to retain title to the property. The district court observed that the Hayden Lake house was not a refinance; the Note and Deed of Trust matched the amount due on the LGC loan, which was paid in full. The court determined that Jennifer would not be unjustly enriched by receiving the deed to the Hayden Lake house after the LGC loan was paid in full. R., pp. 476-477.

E. Additional issue on appeal.

As to the written note from Annie and Tony to pay off $ 150,000 toward the mortgage on the Hayden Lake house, in the event that the Court determines that Jennifer **[*35]** owes Tony and Annie money for the purchase of the Hayden Lake house, Jennifer is entitled to a credit against any such sum in the amount of $ 150,000. *Plaintiff's Exhibit 6*. The evidence of Tony and Annie's obligation was properly admitted and Jennifer should be credited that amount.

F. Jennifer is entitled to costs and attorney fees.

Jennifer claims attorney fees on appeal based on the attorney fee provision in the Note and *Idaho Code § 12-120(3)*. Jennifer is entitled to an award of attorney's fees under *Idaho Code § 12-120(3)*, as her action seeking declaratory and injunctive relief arises directly out of Tony and Annie's attempt to enforce a promissory note and negotiable instrument against Jennifer. Jennifer defended against the judicial foreclosure claim which was necessarily based upon the enforcement of a promissory note.

"Attorney fees are awardable under *Idaho Code § 12-120(3)* for successfully defending against an action to recover on a note." *Bream v. Benscoter, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003)* (*citing* *Spidell v. Jenkins, 111 Idaho 857, 727 P.2d 1285 (Ct.App. 1986)*).

V. CONCLUSION

Jennifer requests that this Court affirm the trial court in all respects and that she be awarded her costs and attorney fees on appeal.

DATED this 18th **[*36]** day of October, 2019.

RAMSDEN, MARFICE, EALY & HARRIS, LLP

By: /s/ [Signature]
Michael E. Ramsden, Of the Firm
Attorney for Respondent Jennifer Porcello

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2019 I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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WILSON v. WILSON

Docket No. 46991-2019

SUPREME COURT OF IDAHO

October 15, 2019

Reporter
2019 ID S. CT. BRIEFS LEXIS 1612 *

GARY A. WILSON, Petitioner/Appellant, v. JENNIFER A. WILSON, N/K/A JENNIFER A. KINSEY, Respondent.

Type: Brief

Prior History: Nez Perce County District Court CV2017-475. Appeal from the District Court of the Second Judicial District for Nez Perce County. Honorable Jeff M. Brudie, presiding.

Counsel

Robert J. Van Idour, Attorney for Petitioner-Appellant, Residing at Lewiston, Idaho, Sarah A. McDowell- Lamont, Attorney for Respondent, Residing at Lewiston, Idaho.

Title

RESPONDENT'S BRIEF

Text

COMES NOW, Respondent, Jennifer A. Wilson, now known as Jennifer A. Kinsey, by and through their attorney of record, Sarah A. McDowell-Lamont, and respectfully submits the *Respondent's Reply Brief* **[*1]** .

I.

STATEMENT OF THE CASE

Petitioner/ Appellant, Gary A. Wilson, hereinafter referred to as "Mr. Wilson," argues in his Brief of Petitioner that he should prevail in his appeal. Respondent, Jennifer A. Kinsey, hereinafter to as "Ms. Kinsey," argues in this Reply that the magistrate court did not error in its division of property.

In the Fall of 2013, Mr. Wilson came across a home for sale at 1110 8th Avenue, Lewiston Idaho. Mr. Wilson then showed the home to Ms. Kinsey, who was taken with the house. Ms. Kinsey decided to purchase the home under her name only. Mr. Wilson sought to assist Ms. Kinsey with the purchase of the home and provided her with just under $ 35,000.00 for the down payment. The purchase of the home occurred in January 2, 2014. The lender, Mann Mortgage, insisted that the Petitioner sign a gift letter, which was admitted as Respondent's Exhibit 506. The parties were then married on June 8, 2014. In March 2015, Ms. Kinsey re-financed the home. The quitclaim deed **[*2]** admitted as Respondent's Exhibit 502 stated Ms. Kinsey was dealing with her sole and separate property as a married woman.

Mr. Wilson was employed before and after the marriage with Clearwater Paper Corporation and had both a 401K Retirement Plan and Pension Plan with that company. Mr. Wilson subsequently borrowed money from his 401K Retirement Account during the marriage and Ms. Kinsey incurred student loan debt in the amount of $ 22,000.00 while the parties were married.

After a court trial on October 17, 2017, the magistrate court ultimately held that Mr. Wilson's Clearwater 401K Retirement Account was community property, that the down payment given by Mr. Wilson to Ms. Kinsey was Ms. Kinsey's separate property and ordered an unequal division of property in favor of Mr. Wilson. Mr. Wilson appealed the decision to the district court, which affirmed the magistrate decision. Mr. Wilson now appeals the district court's decision.

II.

ISSUES PRESENTED

A. Did the magistrate court error in the valuation of Mr. Wilson's Clearwater 401K Retirement Account?

B. Did the magistrate court error in finding the $ 35,000.00 gift from Mr. Wilson to Ms. Kinsey for the purchase of the property **[*3]** located 1110 8th Avenue, Lewiston, Idaho was not an asset of the party's marriage.

C. Is Ms. Kinsey entitled to attorney fees and costs for defending against this appeal?

III.

RESPONSE TO PETITIONER/ APPELLANT'S ARGUMENT

A. The magistrate court did not error in the valuation of the Mr. Wilson's Clearwater 401K Retirement Account as the Petitioner failed to present evidence of its separate value prior to marriage.

During the court trial, Mr. Wilson failed to provide any exhibits in the form of documentation or statements to the community and separate property values of his Clearwater 401K Retirement Account. The only documentation or statements of Mr. Wilson's retirement account were provided by Ms. Kinsey as Exhibit 512. (Tr., p. 33-35). It has been well established that property acquired during the marriage is community property and the party asserting separate property has the burden by clear and convincing evidence that the property is, in fact, separate. *Barton v. Barton, 132 Idaho 394, 396, 973 P.2d 746, 748 (1999)*. While there is no dispute the Clearwater 401K Retirement Account existed prior to marriage, Mr. Wilson did not present any evidence to its separate value besides his own testimony that he contributed **[*4]** $ 128.00 every two (2) weeks to the account during the marriage. (Tr. p. 39-41). This testimony was vague and asked the court to speculate on the community and separate values of the account. Thus, the court did not error in characterizing and valuing the retirement account in the Property Value and Debt Distribution Summary as Mr. Wilson failed to present evidence of its separate nature.

Secondly, the Idaho Supreme Court applies the abuse of discretion to a magistrate court's division of property in a divorce proceeding. *Koontz v. Koontz, 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980)*. Under the abuse of discretion standard, an appellate inquiry is multi-tiered:

(1) whether the lower court rightly perceived the issue as one of discretion;

(2) whether the court acted within the outer boundaries of such discretion and consistently with any rules applicable to specific choices; and

(3) whether the court made its decision by an exercise of reason.

Hentges v. Hentges, 115 Idaho 192, 195, 765 P.2d 1094, 1097 (Ct. App. 1988).

Here, the magistrate court appears to have rightly perceived the issue of nature and value of the Clearwater 401K Retirement Account as a community property asset. As to the standard of review, the Idaho Supreme Court held that determination of the nature and **[*5]** value of property in a divorce proceeding are left to the discretion of a magistrate. See *Dunagan v. Dunagan, 147 Idaho 599, 601, 213 P.3d 384, 386 (2009)*; *Worzala v. Worzala, 128 Idaho 408, 411, 913 P.2d 1178, 1181 (1996)*; and *Kawamura v. Kawamura, 159 Idaho 1, 4, 355 P. 3d 630, 633 (2015)*. Additionally, "a trial court's findings of fact, which are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal; which is to say the findings of fact will not be set aside unless clearly erroneous." *DeChambeau v. Estate of Smith, 132 Idaho 568, 571, 976 P.2d 922, 925 (1999)*. The magistrate court, in this case, acted within its discretion, and within reason, by holding that Mr. Wilson's Clearwater

401K Retirement Account is a community property rather than separate property. Ms. Kinsey was the only party who provided the value of the account and Mr. Wilson only gave vague testimony was provided as to his bi-weekly contribution to the account. (Tr. p. 39-41). Thus, the magistrate court rightly valued the Clearwater 401K Retirement Account at $ 47,428.62 because Mr. Wilson did not present the value of the account at the time of marriage at the court trial, which was easily obtainable by contacting the account's plan administrator or offering an account statement produced near the time of the marriage as an exhibit.

Finally, **[*6]** the magistrate court did, in fact, award the Clearwater 401K Retirement Account to Mr. Wilson in an unequal division of property in his favor. In that unequal division, the court also considered the $ 35,000.00 contribution Mr. Wilson made to Ms. Kinsey's 1110 8th Avenue, Lewiston, Idaho home in that division, despite the court's holding that $ 35,000.00 was Ms. Kinsey's separate property due to being acquired prior to marriage and given to her as a gift. (Findings of Fact and Conclusions of Law, p. 3-7). Thus, the $ 47,428.62 value of the 401K Retirement Account and $ 35,000.00 contribution were both included in the Property Value and Debt Distribution Summary, leaving a net asset of $ 21,814.34 to Mr. Wilson and only $ 12,456.94 to Ms. Kinsey. If the court had valued the 401K Retirement Account at $ 4,608.00 but did not include the $ 35,000.00 contribution in the above-described Summary, Mr. Wilson would have received $ 21,006,29 of debt to Ms. Kinsey's $ 22,543.07 of debt. Further, the court held that the Clearwater 401K Retirement Account was a community debt, which will be paid by Mr. Wilson back to himself after the divorce, and it also awarded Mr. Wilson the Clearwater Pension **[*7]** Plan, without assigning it a value, or considering it in the overall division of property. (Findings of Fact and Conclusions of Law, p. 6)

Because Mr. Wilson failed to produce evidence to his separate property interest, the magistrate order ordered an unequal division of property in favor of Mr. Wilson and considered the 401K debt as a community debt, the court did not abuse its discretion in placing a value of the 401K Retirement Account.

B. The magistrate court did not error in finding the $ 35,000.00 gift from Mr. Wilson to Ms. Kinsey for the purchase of the property located 1110 8th Avenue, Lewiston, Idaho was not an asset of the party's marriage.

In his Appellant brief, Mr. Wilson claims that the court errored in not awarding him in an equitable lien upon Ms. Kinsey's home at 1110 8th Avenue home. Mr. Wilson cites ***Countrywide Loans v. Sheets and Bank of America, 160 Idaho 268, 371 P.3d 322 (2016)*** as authority that he is entitled to such a lien as Ms. Kinsey received $ 35,000.00 for the down payment of her home. (Brief of Appellant. p. 5). *Country Wide Loans* concerned a wrongly recorded full reconveyance of the deed of trust. ***Id. 160 Idaho 268, 371 P.3d at 324-28 (2016)***. That case is factually dissimilar to this case at hand where a divorce **[*8]** court determined that property acquired prior to a marriage was separate property.

Mr. Wilson also argues that the Idaho Supreme Court allows a magistrate court to consider language beyond the language of a deed or document. In this case, the magistrate court considered parole evidence and overruled Ms. Kinsey's objection to Mr. Wilson's testimony about the events surrounding the signing of the a quitclaim deed, admitted as Exhibit 502 a warranty deed, admitted as Exhibit 507, and a gift letter, admitted as Exhibit 506, for the $ 35,000.00. (Tr. p. 20-26). It is also clear from the court's Findings of Fact and Conclusions of Law that the Court consider the testimony of Mr. Wilson who said he looked to purchase real estate, came across the 1110 8th Avenue property and sought to help Ms. Kinsey to purchase the property with money just under $ 35,000.00. (Findings of Fact and Conclusions of Law, p. 2- 3). The court further found that Mr. Wilson did not have the credit to purchase the property, so Ms. Kinsey bought the property in her name only, but used the $ 35,000.00 as a down payment. (Findings of Fact and Conclusions of Law, p. 2-3).

After considering Mr. Wilson's testimony, **[*9]** the court found that there was no evidence to suggest that the gift letter, which was admitted as Exhibit 506, was signed under force, inducement or undue influence. (Findings of Fact and Conclusions of Law, p. 2). The court further found the language of Exhibit 506 gift letter was unambiguous. (Findings of Fact and Conclusions of Law, p. 4). More importantly, the court held the $ 35,000.00 was received by Ms. Kinsey from Mr. Wilson prior to the marriage based upon *Idaho Code Sections 32- 903* and *32-906*, and that it

did not have jurisdiction to make a characterization of the $ 35,000.00 as the money and house were not an asset of a divorce. (Findings of Fact and Conclusions of Law, p. 4).

Idaho Code Section 32-903 provides,

SEPARATE PROPERTY OF HUSBAND AND WIFE. All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either by gift, bequest, devise or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.

Idaho Code Section 32-906 provides,

COMMUNITY PROPERTY - **[*10]** INCOME FROM SEPARATE AND COMMUNITY PROPERTY - CONVEYANCE BETWEEN SPOUSES.

(1) All other property acquired after marriage by either husband or wife is community property. The income, including the rents, issues and profits, of all property, separate or community, is community property unless the conveyance by which it is acquired provides or both spouses, by written agreement specifically so providing, declare that all or specifically designated property and the income, including the rents, issues and profits, from all or the specifically designated property shall be the separate property of one of the spouses or the income, including the rents, issues and profits, from all or specifically designated separate property be the separate property of the spouse to whom the property belongs. Such property shall be subject to the management of the spouse owning the property and shall not be liable for the debts of the other member of the community.

(2) Property conveyed by one spouse to the other shall be presumed to be the sole and separate estate of the grantee and only the grantor spouse need execute and acknowledge the deed or other instrument of conveyance notwithstanding the provisions **[*11]** of *section32-912, Idaho Code*; provided, however, that the income, including the rents, issues and profits, from such property shall not be the separate property of the grantee spouse unless this fact is specifically stated in the instrument of conveyance.

Further, *Idaho Code Section 32-712* provides,

COMMUNITY PROPERTY AND HOMESTEAD - DISPOSITION. In case of divorce by the decree of a court of competent jurisdiction, **the community property and the homestead** must be assigned as follows:

1. The community property must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just, with due consideration of the following factors:

(a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.

(b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to:

(1) Duration of the marriage;

(2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;

(3) The age, **[*12]** health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;

(4) The needs of each spouse;

(5) Whether the apportionment is in lieu of or in addition to maintenance;

(6) The present and potential earning capability of each party; and

(7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits. **Emphasis Added**.

Because the magistrate court characterized the $ 35,000.00 as separate property, an abuse of discretion standard is also applied. See *Dunagan, 147 Idaho at 601, 213 P.3d at 386 (2009)*; *Worzala, 128 Idaho at 411, 913 P.2d at 1181*, *Kawamura, 159 Idaho at 4, 355 P. 3d at 633*. Viewed on that standard, the court did not error in holding that the property was separate property and, thus, outside the jurisdiction of a divorce court, as *Idaho Code Sections 32-903*, *32-906* and *32-712* clearly indicate that separate property belongs to the party who acquired it prior to marriage absent proof of transmutation. Further, the Idaho Supreme Court and Idaho Court of Appeals have both clearly held that a divorce court's jurisdiction does not extend to separate property and a court neither award the separate property of one spouse to another spouse nor compel one **[*13]** spouse to sell his or her separate property to the other spouse as part of a decree of divorce . *Schneider v. Schneider, 151 Idaho 415, 426, 258 P. 3d 350, 361 (2011)*, *Pringle v. Pringle, 109 Idaho 1026, 1028-29, 712 P.2d 727, 729-30 (Ct. App. 1985)*. Here, Ms. Kinsey acquired the home and property at 1100 8th Avenue on January 2, 2014, prior to the parties' marriage on June 8, 2014, and Mr. Wilson signed two (2) deeds affirming Ms. Kinsey's sole interest in the property (Tr. p. 7, 14, 27-30, 48-47). Additionally, here was no evidence offered at trial to show transmutation of the home. The home has always been her separate property and she cannot be forced under Idaho law to give Mr. Wilson an interest in the home, even some kind of equitable lien.

Finally, the magistrate court held that it did not have jurisdiction because the amount in controversy was also over $ 10,000.00. Rule 5(C)(1) of Idaho Court Administrative Rules states, "Additional cases may be assigned to magistrates pursuant to *Idaho Code Section 1-2210* when approved by the administrative district judge of a judicial district. The additional cases assigned to magistrates may include: 1. Civil actions regardless of the nature of the action, where the amount of damages or value of the property claimed does not exceed $ 10,000." **[*14]** I.C.A.R. 5(C)(1). Mr. Wilson sought a $ 35,000.00 equitable lien for transaction that occurred prior to marriage. This equitable lien well exceeds $ 10,000.00 and therefore belongs in district court.

Therefore, the magistrates' decision is within the boundaries of the Idaho Code, Idaho Supreme Court Case law, and the Idaho Court Administrative Rules as the $ 35,000.00 and property at 1110 8th Avenue are outside its jurisdiction.

C. Ms. Kinsey is entitled to attorney fees and costs for defending this appeal.

Ms. Kinsey is entitled to attorney's fees and costs under *Idaho Code Sections 12-107*, *12-120* and *12-121*, and I.A.R. 35(b)(5), and I.A.R. 41. If Ms. Kinsey prevails in this appeal, this Court should award her, her attorney's fees and costs, because Mr. Wilson failed to meet the appropriate legal standard in this case.

IV.

CONCLUSION

For the reasons set forth above, Ms. Kinsey respectfully requests that Mr. Wilson's appeal be denied, and she be awarded attorney fees.

DATED this 15th day of October 2019.

/s/ [Signature]
Sarah A. McDowell-Lamont
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October 2019, **[*15]** I caused to be served a copy/ copies of the foregoing by the method indicated below and addressed to the following:

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WILSON v. WILSON

Docket No. 46991-2019

SUPREME COURT OF IDAHO

September 15, 2019

Reporter
2019 ID S. CT. BRIEFS LEXIS 1444 *

GARY A. WILSON, Petitioner-Appellant, v. JENNIFER A. WILSON, Respondent.

Type: Brief

Prior History: Nez Perce County District Court CV2017-475. Appeal from the District Court of the Second Judicial District for Nez Perce County. Honorable Jeff M. Brudie, presiding.

Counsel

Robert J. Van Idour, Attorney for Petitioner-Appellant Residing at Lewiston, Idaho.

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Title

APPELLANT'S BRIEF

Text

[*1] GARY A. WILSON, by and through his undersigned attorney of record, submits his appellate brief as follows:

STATEMENT OF THE CASE

Gary Wilson filed for divorce against his former spouse, Jennifer Kinsey, on March 3, 2017 in Nez Perce County, Idaho. Both parties were Idaho residents and lived in Nez Perce County at that time. The Respondent, Jennifer Kinsey, filed a Response and Counterclaim on March 15, 2017. Their case was assigned to Magistrate Kent J. Merica. The parties engaged in discovery and pre-trial hearings ultimately settling on a trial date of October 17, 2017. The trial in their case was held on October 17, 2017. After receiving evidence and testimony Magistrate Merica took the case under advisement and issued his Findings of Fact and Conclusions of Law in open court on November 30, 2017. Written Findings of Fact and Conclusions of Law memorializing the oral Findings and Conclusions were filed on March 6, 2018. A Decree of Divorce was filed. On April 17, 2018 a Notice of Appeal was filed by the Petitioner. The case was assigned to District Judge Jeff M. Brudie. A transcript of the trial was prepared and filed. A Scheduling Order was entered on September 17, 2018. Oral **[*2]** argument was heard on December 13, 2018 before District Judge Brudie. On December 13, 2018 Judge Brudie took the case under advisement. A written decision denying Petitioner-Appellant's appeal was issued. Notice of Appeal was timely filed from that decision.

FACTS OF CASE

The parties were married on June 8, 2014. (Tr. p.5) No children were born of the marriage. (Tr. p. 6) The Petitioner had accrued retirement benefits prior to the parties' marriage and was fully vested in the pension program prior to the parties' marriage. (Tr. p.16) The Respondent incurred student loans during the marriage in her successful pursuit of a master's degree in social work. (Tr. pp. 58-59)The Petitioner was employed by the Clearwater Paper

Corporation before his marriage to Respondent and remains employed there. (Tr. p. 14) The Respondent began working for the State of Idaho Department of Health and Welfare as a social worker and continues her employment there. At the time of the divorce she was not vested in PERSI, based on her lack of five (5) years employment with DHW.

A core asset in this case is the home purchased in January of 2014, prior to the parties' marriage and occupied by the parties **[*3]** until their separation. (Tr. p. 7) The Respondent remained in the home after the parties separated. Its purchase was accomplished in a somewhat odd and circular manner.

The Petitioner had difficult credit issues prior to the marriage. (Tr. p. 10) Although they were partially addressed they remained a fiscal impediment during the marriage. (Tr. p. 20) The Petitioner had a civil judgment against him, for which his wages were being garnished. (Tr. p. 63)

Into this mix was injected a decision to try and purchase what is now the Respondent's home. As noted above, the Petitioner had credit issues at the time the home was purchased. The Petitioner made it clear to the mortgage company that this was in all reality, a joint purchase. (Tr. p.20) The Petitioner contributed roughly $ 35,000.00 from his separate funds as a down payment on the home purchase. (Tr. p. 20) The Respondent and the mortgage company proffered a "gift letter" for the Petitioner's signature essentially giving all of any interest Petitioner might have in the home at the time of purchase to Respondent, citing the credit issues as a basis for the demand. (Tr. p.20) Petitioner also signed a quitclaim deed in favor of Respondent. **[*4]** (Tr. p. 27) Petitioner testified that it was never his intention to make a gift of the $ 35,000.00 down payment to Respondent. (Tr. pp.20, 25) After living together in the home both before marriage and after, the parties ultimately separated. The issues of debt division and property allocation were addressed in the lower Court's Findings of Fact and Conclusions of Law, as reflected in the March 6th filing with the Court.

ISSUES PRESENTED

1. Did the lower court commit error by not awarding Petitioner an equitable lien on the real property owned by the Respondent and purchased with separate funds of the Petitioner?

2. Did the lower court commit error in classifying the entirety of the $ 47,428.62 value of Petitioner's 401K account as having accrued after Petitioner's marriage to Respondent?

ARGUMENT

As noted above Appellant is seeking an equitable lien on the real property awarded to Respondent in the lower court. The key basis for this is the $ 35,000.00 down payment contributed to the home purchase by Petitioner. However in order to fully evaluate this issue the Court must examine the primary financial factors in this case. This will enable the Court to consider the **[*5]** ultimate effect of the lower Court's decision in allocating both property and debt.

Petitioner was awarded his Clearwater 401K account, citing a value of $ 47,428.62. The specific language used was "Petitioner's Clearwater 401K Retirement (since marriage). The Court's distribution classifies the post-marriage contributions as community property. However, the value awarded in the Property Value and Debt Distribution Summary (herein Property Summary) does not specify how much that contribution was, so there is no way to determine from the Property Summary what value was allocated as community property. This makes it untenable to analyze the equity of the distribution. Petitioner's contributions to the 401K account were $ 128.00 every two weeks. (Tr. pp. 39-40) This continued after the marriage date of June 8, 2014. (Tr. p.40) Per Conclusion of Law 11 the divorce was granted as of November 30, 2017. This caps the community contribution to the 401K at $ 4,608.00 [$ 128.00 X 36 = $ 4,608] The import of this calculation is that the lower Court classified all of the 401K amount as essentially a post-marital contribution, thereby overstating the community value that was ultimately divided. This was a post-marital or community contribution of roughly only 10% of the value of the account. This resulted in a disproportionate award of property in a non-fault based divorce. Whatever the parties' differences Idaho law heavily

favors equal division of assets. *Idaho Code § 32-712(1)(a)*; ***Josephson v. Josephson, 115 Idaho 1142, 772 P.2d 1276 (1989)***

The reality is that the issue of the effect of the Appellant's $ 35,000 contribution to the post marital home is the main turning point in this case. This was a de facto joint purchase by the parties. The Appellant testified to this effect. He lived there with Respondent and her children during the time they were a married couple, and before. This was not just a kind hearted purchase of an incidental asset. The testimony of the Appellant is clear. Both the evidence presented by the Appellant is clear that he intended this as a contribution to a marital residence, not a freewheeling unconditional gift. The testimony makes this clear when we examine it closely.

The parties both spoke dealt with the realtor. (Tr. p.17) The house was jointly selected by the parties. (Tr.p.17-18) The parties jointly made repairs to the home. (Tr. pp. 18-19) Again, as noted above the parties lived together in the home before and after marriage and prior to separation. The question comes down to what is the equitable thing to do with the $ 35,000.00 down payment that Petitioner **[*6]** made?

We begin with the standards of divorce courts. Divorce courts are traditionally regarded as courts of equity. "...equity will consider the conduct of the adversary, the requirements of public policy, and the relation of the misconduct to the subject matter of the suit and to defendant." ***Howay v. Howay**, 74 Idaho 492, 497, 264 P.2d 691 (1953)* (citing 30 C.J.S. Equity § 98) It is this philosophy of the role of a court of equity that allows a court to look deeper into a transaction than is traditionally allowed, even to explore beyond the four corners rule regarding documentation. This is what occurred in ***Barrett v. Barrett**, 149 Idaho 21, 24, 232 P.2d 800 (Idaho 2010)* In that case a dispute arose as to the nature of real property. The Idaho Supreme Court held that in a disputed case evidence of intent of the parties was not constrained to language of a deed, but could be determined by also examining parol evidence of intent and that the language of a deed was not in and of itself dispositive of intent in a divorce case. ***Barrett*** at *149 Idaho 24* This follows closely on the reasoning of the appellate court in ***Winn v. Winn**, 105 Idaho 811, 673 P.2d 411 (1983)* in which the Idaho Supreme Court examined multiple factors and did not limit itself to the language of the deed.

All of the foregoing **[*7]** brings the analysis to the key question in this case, which is what is to be done to recognize the equity of providing Appellant with equitable compensation for his separate property contribution to the real estate now classified as separate property? The answer is to impose an equitable lien on the home for all or part of the $ 35,000.00 down payment.

An equitable lien is a court ordered tool for enforcing the doctrine of unjust enrichment. That doctrine was recently stated in ***Countrywide Loans v. Sheets and Bank of America, 160 Idaho 268, 371 P.2d 322 (Idaho 2016)*** as "unjust enrichment occurs when a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust." In this case an equitable lien is the only realistic remedy for Petitioner to receive any compensation for his $ 35,000.00 expenditure.

CONCLUSION

Appellant's $ 35,000.00 contribution to the purchase of what he viewed as the family home was never intended as an unconditional gift. He made the payment as part of what was supposed to be a mutually beneficial way to obtain a family residence for both himself and the Respondent. It is manifestly unfair to allow the Respondent to **[*8]** keep all of the benefits of Appellant's separate funds payment. Appellant asks that this Court grant an equitable lien on the Respondent's real property to enforce his claim of unjust enrichment.

Respectfully submitted this 11th day of September, 2019.

/s/ [Signature]
Robert J. Van Idour
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on September 15th, 2019 a true copy of this document was served on the following counsel in the manner noted below:

Ms. Sarah A. McDowell-Lamont
Attorney at Law
PO Box 237
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Sent via e-mail to sarahmcdowell@yahoo.com by efiling

/s/ [Signature]
Robert J. Van Idour

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REESE v. SIDDOWAY & CO.

Supreme Court No. 46126-2018

SUPREME COURT OF IDAHO

January 22, 2019

Reporter
2019 ID S. Ct. Briefs LEXIS 103 *

WADSWORTH REESE, PLLC, an Idaho professional corporation; CLARK A REESE CPA P.C., and Idaho professional corporation; and WADSWORTH ACCOUNTING CPA, an Idaho professional corporation, Plaintiffs-Counterdefendants - Respondents, v. SIDDOWAY & COMPANY, PC, an Idaho professional corporation; RANDY SIDDOWAY, an individual, Defendants-Counterclaimants-Appellants. SIDDOWAY & COMPANY, PC, an Idaho professional corporation; RANDY SIDDOWAY, an individual, Counterclaimants - Appellants, v. FREDERICK WADSWORTH, an individual; and CLARK A. REESE, an individual, Counterdefendants - Respondents.

Type: Brief

Prior History: Ada County District Court CV-OC-2015-21225.

Counsel

[*1] Vaughn Fisher, ISB No. 7624, FISHER RAINEY HUDSON, Boise, ID, Attorney for Plaintiff -Respondents.

Title

RESPONDENTS' BRIEF

Text

I. STATEMENT OF THE CASE

A. Nature of the Case

This appeal stems from two accountants' successful efforts to judicially dissociate a third accountant from their business, Wadsworth Reese, PLLC ("WR PLLC"). [1] After more than a year and half of working together and trying to negotiate first a way to remain associated and, later, a way to amicably separate, Randy Siddoway ("Siddoway") decided to leave. He and several former WR PLLC employees, including his nephew, Dustin Siddoway (also an accountant), moved into a new location and established Anchorpoint Accounting PLLC and Anchorpoint LLC. Hundreds of WR PLLC clients followed.

In response, the other two accountants, Clark Reese ("Reese") and Frederick **[*2]** Wadsworth ("Wadsworth"), filed a lawsuit to judicially dissociate Siddoway from WR PLLC. [2] The only claim won by any party in this entire litigation was the respondents' successful summary judgment judicially dissociating Siddoway from WR PLLC because he "[h]as engaged or is engaging in conduct relating to the company's activities and affairs which makes if not

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[1] WR PLLC was previously named Siddoway, Wadsworth & Reese, PC. The company is referred to as WR PLLC throughout regardless of the name during the period referenced.

[2] Each of the three accountants had a professional corporation in which they held their interest in WR PLLC. They are referred to herein as "Siddoway PC", "Wadsworth PC", and "Reese PC".

reasonably practicable to carry on the activities and affairs with the person as a member." R. Vol. I, p. 376-377; *I.C. § 30-25-602(6)(C)*.

A five-day bench trial spawned copious Findings of Fact and Conclusions of Law but no finding of liability on any of the parties remaining claims. The Court essentially decided to leave the parties in the position they had put themselves in.

Siddoway appeals the trial court's determination that he was not entitled to piecemeal **[*3]** attorney fees for his perceived success in compelling arbitration on two claims he filed against Reese PC. [3] He also objects to the trial court's conclusion that, under the circumstances, it was an appropriate business purpose for WR PLLC to use its resources to dissociate Siddoway and resolve Siddoway's claim that he owned a two-thirds interest in the company and that Reese owned none. Siddoway's third issue lies with the trial court's finding that Siddoway was not entitled to an unjust enrichment award against Reese PC for the value of the clients that did not follow Siddoway and his nephew to their new business. Siddoway has not demonstrated that any of the trial court's factual findings were clearly erroneous and he has not shown a misapplication or misapprehension of the law. It is not always clear what standard of review Siddoway is applying to his arguments. However, the trial court based its decision on detailed factual findings with comprehensive evidence citations and Siddoway's appeal should be denied.

[*4]

B. Concise Statement of Facts

Reese, Wadsworth, and Siddoway are certified public accountants, each with their own professional corporations. R. Vol. I, p. 385, P 1. Around November 2013 Siddoway and Reese began discussing becoming partners or co-owners of an accounting firm, on terms that involved Reese buying a one-half interest in Siddoway's practice. R. Vol. I, p. 386, P 4. On December 20, 2013, Reese and Siddoway formed CRS Services, PLLC. [4] R. Vol. I, p. 386, P 5 (citing Def's Ex. 1017; Tr. 56:18-25). At the time, no agreement had been reached between Reese and Siddoway for Reese to purchase a one-half interest in Siddoway's client base; in fact, no such agreement was formalized until January 2015 (13 months later). R. Vol. I, p. 386, P 5 (citing Pls.' Ex. 14).

After Wadsworth agreed to join the company, the three accountants signed the WR PLLC operating agreement on January 6, 2014. R. Vol. I, p. 387, PP 9-10 (citing Tr. 57:1-24, 819:22-24, Pls.' Ex. **[*5]** 13, Ex. A). Pursuant to Exhibit "A" of the operating agreement, each of the companies was apportioned a 33.333% interest in the new venture. [5] The operating agreement permitted the accountants to compete with one another and required no formal contribution of any of their client bases. R. Vol. I, p. 387, P 10. During 2014, Reese met with Siddoway from time to time to continue discussing the purchase of a one-half interest in Siddoway's client base. R. Vol. I, pp. 387-388, PP 10 & 12 (citing Pls.' Ex 13 and Tr. 67:22-68:10).)

On January 28, 2015, Reese and Siddoway entered into a signed agreement ("the Reese Agreement") which included Reese PC's promise to pay $ 200,000 to Siddoway PC for the "right to receive" a one-third interest in WR PLLC, along with Siddoway's commitment to sell "certain assets" to Reese, and the parties agreement to simultaneously contribute those assets to WR PLLC. R. Vol. I, p. 388, P 12. **[*6]** The Reese Agreement also contained a non-competition clause barring Siddoway from competing with WR PLLC. R. Vol. I, p. 388, P 12 (citing Pls.' Ex. 14 Recitals, § § 1, 2 and 9; Tr. 144:10-145:17, 261:11-14).) The same day the Reese Agreement was signed, the parties signed Modification #1, which contemplated the three WR PLLC members amending the original operating agreement and, if they failed to do so by February 15, 2015, the Reese Agreement would be void. R. Vol. I, p. 388, P 12 (citing Pls.' Ex 14). Although February 15, 2015 came and went without the parties successfully amending the operating agreement, Reese PC continued to make payments totaling $ 28,000 through September

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[3] Both claims were dismissed by the arbitrator pursuant to dispositive motions.

[4] CRS was another prior name of WR PLLC.

[5] The Reese Agreement would not be signed until January of the following year. (Pls.' Ex. 14.)

1, 2015. R. Vol. I, pp. 388-389, P 13 (citing Tr. 71:19-73:14; Pls'. Ex. 24; Pls.' Ex. 58, at 1-2; Tr. 78:12-19; Tr. 420:2-5; Tr. 76:8-11; 424:23-25).

Because no amended operating agreement was ever agreed to as required by Modification #1, the Reese Agreement was ultimately found to be void by an arbitrator. R. Vol. I, pp. 388-389, P 13 (citing Tr. 287:3-10; see also R. Vol. I, pp. 266-269).

During 2015, Siddoway's relations with Reese and Wadsworth broke down, causing the parties to begin discussing Reese **[*7]** PC and Wadsworth PC buying out Siddoway PC's WR PLLC interest instead of amending the operating agreement. R. Vol. I, p. 389, P 14 (citing Tr. 78:20-79:22). The parties failed to reach an agreement on amending the operating agreement and failed to reach an agreement on buying out Siddoway PC's interest, culminating in Siddoway's decision to announce his voluntary departure from WR PLLC on August 21, 2015. R. Vol. I, p. 390, P 19 (citing Tr. 93:7-22; 95:12-18; 833:5-10).

Soon after Siddoway's departure, his nephew, Dustin Siddoway, and several other Wadsworth Reese employees also left. R. Vol. I, p. 390, P 21 (citing Tr. 95:19-25; 103:7-10). On August 24, 2015, Siddoway sent a list of Wadsworth Reese's clients, including historical billing data, to Dustin Siddoway. R. Vol. I, pp. 390-391, P 22-23 (citing Tr. 121:17 - 122:8; Pls.' Exs. 1, 8, 12). During the litigation it was discovered that the day Siddoway decided to depart he downloaded WR PLLC's Ultra Tax files, which included client names, addresses, social security numbers, prior tax information, and depreciation schedules, as well as work-in-progress and notes of the servicing accountant. R. Vol. I, p. 390, P 20 (citing Tr. 123: **[*8]** 6-126:2; 294:24-296:11; 369:10-14; 479:17-20; 1036:17-25; Pls'. Ex. 60). Siddoway testified that he provided his nephew Ultra Tax data for all clients who signed a release and hundreds of clients left WR PLLC. R. Vol. I, pp. 391-392, P 27 (citing Pls.' Ex. 44; Tr. 369:18-370:12; 618:25-619:7; 653:17-655:3).

In October 2015, Reese and Wadsworth voted to have WR PLLC pay the legal expenses to be incurred in the impending litigation against Siddoway, including those for a dispute between Reese PC and Siddoway PC arising under the Reese Agreement (which, at that point, had yet to be declared void in arbitration). R. Vol. I, pp. 392-393, P 29 (citing Tr. 128:4-129:23; 775:23-777:7; Pls,' Ex. 74). Among the purposes of filing the suit was to disassociate Siddoway PC from WR PLLC and to resolve the dispute over membership interests, as Siddoway PC was claiming to own both its own membership interest and Reese PC's membership interest in WR PLLC. R. Vol. I, pp. 392-393, P 29 (citing Tr. 128:15-129:23; 775:10-22).

II. ATTORNEY FEES ON APPEAL

Respondents request attorney fees on appeal. This action is a commercial transaction under *Idaho Code § 12-120(3)* and, therefore, if respondents **[*9]** prevail on this appeal they are entitled to an award of reasonable attorney's fees. *Idaho Code § 12-120(3)* provides that in any civil action to recover on a "contract relating to the purchase or sale of . . . services and in any commercial transaction. . . the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." Rule 54(d)(1) provides that prevailing parties are entitled to costs as a matter of right. In addition to a prevailing party recovering costs and fees in a commercial transaction, Rule 54(e)(1) provides that the Court may award reasonable attorney's fees to the prevailing party when provided for by statute or by contract. Rule 54(e)(1) also provides that attorney's fees may be awarded pursuant to *Idaho Code § 12-121* when the court finds that the case was "brought, pursued or defended frivolously, unreasonably or without foundation." The instant appeal is without foundation. Respondents request attorney fees on appeal pursuant to both or either *Idaho Code § 12-120(3)* and *Idaho Code § 12-121*.

III. ARGUMENT

A. The District Court did not abuse its discretion determining the Siddoway Parties were [*10] not prevailing parties in the litigation.

The Siddoway Parties are not entitled to an award of attorney fees because, "(t)he Siddoway Parties aren't prevailing parties." Aug. R. p. 8. [6] Without so much as saying it, the appellants are arguing that the District Court abused its discretion in making that succinct and firm conclusion.

I.R.C.P. 54(e) permits attorney fee awards and subsection (1) specifically states that, "[i]n any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract." Section 14 of the Reese Agreement provides, "[s]hould either party be required to commence legal action to enforce any of the terms of this Agreement, the prevailing party in such litigation shall be entitled to an award of reasonable attorney's fees and **[*11]** costs from the other party." Both Rule 54(e)(1) and the language of the void Reese Agreement are clear that any such award is only available to prevailing parties.

It is well settled that, "[a] determination on prevailing parties is committed to the discretion of the trial court." *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005)*. I.R.C.P. 54(d)(1)(B) guides courts' inquiries on the prevailing party question. *Id. at 719, 117 P.3d at 133*. That rule provides:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Idaho R. Civ. P. 54(d)(1)(B). **[*12]**

In determining which party prevailed where there are claims and counterclaims between opposing parties, the court determines who prevailed "in the action"; that is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis. *Eighteen Mile, 141 Idaho at 719, 117 P.3d at 133*.

The district court's determination of who is a prevailing party will not be disturbed absent an abuse of discretion. *Trilogy Network Sys., Inc. v. Johnson, 144 Idaho 844, 847, 172 P.3d 1119, 1122 (2007)*. When examining whether a trial court abused its discretion, this Court considers whether the trial court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of this discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Id.* (affirming the trial court's decision that each party bear its own costs in a case where a plaintiff successfully showed a breach of contract, but failed to provide adequate evidence to show damages that were not mere speculation).

In the immediate case, Siddoway filed **[*13]** arbitration claims against Reese and Reese PC, both of whom moved the District Court to stay the arbitration. See R. Vol. I, p. 267. The arbitration was stayed as to Reese and not as to Reese PC. *Id.* During the arbitration between Siddoway and Reese PC, the arbitrator declared the Reese Agreement void because of the failure to reach an agreement on amending the operating agreement, as set forth in Modification #1. R. Vol. I, p. 269.

In ruling on Siddoway's persistent requests for attorney fees for compelling arbitration of two claims against Reese PC the trial Court noted that, "[t]o determine whether a party qualifies as a prevailing party, 'the trial court must, in its sound discretion, consider the final judgment or result of the action.'" Aug. R. p. 8; I.R.C.P. 54(d)(1)(B).

> The Siddoway Parties aren't prevailing parties. That is so whether a prevailing party determination is made by considering the results of this action as a whole or instead by considering only the results of the litigation as to the arbitrability of claims made under the Reese Agreement. Though all but one of Plaintiffs' claims in this action failed, every one of the Siddoway Parties' counterclaims **[*14]** failed. And, as already noted, the

[6] Respondents have moved to augment that record as appellants failed to designate one of the orders from which they appeal.

> Siddoway Parties prevailed only in part in litigating the arbitrability of claims made under the Reese Agreement, and then after convincing the Court of the arbitrability of some of those claims, they lost on the merits in arbitration. That is nowhere near enough success to make them prevailing parties. They aren't entitled to any award of attorney fees.

Id. page 8.

Clearly, the trial court perceived the issue as one of discretion, noted and acted within the legal standards applicable, and reached its decision by an exercise of reason, which was memorialized in its order, as set forth above. The Siddoway parties have failed to demonstrate the trial court abused its discretion in finding they were not the prevailing parties.

The Siddoway parties try to avoid the trial court's clear, discretionary finding that they are not prevailing parties in the litigation by hyper-focusing on one perceived victory, compelling arbitration against Reese PC. There are many problems with this approach.

First, the trial court considered Siddoway's perceived victory as part of its analysis and Siddoway has shown no abuse of discretion, just a difference **[*15]** of opinion. Second, the language in the Reese Agreement only permits an award of attorney fees to the party that prevailed in "the litigation." Siddoway's argument, that we ignore all the other claims decided by the court, is vitiated by the fact that Siddoway lost the arbitration on summary judgment. Which result begets the next problem: the Reese Agreement (including its attorney fees provision) was found to be void and it can no longer serve as the basis for an attorney fee award or anything else.

Appellants try to sidestep all of these arguments by misapplying the holding in *Grease Spot, Inc. v. Harnes, 148 Idaho 582, 226 P.3d 524 (2010)* and claiming it supports their position that they should be awarded attorney fees simply because they partially won a motion to compel arbitration. The trial court addressed this argument and concluded that, "in *Grease Spot* the movants were prevailing parties because they compelled arbitration on all claims, 'thereby terminating consideration of the merits of the action.'" Aug. R. p. 8, fn. 4 (emphasis in original) (citing *148 Idaho at 586, 226 P.3d at 528*). "Unlike the movants in *Grease Spot*, the Siddoway **[*16]** Parties fought to win the right to arbitrate only a small portion of a multi-faceted piece of litigation, only partly succeeded in compelling arbitration, lost the claims they won the right to arbitrate, and then lost all the counterclaims they litigated." Aug. R. p. 8, fn. 4.

The appellants are not prevailing parties and are not entitled to attorney fees.

B. The District Court's determination that WR PLLC had a legitimate business purpose to pay legal fees to dissociate Siddoway and settle his claim that he was a two-thirds owner were not clearly erroneous.

a. Standard of Review

Siddoway takes issue with WR PLLC's use of a portion of the fees it was generating to have him judicially dissociated after he left WR PLLC, provided information, credit and assistance to a competitor, and stopped earning revenue for WR PLLC. Siddoway challenges the trial court's determination that WR PLLC had a legitimate business purpose to dissociate Siddoway and resolve his claim that he owned a two-thirds membership interest in WR PLLC, despite an abundance of evidence cited by the court.

Rule 52(a)(7) instructs that findings of fact are not to be set aside unless "clearly erroneous, **[*17]** and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Further, that review of a trial court's decision "is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Akers v. Mortensen, 147 Idaho 39, 43, 205 P.3d 1175, 1179 (2009)*. The Supreme Court "will liberally construe the trial court's findings of fact in favor of the judgment entered, as it is within the province of the trial court to weigh conflicting evidence and testimony and judge the credibility of the witnesses." *Prehn v. Hodge, 385 P.3d 876, 882 (2016)*(internal citations omitted). A trial court's findings of fact will not be set aside unless they are found to be *clearly erroneous. Akers, 147 Idaho at 43, 205 P.3d at 1179*. (citing *Ransom v. Topaz Mktg., L.P., 143 Idaho 641, 643, 152 P.3d 2, 4 (2006)* *Camp v. East Fork Ditch*

Co., Ltd., 137 Idaho 850, 856, 55 P.3d 304, 310 (2002); Bramwell v. South Rigby Canal Co., 136 Idaho 648, 650, 39 P.3d 588, 590 (2001); I.R.C.P 52(a))(emphasis **[*18]** added).

Even if evidence may be conflicting, if the findings of fact are based upon substantial evidence, they will not be overturned on appeal. *Id.* Evidence is substantial if "a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." PacifiCorp v. Idaho State Tax Com'n, 153 Idaho 759, 768, 291 P.3d 442, 451 (2012)(citing The Senator, Inc., v. Ada Cnty. Bd. Of Equalization, 138 Idaho 566, 569, 67 P.3d 45, 48 (2003)). The Idaho Supreme Court has refused to "substitute its view of the facts for that of the trial court." Akers, 147 Idaho at 43, 205 P.3d at 1179. The Supreme Court "exercises free review over matters of law." Borah v. McCandless, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009).

b. The trial court's findings of fact underlying the conclusion that WR PLLC's payment of litigation costs was a legitimate business expense is supported by substantial evidence.

The Siddoway Defendants have failed to identify any specific finding of fact that is alleged to be clearly erroneous. They simply don't like the trial court's conclusion that, **[*19]** "the payments to Wadsworth Reese Parties' legal counsel were made for the legitimate business purpose of addressing disputes among the parties. Most notably, these disputes were over the validity of the Reese Agreement and ownership of the company in the event of its enforceability. The company needed to resolve these disputes in order to stabilize itself and continue as a going concern." R. Vol. I, p. 408, P 31. The supporting evidence is substantial.

Siddoway concedes that Reese provided supporting testimony, but complains that the trial court "based its conclusion almost entirely on the testimony of Clark Reese..." App. Br. p. 20. Even if there was no more evidence, this would suffice. It is the province of the trial court to weigh conflicting evidence and testimony and judge the credibility of the witnesses. Akers, 147 Idaho 39, 43, 205 P.3d at 1179.

However, there was significant additional evidence that Siddoway was claiming he owned two-thirds of the business. For instance, his own testimony:

> **Q**. So after your firm had continued on for a year, say January of 2015, do you recall January 20th, 2015, as being the date that you and Mr. Reese signed **[*20]** the Reese agreement?
>
> **A**. It was in January of 2015.
>
> **Q**. And do you recall having mentioned during a partner meeting that if he didn't sign it that you were a two-thirds owner of the entity?
>
> **A**. I recall having discussions regarding the ramifications of him not living up to his obligation that he had agreed to me prior.
>
> **Q**. And you agree with me that one of those was that you claimed to be a two-thirds owner of the company. Correct?
>
> **A**. In my mind, he had bought - had received the right to buy the practice by agreeing with me. So it was evident to me if he didn't follow through on that, that I would get it back, yes.
>
> **Q**. Okay. That you would be a two-thirds owner of SWR?
>
> **A**. That I would get back that interest that he would not have had because he didn't follow through.
>
> **Q. Thereby making you a two-thirds owner of SWR**?
>
> **A. Yes**.
>
> **Q**. And you expressed that perceived right to both Mr. Reese and to Mr. Wadsworth. Correct?

A. I believe so.

Tr. 355:15 - 356:18. (Emphasis added). [7]

[*21]

Reese explained in detail why it was an important business purpose to settle Siddoway's claim:

Q. BY MR. FISHER: Did you and Fredrick have any discussions about the status of the WR, PLLC, membership?

A. Yes. We wanted to have that resolved because of Randy's previous claims that he felt like that he was a two-thirds owner.

Q. Did you vote for the company to address that issue in the lawsuit as well?

A. Yes.

Q. Why was it important for WR, PLLC, to settle the membership?

A. Because there was a lot of - there was a lack of noncompetes amongst all the members. So at any time, any one of us could get up and leave and leave the other holding the bag for, you know, paying off the debts.

And so we wanted to resolve that so we know that what we were working with, what - everything that we were generating would be for the benefit of the firm and for our creditors.

Q. And did you feel that you could have left as well at that point in time?

A. Yes.

Q. Who would have paid all these debts if you guys had all just left?

A. I guess we would have to pay the debts through the existing **[*22]** accounts receivable, but we weren't able - there wouldn't have been any future revenues generated to pay those debts.

Q. And is that something that the two of you discussed when you made the decision to soldier on?

A. Yeah. And we felt an obligation and a loyalty to those people, and we felt like they deserved to be paid and we would work for them, get them paid.

Tr. 129:4 - 130:14.

Wadsworth testified as well that they voted to initiate the lawsuit, "[t]o resolve the matters that we had not been able to resolve, that Randy was maintaining that he was still an owner even though he quit working for the partnership. In fact, he had talked about even being a majority owner of the firm." Tr. 775:10-18.

There was also put into evidence an email from Wadsworth to Reese on October 5, 2015, which memorialized one of their discussions regarding the decision to have the company pay the legal fees. Pls.' Ex. 74. [8]

[*23]

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[7] After the Reese Agreement was declared void, Siddoway repeated his two-thirds ownership argument by adding his Ninth Counterclaim, which sought a declaration that he was a two-thirds owner of WR PLLC. R. Vol. I, p. 295, P 155. It was dismissed on summary judgment. R. Vol. I, p. 379.

[8] The trial court noted and addressed Siddoway's concern that the email didn't specifically mention Siddoway's two-thirds contention, noting that its absence from this one email "certainly doesn't disprove that the claim was part of the reason for taking the vote." Aug. R. p. 4.

Understandably, the District Court concluded that the payments made by WR PLLC "were made on account of a perceived need to address and resolve disputes among the parties, including the dispute in which Siddoway PC claimed that, in the event of the Reese Agreement's failure, the operating agreement's allocation of a one-third membership interest to Reese PC is ineffectual and Siddoway PC owns that membership interest, plus its own one-third membership interest." R. Vol. I, p. 404, P 24. The district court concluded that the evidence supported the contention that the Company needed to resolve the various disputes among the members, including ownership of membership interests, in order to continue as a going concern. R. Vol. I, p. 408, P 31.

c. Appellants have made no argument the court applied the wrong law or otherwise committed a legal error.

Other than citing one case regarding fiduciary duties, Siddoway's argument regarding the payment of legal fees is devoid of legal citation. Instead, appellants take issue with the plaintiffs' decision not to address Siddoway's two-thirds ownership interest claim in response to Siddoway's request for a preliminary injunction. This attempt **[*24]** to establish a tenuous inference is not a legal reason to disturb the trial court's conclusion, especially in light of the fact that success on the merits was not at issue during the preliminary injunction hearing. See generally Rule 65(e).

The trial court considered whether the payment of legal expenses under these circumstances was a distribution or, even, a disguised distribution. R. Vol. I, p. 404, P 24; R. Vol. I, p. 408, PP 30-31. Appellants make no argument about the propriety of the Court's detailed legal analysis, which concluded the payment was not a distribution. *Id.* The appellants simply disagree with the court's conclusion, "that the positions the company took were vindicated demonstrates good faith. More to the point, the Court cannot conclude that company's payments of the Wadsworth Reese Parties' legal counsel violated, nullified, or significantly impaired any benefit of Siddoway PC under the operating agreement." R. Vol. I, p. 408, P 31.

d. The trial court correctly found that the nature of the action did not matter to its analysis of the payment of legal expenses.

The trial court determined that it was unnecessary to determine whether this lawsuit was **[*25]** a direct of derivative action. Siddoway pressed the Court for a determination by filing a Rule 59(e) motion. An order denying a motion under Rule 59(e) is appealable, "but only on the question of whether there has been a manifest abuse of discretion." *Pandrea v. Barrett, 160 Idaho 165*, , *369 P.3d 943, 949 (2016)*. (string cite omitted). In support of their contention that a derivative action would require Wadsworth PC and Reese PC to pay the litigation fees, Siddoway cites *Prehn v. Hodge* arguing that "attorney's fees are deducted from the recovery of the LLC." App. Br. p. 28. [9] However, in *Prehn* the plaintiffs brought the action solely as individuals, the company itself did not pursue the litigation. *161 Idaho 321, 385 P.3d 876 (2016)*. A derivative action is an action brought by a member of a limited liability company to enforce the company's rights, whereas a direct action is an action brought by a member to assert the member's own rights, and not to recover solely for an injury to the company. *I.C. § § 30-25-801* to 803. However, "neither term [direct or derivative] encompasses an action a limited liability company pursues in its own **[*26]** right." Aug. R. p. 5; See generally, *I.C. § § 30-25-801* to 803. Regardless, the trial court concluded, "[n]o reallocation of legal expenses would result either way." Aug. R. p. 6. There was no abuse of discretion or erroneous factual findings and the trial court's determination that the payment of legal fees toward the successful effort to dissociate Siddoway and resolve his two-thirds ownership argument should stand.

C. The District Court's determination that Siddoway was not entitled to an unjust enrichment award was not an abuse of discretion.

A party is only entitled to damages for unjust enrichment if he establishes three elements: "(1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 272, 371 P.3d 322, 326 (2016)*** **[*27]** (quoting *Teton Peaks Inv. Co., LLC v. Ohme, 146 Idaho 394, 398, 195 P.3d 1207, 1211 (2008))*. At trial both Reese and Siddoway advanced unjust enrichment claims and the trial court found for both on the first two elements and not the third, that it would not be inequitable

[9] Siddoway cites no authority for his contention that a direct action requires a division of costs amongst the plaintiffs.

for the other party to keep the benefit without paying for it. R. Vol. I, pp. 400-401, P 19 and p. 422, P 61. In this instance, only Siddoway appealed that decision. However, the Court's reasoning and conclusions were not based on clearly erroneous facts and not an abuse of discretion.

As an initial matter the respondents disagree that any identifiable benefit was "conferred" on Reese. The trial court reached this erroneous conclusion by relying on Conclusion of Law P 19, which incorrectly found that Siddoway transitioned clients after the Reese Agreement was signed. R. Vol. I, p. 400-401, P 19. A careful review of the testimony cited by the court demonstrates that no such temporal reference is made explicitly or implicitly. The Reese Agreement was executed over a year after the accountants started working together and the evidence demonstrates they all transitioned all of their clients **[*28]** to WR PLLC right from the beginning. [10] Reese testified:

> **Q**. Now, how many clients do you believe that you serviced in, say, the first year that you were at SWR, 2014?
>
> **A**. I don't know if I can give you an exact number, but 100, 200. I don't know.
>
> **Q**. Is it more than 8.
>
> **A**. Yes.
>
> **Q**. And isn't it true that right from the beginning you were placed in charge of and assigned to be the relationship partner for those hundreds of clients?
>
> **A**. From the very beginning?
>
> **Q**. Yes.
>
> **A**. I don't know if I was assigned. Like I said before, it was all based off of capacity. It was very chaotic, and we'd just - a client would come in. I'd say, "I have capacity. I can help them out."

Tr. 167:16 - 168:8.

When the Reese Agreement **[*29]** was signed, the three accountants had already spent one year integrating their clients and the Harding clients into WR PLLC and had done so pursuant to the operating agreement they signed in the beginning of 2014, with no non-competes or other protections. So, instead of signing the Reese Agreement, Siddoway could have just walked away and invited all of his clients to join him. In fact, that is what Siddoway did seven months later in August when he left to start a new business in a new location with his nephew. In doing so, Siddoway left behind whatever clients he or Dustin could not convince or chose not to pursue, and then asked to be compensated for what was left behind. [11] No document, not even the voided Reese Agreement, ever even identified which one-half of Siddoway's client base Reese PC was to buy. [12] Siddoway did not confer a benefit on Reese PC.

[*30]

Nonetheless, the trial court found that some benefit was conferred, but that it, "would not be unjust for Reese PC to retain the excess benefit of $ 21,359.50 (or whatever other amount the excess benefit might be calculated as) [13] it arguably received under the Reese Agreement over and above the $ 28,000 it paid to Siddoway PC." [14] R. Vol. I, p.

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[10] It makes no sense (and is contradictory to the evidence) that Siddoway kept his clients in some sort of suspended animation during the year between when WR PLLC was formed and when the Reese Agreement was signed.

[11] If clients may actually be "left" anywhere, they were left to WR PLLC, not Reese PC.

[12] As implied in the last footnote, accounting "clients" are not chattels to be bought and sold. Each was free before and after the execution of the Reese Agreement to hire the accountant of their choice and the only conceivable reason they stayed with WR PLLC is because they were satisfied with the service they were receiving.

[13] Although the trial court attempted to follow Siddoway's calculation, it clearly never adopted that calculation, instead finding that is was unnecessary to adopt any calculation. R. Vol. I, pp. 419-421, PP57-60.

422, P61. Siddoway has appealed that conclusion despite the abundance of evidence cited in the Court's reasoning.

In **[*31]** making its argument, Siddoway stubbornly clings to its inaccurate claim that Reese PC obtained its membership interest in WR PLLC from Siddoway PC (the district court actually held that the membership interest came from the operating agreement (R. Vol. I, pp. 377-378)). [15] When the Reese Agreement was determined void the parties were to be put back in the position they were in as if it had never been signed (i.e. three equal partners in a one year old accounting firm, with no anti-competitive agreements, and each free to leave at will and compete for any of the other's clients).

The District Court cited substantial evidence in reaching the conclusion that Siddoway failed to meet the burden of proving that it would be unjust for Reese PC to keep the "benefit" it received without compensating **[*32]** Siddoway. The court found that Siddoway's volitional decision to leave WR PLLC created a great potential for client flight and a large share of his client base-hundreds of clients-promptly left for the firm his nephew opened in the same location of Siddoway's new consulting firm. [16] R. Vol. I, pp. 422-423, P 61 (citing Pls.' Ex. 44; Tr 653:17-655:3); see also R. Vol. I, p. 400-401, P 19; Tr. 93:7-22, 95:12-18, 833:5-10. That WR PLLC was able to hang onto some fraction of the Siddoway PC client base, no thanks to the Siddoway Parties, doesn't make it unjust for Reese PC not to further compensate Siddoway PC for those clients. R. Vol. I, p. 423, P 61.

The Court also based its conclusion on the evidence of contributions other than client relations to the enterprise.

> it seems reasonably clear from the evidence **[*33]** that Reese (and thus Reese PC) was actively engaged throughout the period in servicing Wadsworth Reese clients, leading directly to the generation of revenue that contributed to the company's ability to pay the monthly management fees. Whether the same is true of Siddoway (and thus Siddoway PC) was never as clear to the Court. [17]

R. Vol. I, p. 423, P 62 (citing Defs.' Ex. 1010; Pls.' Ex. 49; Tr. 66:10-67:1, 189:20-192:4, 266:1-9).

Reese testified:

> **Q**. So under Mr. Siddoway's proposal, he assigns himself no clients to work on, but he has an administrative assistant; and he's still supposed to get paid evenly every month with you guys?
>
> **A**. Yes.
>
> **Q**. Was that one of the issues causing the partners some consternation?
>
> **A**. Yes.

Tr. 266:1-9. **[*34]**

Reese and Siddoway both received their membership interests pursuant to the operating agreement. Immediately prior to signing the Reese Agreement the parties were three accountants with equal membership interests and a hope that they would reach an agreement to have Reese purchase one half of Siddoway's client base and that all

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[14] Siddoway transitioned clients into WR PLLC one year before the Reese Agreement was signed and then oversaw the mass migration of his clients away from WR PLLC after the Reese Agreement was signed. Any benefit Reese PC or WR PLLC received in the form of remaining clients was not a benefit received under the Reese Agreement.

[15] Siddoway has not appealed the trial court's finding that Reese PC received its interest from the operating agreement and any argument based on the idea that Reese PC received it from any other source must be disregarded.

[16] There was testimony at trial that shortly after Randy's departure from WR PLLC, Dustin's new firm had received between 200 and 300 releases for clients transferring from WR PLLC. Tr. 654:21-655:3.

[17] Siddoway concedes that he didn't do much client servicing during his time at WR PLLC because his efforts were, "largely devoted to transferring client relationships and other benefits to Reese..." App. Br. p. 33.

three would "contribute" those interests and reach an agreement on anti-competitive language to protect the contribution. But that hope never came to fruition and Siddoway chose to leave when he grew frustrated with the negotiations. Siddoway persistently recites the trial court's quote from an earlier order about what the Reese Agreement covers to buttress his contention that Reese received his membership interest from Siddoway under the Reese Agreement. But the Reese Agreement is void, the quote is out of context even within the Reese Agreement (clearly Reese already had a one-third interest and clearly the larger context included identifying and contributing assets to WR PLLC) and the trial court flatly rejected that Reese' one-third membership interest came from anywhere but the same place as Siddoway's, the operating agreement they all executed on January 8, 2014. See **[*35]** App. Br. p. 37. "The operating agreement, not the Reese Agreement, is the source of Reese PC's membership interest." R. Vol. I, p. 378.

"Prior decisions may suggest that, under the Reese Agreement, Reese PC agreed to purchase a one-third membership interest in Wadsworth Reese from Siddoway PC, but any such reading of the Reese Agreement would be mistaken." R. Vol. I, p. 378.

In the end "the Siddoway Parties haven't shown that it is unjust, under the circumstances, for the Court to leave the parties where it found them: Reese PC having paid only part of the agreed price for Siddoway PC's unenforceable- and only partly performed-obligation to transition its client base to Wadsworth Reese." R. Vol. I, p. 424, P 63. The appellants have provided this court with no viable reason to disturb that finding and the appeal should be denied.

IV. CONCLUSION

In the end, the trial court decided to leave the parties in the position into which they put themselves. Appellants have offered no legal reason or factual distinction which requires a different outcome. The trial court did not abuse its discretion in finding that Siddoway was not the prevailing party in the litigation and that he is **[*36]** not entitled to an award of attorney fees for compelling an arbitration that he lost. The trial court's determination that WR PLLC made a legitimate business decision to pursue Siddoway's dissociation and to defeat his two-thirds membership claim is supported by substantial evidence and the legal analysis is not in question. It was not an abuse of discretion to find that justice does not require Reese PC to compensate Siddoway for the clients that chose to continue to purchase services from WR PLLC. The appeal should be denied.

DATED this 22nd day of January, 2019.

FISHER RAINEY HUDSON

/s/ Vaughn Fisher
Vaughn Fisher

Attorney for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of January, 2019, I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF** to be served upon the following individuals in the manner indicated below:

Brett Hastings
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( ) Via U.S. Mail
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( ) Via Overnight Mail

( ) Via Hand Delivery

(x) Email *brett@hastingslaw.us*

/s/ Vaughn Fisher
Vaughn Fisher

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NORTH IDAHO BLDG. CONTRS. ASS'N v. CITY OF HAYDEN

Supreme Court Docket No. 45181-2017

SUPREME COURT OF IDAHO

February 21, 2018

Reporter
2018 ID S. Ct. Briefs LEXIS 304 *

NORTH IDAHO BUILDING CONTRACTORS ASSOCIATION, an Idaho non-profit corporation; TERMAC CONSTRUCTION, INC., an Idaho corporation, on behalf of itself and all others similarly situated, Plaintiffs-Respondents-Cross Appellants, and JOHN DOES 1-50, whose true names are unknown, Plaintiffs, v. CITY OF HAYDEN, an Idaho municipality, Defendant-Appellant-Cross Respondent.

Type: Brief

Prior History: Kootenai County No. CV-2012-2818. Ref. No. 17-385. Appeal from the District Court of the First Judicial District for Kootenai County. Honorable Cynthia K.C. Meyer, District Judge, Presiding.

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Title

APPELLANT'S/RESPONDENT'S REPLY AND RESPONSE BRIEF

Text

I. STATEMENT OF THE CASE

A. Facts Are Clear and Undisputed.

The City of Hayden (the "City") provides sewer service to the residents living in the City and to some persons living in a small service area outside the City. The City collects sewage from its customers and delivers it to a regional treatment facility. The City is responsible for the construction, maintenance, and operation of its collection system, which includes various components, such as trunk lines, sewer mains, interceptors, and lift stations which collect sewage for transport to the regional treatment facility. The City charges each customer it serves a bi-monthly fee, which covers a proportionate share of the operation and maintenance **[*2]** of the City's sewer collection system and the operation and maintenance costs associated with the regional wastewater treatment facility.

In addition to the bi-monthly fee, the City charges a one-time sewer capitalization fee ("Cap Fee") for each new structure, whether residential or commercial, and for any addition to an existing structure that will result in an increase in the volume of sewage generated. The Cap Fee is charged when a building permit is issued, and it is only charged to people who asked for a connection to the sewer. The Cap Fee is not imposed on City residents as a whole, nor is it a general obligation to all residents.

In 2007, the City raised its Cap Fee from $ 774 to $ 2,280 for one equivalent residential connection ("ER"). (R., p. 451; R., pp. 588-589, P 6; R., Aug. pp. 48-49, P 29.) The increased fee more accurately reflected the costs of construction (or more precisely, the depreciated replacement value) of one ER. (R., p. 685.) Prior to that time, the City's Cap Fee significantly understated this value. Indeed, as documented in great detail by City via the Second Affidavit of Donna L. Phillips (R,. pp. 593-594), the tripling of the Cap Fee in 2007 reflected **[*3]** no more than a long-overdue catch-up on a fee that reflected substantially less than the pro rata depreciated value of the existing system.

The amount of the increased Cap Fee charged by the City was based upon the 2006 study of the system completed by Welch Comer. (R., Aug. p. 47, P 23; R., Aug. pp. 325-443.) Welch Comer did not utilize the methodology prescribed by *Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991)*. Rather, to arrive at the increased fee, Welch Comer divided the estimated cost of increasing the size of the system from 5,600 ER's to 14,550 ER's - the estimated number of future ER's that the city would need for future growth - by the number of new ER's that would result from the construction, and based the new connection fee for each new user on a proportionate amount of the cost of that increase. (R., Aug. pp. 422-423.) In essence, the Welch Comer formula calculated the replacement value of existing excess system capacity by looking at the cost to build the next increment of system capacity, rather than the cost to reproduce the existing system. At all times, the money from the Cap Fee was placed into a special fund for the utilization **[*4]** by the City for sewer, interceptor, collection, and treatment system construction and obligations for the regional facility. [1] (R., p. 576; R., p. 572; Ordinance 422.) The money from the Cap Fees was never transferred to the City's general fund or used for general fund purposes.

[*5]

The increased Cap Fees were paid from 2007 to 2012 without protest or objection by members of NIBCA and others, including the class members, as a condition to the issuance of a building permit. (R., p. 449, P 3.) NIBCA customers and class members were all hooked up to sewer, and enjoying the benefit of having sewer service. In 2012, the North Idaho Building Contractors Association ("NIBCA") filed this action to have the Cap Fees declared unlawful.

The district court found that the City's method of calculating the replacement value of excess capacity based on the cost of building more excess capacity was reasonable, and dismissed the challenge by Plaintiffs. On appeal, the Supreme Court held the City should have calculated replacement value based on the value of the existing system, per *Loomis v. City of Hailey*. It vacated the dismissal and remanded the case to the district court for further proceedings. *See, NIBCA v. City of Hayden, 158 Idaho 79, 343 P.3d 1086 (2015)* ("*NIBCA I*").

Knowing that the case required further proceedings following the remand, the City retained Financial Consulting Solutions Group, Inc. ("FCS"), an accounting firm specializing in **[*6]** utility rates and fee management, to conduct an analysis of the Cap Fees to determine whether, and to what extent, the Cap Fees adopted in 2007 exceeded the amount the City should have charged under the *Loomis* methodology. (R., p. 450, P 9.) The FCS analysis concluded the per user depreciated replacement value of the City's sewer system - as it existed in June of 2007 - was between $ 2,600 and $ 4,808, depending upon whether surface restoration costs and/or unfunded (versus straight line) depreciation are taken into account. (R., p. 450, P 11.) Thus, the evidence developed by FCS established that the Cap Fee, if calculated using the authorized methodology that was approved by the Court in *Loomis*, would have been more than the $ 2,280 Cap Fee that was actually paid by the class members, since the value received was at least $ 2,600. [2] while NIBCA objected to the admission of the FCS study on the grounds of

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[1] Ordinance No. 188 States: "Reserve Fund for the Sewer Collector Depreciation and Treatment Facility: There is hereby created a reserve fond dedicated to the preliminary engineering, design, and construction of collectors, interceptors, pump station, sewer treatment facilities, and obligations for the regional facility. Funds derived from the charge of the capitalization fee and collection depreciation fee shall be placed in this dedicated reserve fond. The money so reserved may only be utilized for preliminary engineering, design and construction of collectors, interceptors, pump stations, sewer treatment facilities and obligations for the regional facility; and the money from said reserve fond is not to be utilized for regular operation and maintenance of the sewerage system, except that up to five percent (5%) of the annual receipts can be utilized to administer the capitalization fee and collector depreciation program." (R., p. 576.)

relevance, untimely disclosure and legal conclusions, the validity of this new evidence was uncontested by NIBCA and it is the only evidence in the record on this issue. (R., pp. 450-451, PP 11-17; R., p. 829.)

[*7]

In the district court following remand, the City attempted to show that the amount of the fees it imposed complied with the "Equity Buy-In" connection fee methodology that was approved in *Loomis v. City of Hailey*, that such fees were reasonable, and that the fees were placed into a separate sewer capitalization fund to be used for improvement and expansion of sewer system components and no monies from this fund were transferred to the City's general fund or used for general fund purposes. The district court ruled that the FCS evidence was irrelevant and it was rejected. (R., pp. 288-309; R., pp. 819-839; R., p. 887.)

B. The Law Governing the Ability to Charge the Fee is Clear.

The issue in this case is one of calculation, not of authorization. In *Loomis v. City of Hailey*, the Idaho Supreme Court recited the governing law regarding the authority of municipalities to impose rates and charges for public works projects, stating "[t]he *Idaho Constitution, art. 8, § 3* allows municipalities to impose rates and charges to provide revenue for public works projects, and pursuant to this section of the Constitution, the Idaho legislature enacted the Idaho Revenue Bond **[*8]** Act, codified at *I.C. § 50-1027* through *§ 50-1042*." *119 Idaho 434, 437-438, 807 P.2d 1272, 1275-76 (1991)*. The Court went on to state:

> The Idaho Revenue Bond Act grants municipalities the right to operate public works "for the use and benefit of those served by such works and for the promotion of the welfare and for the improvement of health, safety, comfort and convenience" of its residents. *I.C. § 50-1028*. In order to accomplish this task, cities in Idaho are given the authority by the legislature to issue "revenue bonds … to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works ..." *Idaho Code § 50-1030(e)*. In addition, municipalities may "prescribe and collect rates, fees, tolls, or charges, … for the services, facilities and commodities furnished by such works ..." *Idaho Code § 50-1030(f)*.

Id. at 438, 807 P.2d at 1276.

> …
>
> The Idaho Revenue Bond Act authorizes the collection of sewer connection fees, *Schmidt v. Village of Kimberly, 74 Idaho 48, 256 P.2d 515 (1953)*, and it is clear that so long as the fee collected **[*9]** pursuant to the Idaho Revenue Bond Act are allocated and budgeted inconformity with that Act they will not be construed as taxes. However, if fees are collected under the disguise of the Act and allocated and spent otherwise, then the fees are primarily revenue raising and will be construed as taxes. *Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1989)*. Thus, to determine whether the sewer connection fees are in reality taxes in disguise, we must determine whether the monies collected from those funds are dispersed in accordance with that Act.

Id. at *119 Idaho at 439, 807 P.2d at 127*. (emphasis added).

Idaho Code section 50-1028 provides:

> Any city acquiring, constructing, reconstructing, improving bettering or extending any works pursuant to this act, shall manage such works in the most efficient manner consistent with sound economy and public advantage, to the end that the services of such works shall be furnished at the lowest possible cost. No city shall operate any works primarily as a source of revenue to the city, but shall operate all such works for the use and benefit of those served by such works and for the **[*10]** promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the city.

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[2] On March 4, 2016, the City, using the 2015 FCS study, increased its Cap Fee to $ 2,306.00. That fee has not been challenged. (R., p. 589.)

I.C. § 50-1028.

Idaho Code section § 50-1030 provides, in relevant part, that "[i]n addition to the powers which it may now have, any city shall have power under and subject to the following provisions:

> (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city…
>
> …
>
> (f) To prescribe and collect rates, fees, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and its subdivisions, for the services, facilities and commodities furnished by such works …

I.C. § 50-1030.

In *NIBCA I*, the Court stated that sewer connection fees can be used to extend the capacity of a sewer system:

> When a new user pays a sewer connection fee to a city based upon the value of that portion of the sewer system's capacity that the new user will be utilizing at that point in time, the connection fee **[*11]** will probably allow the city to accumulate a fund to increase the capacity of its sewer system. That proportionate value of the system capacity used by the new user will undoubtedly be more than any increased operational costs of adding the new user to the current system. Assuming that the city is able to extend its sewer system by accumulating a fund from charging new users a connection fee based upon the value of the system capacity that each of them will be using, the Idaho Revenue Bond Act would not prevent a city from using those funds to extend its system, as long as it did so consistent with *Idaho Code section 50-1028*.

North Idaho Building Contractors Association v. City of Hayden, 158 Idaho 79, 83-84, 233 P.3d 1086, 1090-91 (2015).

Further, nothing in *Loomis* suggests that it provides the exclusive methodology for calculating legal cap fees. *Loomis* suggests factors under which a court should assess the permissibility of the fee, including assessing the intent or purpose of the fee and also whether the fee is reasonably related to the actual costs of providing the service, stating:

> It is not the province of this Court to determine how **[*12]** a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld. The fees, rates and charges imposed by the municipality must be reasonable and produce sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act.

Loomis, 119 Idaho at 442, 807 P.2d at 1280. (emphasis added).

Nine years later the Court reiterated its limited role:

> The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.

Viking Const., Inc. v. Hayden Lake Irrigation Dist., 149 Idaho 187, 194, 233 P.3d 118, 125 (2010).

Additionally, public works projects under the Revenue Bond Act "shall be and always remain self-supporting." *I.C. § 50-1032*. This Court has recently reaffirmed the following **[*13]** principle that:

> The legislature has not imposed exacting rate requirements upon localities and the law requires only that the fee be reasonably related to the benefit conveyed. *Loomis, 119 Idaho at 442, 807 P.2d at 1280*. Creating a fee

> structure "whereby every member of the general public would be charged only for his exact contribution of waste presumably could be established, but the system would be cumbersome and perhaps prohibitively expensive to maintain. The law only requires that the fee be reasonably related to the benefit conveyed." *Kootenai Cnty. Prop. Ass'n v. Kootenai Cnty., 115 Idaho 676, 680, 769 P.2d 553, 557 (1989)*.

Manwaring Investments, L.C. v. City of Blackfoot, 162 Idaho 763, 767, 405 P.3d 22, 27 (2017). (emphasis added).

Although the method of calculating the fee is relevant, the focus must be on how the money is used to determine whether the use is lawful. The use must comply with the Idaho Constitution and the Idaho Revenue Bond Act. The Idaho Revenue Bond Act does not prevent a city from using the funds to extend its system, so long as it does so consistent with *Idaho Code section 50-1028*. **[*14]**

At all times, the money from the Cap Fee was placed into a special fund for the utilization by the City for sewer, interceptor, collection, and treatment system construction and obligations for the regional facility. (R., p. 572; Ordinance 422.) The money from the Cap Fee was never transferred to the City's general fund or used for general fund purposes.

This is a unique case. Unlike *Idaho Building Contractors Assoc. v. Coeur d'Alene, 126 Idaho 740, 890 P.2d 326 (1995)* ("IBCA") and *BHA Investments, Inc. v. City of Boise, 141 Idaho 168, 108 P.3d 315 (2004)* ("BHA II"), where the fees were illegal on their face because they were imposed without authority, the Cap Fee in this case was authorized by statute and relevant to the cost of providing and sustaining the sewer system. Further, unlike *Hill-Vu Mobile Home Park v. City of Pocatello, 162 Idaho 588, 402 P.3d 1041 (2017)*, where the fee was to generate revenue and the profit was placed into the general fund, the City's Cap Fee was not assessed and collected to raise revenue for the City's general fund. Rather, the Cap Fee was, at all times, placed into a special fund for the utilization **[*15]** by the City for sewer, interceptor, collection, and treatment system construction and obligations for the regional facility. (R., p. 572; R., p. 576; Ordinance 422.) This is not a situation where the City acted outside its authority. It clearly has authority to charge a reasonable Cap Fee. Nor is this a situation where the City used money collected for improper purposes. This Court has made clear that it is proper to use a cap fee for future expansion. The City had authority to charge a fee and use it for system expansion. The only question is whether the Cap Fee charged was reasonable.

II. RESTATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the district court committed error when it ignored the instructions of the Court on remand and arbitrarily refused to consider uncontroverted evidence of the reasonableness of the Cap Fee when it was properly calculated by the City under the methodology prescribed by *Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991)* and was actually less than the actual pro rata value of sewer service provided to a customer connecting to the City sewer system as authorized by *Idaho Code Section 50-1030(f)*.

2. Whether the district **[*16]** court failed to recognize that even if the Cap Fee were not lawfully imposed, any damages are limited to the excess of the Cap Fee over the amount that could lawfully have been charged.

3. Whether the district court committed error when it ruled that the failure of NIBCA, Termac Construction, Inc., and the class members (hereinafter collectively "NIBCA") to ripen their federal claims (their only surviving damage claims) by employing state law remedies in compliance with Idaho precedent as established in *Alpine Village Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013)* and *Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013)* and the requirements prescribed by *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108 (1985)*, did not bar NIBCA's federal takings claims.

4. Whether the district court committed error when it arbitrarily rejected the City's equitable defenses and ordered that Cap Fees that had been paid to the City by developers and individuals in excess of the $ 774 rate be refunded to Plaintiffs, which was a Cap Fee that is less than the pro rata replacement value **[*17]** of the portion of the system to which they were allowed to connect and which results in a double recovery for the developer Plaintiffs who were paid Cap Fees by the purchasers of their development properties.

5. Whether the district court committed error when it found Plaintiffs to be the prevailing party and awarded costs in the amount of $ 976.78 and attorney fees in the amount of $ 219,707.77 to Plaintiffs.

6. Whether the City is entitled to an award of costs and attorney fees on appeal.

III. ARGUMENT

A. The District Court Committed Error When It Ruled That It Would Not Consider the Evidence of the Reasonableness of the Cap Fee Under the Methodology Prescribed by Loomis v. City Of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991) Following Remand.

The sole and uncontested evidence in the record establishes that the fee imposed by the City is for an amount lower than it could legally have charged as measured by the Loomis methodology, which has been approved by the Court. The district court refused to consider this evidence, holding that the Cap Fee as imposed is an impermissible tax and that the district court would not consider whether the "tax" **[*18]** is reasonable in amount. This ruling is reversible for several reasons.

1. The district court failed to proceed in a manner consistent with the Court's opinion in *NIBCA I* to hear and consider evidence of the reasonableness of the Cap Fee.

This case was back in front of the district court on remand from the Supreme Court with instructions to proceed in a manner that is consistent with the Court's opinion. *NIBCA I, 158 Idaho at 86, 343 P.3d at 1093*. On remand, the posture of the case before the district court was not as the district court characterized in its "*Decision Following Remand*" - a case where the parties were placed in the same position they had been in prior to the *Order Granting Defendant's Motion for Summary Judgment*. (R., p. 114.) Rather, the district court and the parties were instructed to proceed with the case in a manner that is consistent with the Court's opinion. *Id. at 84, 343 P.3d at 1091*. The failure and refusal of the district court to comply with these instructions on remand is a reversible error.

NIBCA I is focused on the "absence of evidence" in the record. *See, NIBCA I, 158 Idaho at 81, 343 P.3d at 1088* **[*19]** ("no evidence in the record that [the Cap Fee] related to the actual cost of the service being rendered as of June 7, 2007]"); *Id. at 84, 343 P.3d at 1091* ("no evidence in the record to support the contention [that] the cap fee is 'equal to the value of the system capacity that would be utilized by the new user who connected to the system on or after June 7, 2007'"). The Court's decision clearly infers that an evaluation of these factual issues on remand is required, and the concurring opinion explicitly says so. *NIBCA I, 158 Idaho at 86-87, 343 P.3d at 1093-94*.

Indeed, such a reading would also be consistent with the procedural posture of the case, as the Court was assessing whether the district court properly granted summary judgment in favor of the City, holding that the City was authorized to collect the Cap Fee pursuant to Hayden City Code § 8-I-3(B)(9) and Idaho Code sections § 63-1311 and 50-1030. (R., Aug. pp. 577-581.) Hearing the case in that posture, the Court's decision to vacate the summary judgment and remand the case back to the district court would be for the purpose of requiring further evidence. Therefore, the parties were **[*20]** placed in the position they would have been in if the district court had denied the City's summary judgment and found a genuine issue of fact existed as to the reasonableness of the fee. In that scenario, the case would not be disposed of summarily; rather, the case would proceed and the City would have to provide additional evidence to overcome the existence of a genuine issue of fact.

Therefore, it is reasonable to conclude that the case was remanded so the district court could take evidence to determine whether the fee was reasonably related to the value received. The district court abused its discretionary powers and committed reversible error when it refused to consider this evidence on remand.

2. The district court failed to properly consider the relevance of the evidence and the reasonableness of the Cap Fee.

The district court took issue with the timing of the City's FCS study - (which established that the Cap Fee calculated under *Loomis* was actually less expensive than the methodology of assessing pro rata future expansion costs) - and implied that the post-remand timing of the FCS Study somehow inherently and permanently taints the process. While the district **[*21]** court, as the fact finder, would have the discretionary power to weigh the evidence of the FCS study, the district court did not do that. Instead, the district court applied a contorted legal rationale to justify completely disregarding that evidence, holding that the Cap Fee must be assessed for reasonableness "at the time" it was originally issued. (R, pp. 292-293; R., pp. 305-306.)

Here, the amount of the Cap Fee was reasonable at the time it was adopted even though the method used to arrive at the amount of the fee was deemed to be flawed. An analysis of the facts from 2007 by FCS establishes the amount of the Cap Fee as reasonable and in conformance with the Revenue Bond Act. Further, the purpose and intent of the increased fee was not to generate revenue for the *City. Unlike Hill-Vu Mobile Home Park v. City of Pocatello, 162 Idaho 588, 402 P.3d 1041 (2017)* in which Pocatello tacked on a blatantly revenue-generating "payment in lieu of taxes" charge, Hayden's Cap Fee was not revenue-generating. Rather, the money was collected and placed in a special fund and designated for sewer system obligations. (R., p. 572; Ordinance 422.) The intent was to offset the costs **[*22]** of the system, and to make the system as close to self-supporting as possible in accordance with the Revenue Bond Act.

In accordance with *Loomis* and this Court's remand order, the City's FCS calculation looked only to infrastructure that was physically in the ground at the time the Cap Fee was imposed. The FCS study, did not, as NIBCA suggests, concoct new facts to save the fee. *See, Respondents/Cross-Appellants' Br.*, p. 4. Engineering studies, such as the FCS study, have the ability to know exactly what infrastructure was in the ground at the time the fee was put in place, and are able to calculate the costs of replacing the system based upon the cost it would have been in 2007. The FCS study revealed that the methodology allowed by *Loomis, Viking* and *NIBCA I* would be more expensive to the new users connecting to the system, and thus established in the district court record that the amount of the Cap Fee was legal, as it did not exceed the pro rata value of the existing system. (R., p. 124, P 33; R., pp. 127-143; R., p. 450.) The district court expressly stated that it would disregard that evidence. If that is allowed to stand, the district court's decision would **[*23]** lead to absurd results, and would create a windfall for class members at the expense of the taxpayers who would have to pay the judgment if affirmed. Further, the implications of this decision by the district court would violate the principles and plain language of the Revenue Bond Act, which requires that the system "shall be and always remain self-supporting." *I.C. § 50-1032*.

Previously, this Court has held "[w]hen this Court remands a case back to the district court 'it is within the discretion of the trial court to determine whether the existing record is sufficient, or should be supplemented, in order to make the required findings of fact and conclusions of law.'" *Morgan v. New Sweden Irr. Dist., 160 Idaho 47, 52, 368 P.3d 990, 995 (2016)* (quoting *Akers v. D.L. White Const., Inc., 156 Idaho 37, 44, 320 P.3d 428, 435 (2014))*. However, unlike *Morgan* and *Akers*, this case was not appealed from a judgment as a result of trial; rather, in *NIBCA I*, this case was before the Court on an appeal from summary judgment. Therefore, this case was not in the procedural posture as one in which the parties had completed a trial and the record had **[*24]** been closed, as the window to complete discovery is still open during the time motions can be heard. In this case the record was not closed. The City submits that the FCS study was admitted and properly before the district court. The district court, however, failed to consider and weigh the evidence before it. This failure to consider pivotal evidence in the record violated a substantial right of the City.

Relevance of evidence is not a matter of discretion with the court. The determination of relevance is a legal question, not a matter of discretion. *State v. Raudebaugh, 124 Idaho 758, 864 P.2d 569 (1993)*. Whether evidence is relevant under Rule 401 is an issue of law which an appellate court will review de novo. *State v. Sanchez, 147 Idaho 521, 211 P.3d 130 (2009)*. If relevant, evidence is admissible unless there are other valid grounds to exclude the evidence notwithstanding the fact it is relevant. I.R.E. 401 and 402. Rule 401 defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. **[*25]** " I.R.E. 401. Rule 401 requires only that the proffered evidence have "any tendency" to make the existence of the fact more or less

probable. Each item of evidence need not alone have probative value if the cumulative effect is probative. With respect to presumptive admissibility, the Idaho Trial Handbook provides the following:

> The evidence rules give presumptive admissibility to relevant evidence. IRE 402 provides that 'all relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state.' The effect of this approach is to place on the party opposing the admission of relevant evidence the burden of justifying its exclusion, rather than requiring the proponent to justify admission.

Lewis, IDAHO TRIAL HANDBOOK, 219 (2d ed. 2005).

In *NIBCA I*, the inference is clear that the Court remanded the case to hear evidence of whether the Cap Fee of $ 2,280 could be supported under a calculation that complies with the *Loomis* methodology. Contrary to this remand, the district court determined that the fee was an impermissible tax and arbitrarily refused to consider any evidence that was offered by the City **[*26]** to establish that the amount collected was less than the amount that could have been collected if the *Loomis* methodology had been followed. (R., pp. 308-309, 803.)

It would be one thing if the district court had considered the FCS Study and found it unpersuasive. It is a far different thing to arbitrarily decline to consider the report at all. For example, this Court has stated: "The opinion of an expert is not binding on the trial court [] as long as it does not act arbitrarily. … Bate's testimony was not arbitrarily rejected. Rather his testimony was addressed below and found unpersuasive." *Manwaring Investments, 162 Idaho 763, 405 P.3d at 30* (quoting *Pinnacle Eng'rs, Inc. v. Heron Brook, LLC, 139 Idaho 756, 758, 86 P.3d 470, 472 (2004)* (emphasis added). Additionally, while NIBCA argues that the FCS study was not subject to peer review and was "full or inaccuracies and unfounded assumptions," NIBCA offered no evidence of "inaccuracies and unfounded assumptions." It had the opportunity to submit its own study into evidence and chose not to do so. *See, Respondents/Cross-Appellants' Br.*, p. 5.

B. The District Court Abused its Discretionary [*27] Powers and Imposed its Own Sense of Justice When it Refused to Consider the City's Evidence Following Remand that the $ 2,280 Fee per ER is Less Than the Value of the System Capacity that Would Be Utilized By the New User Who Connected to the System On or After June 7, 2007. This Holding by the District Court was Arbitrary and Constitutes Reversible Error. The Remedy for an Unlawful Tax or Fee is Limited to a Refund of the Overcharge.

Even if the Cap Fee is deemed an illegal tax (and the FCS analysis is an impermissible do-over), a full refund would amount to a windfall at the expense of the taxpayers who would have to pay the judgment. Such a windfall would violate U.S. Supreme Court precedent that has been followed without deviation in every state in which the issue has arisen. *See, McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18, 40, 110 S. Ct. 2238, 2252-53 (1990)*. This authority establishes that the remedy for an unlawful tax or fee is to refund the amount of the tax or fee that was in excess of that amount that NIBCA lawfully could have been charged.

Contrary to NIBCA's arguments, the City did **[*28]** not impose the fee without authority, amounting to an unconstitutional tax. *See, Respondents/Cross-Appellants' Br.*, pp. 14-15. In this case, the City is empowered by statutory authority under *Idaho Code Section 50-1030(f)* to collect a sewer connection fee, if the fee is reasonably related to the cost of the service provided as authorized under Section 50-1030(f). Therefore, since the City does have statutory authority to charge the fee, the amount of the refund is limited to the amount that was in excess of the amount that NIBCA could have been lawfully charged when calculated in compliance with the *Loomis* methodology. It is not, as NIBCA argues, that because the City used the wrong formula when it adopted the fee, even though at all times it had statutory authority to impose the fee, that NIBCA is entitled to pay no fee at all.

If a full refund is allowed, as NIBCA argues, it would amount to a windfall at the expense of the taxpayers. *See, Respondents/Cross-Appellants' Br.*, p. 15. It cannot be overlooked that NIBCA received a significant benefit from being able to hook into the sewer system. Further, a sewer connection is a requirement to build a habitable structure under **[*29]** *Idaho Code Section 50-1326*. Without the Cap Fee and associated sewer connectivity, the properties could not have been built. NIBCA is not seeking compensation, it is seeking a windfall. If a full refund is

granted, NIBCA would have been allowed to connect to the sewer system for free, build and sell homes, and make a profit-all at the expense of tax payers who would have to pay the judgment if affirmed.

C. The District Court Committed Error When it Ruled that the Failure of NIBCA To Comply with the *Requirements Prescribed by Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985)* Did Not Bar NIBCA's Federal Takings Claims.

The City sought dismissal of NIBCA's federal law damage claims as unripe under *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108 (1985)* ("*Williamson County*") and its progeny, including *Alpine Village Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013)* ("*Alpine Village*") and *Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013)* ("*Hehr*"). In *Williamson Cnty.* **[*30]** , the United States Supreme Court announced a two-prong test to determine whether a federal takings claim against a state was ripe. *Williamson Cnty., 473 U.S. at 186, 105 S. Ct. at 3116*. Prong one requires that "the government entity charged with implementing the regulations has reached a final decision" *Id.* Prong two requires the party alleging the taking to pursue any available state remedy and be denied relief by the state. *Id. at 194-95, 105 S. Ct. at 3120-21*. Plaintiffs fail prong two.

1. NIBCA may be exempt from prong one because they assert a facial challenge.

NIBCA argues that it is exempt from satisfying prong one because it asserts a facial challenge to the legality of the ordinance instituting the 2007 Cap Fee. *See, Respondents/Cross-Appellants' Br.*, pp. 15-26. It is correct with respect to its request for declaratory relief, which is a facial challenge. However, NIBCA's damage claims may not be exempt from prong one because each claim is based on the circumstances of each particular property. In any event, the facial challenge exception only applies to prong one, requiring NIBCA to satisfy prong two. *See, Yee v. City of Escondido, 503 U.S. 519, 534 (1992)*. **[*31]**

2. NIBCA cannot satisfy prong two because it failed to timely pursue its state inverse condemnation claims by filing a timely notice of claim under the Idaho Tort Claims Act, and seeking review under the Regulatory Takings Act.

Prong two of *Williamson Cnty.* mandates that NIBCA cannot pursue a federal taking claim for compensatory damages unless it has timely pursued available state remedies and has been denied relief by the state. *Williamson Cnty., 473 U.S. at 194-95, 105 S.Ct. at 3120-21*. The City argued that NIBCA had two available remedies under Idaho law. Having failed to use either, it has forfeited its federal damage claims. First, it failed to timely pursue its state law taking claims by failing to file a timely notice of claim under the Idaho Tort Claims Act ("ITCA"), *Idaho Code Section 6-901*, *et seq.*, applicable through *Idaho Code Section 50-219*. (R., p. 342; R., pp. 768-769.) Second, it failed to timely seek review under the Regulatory Takings Act, *Idaho Code Section 67-8001 et seq.* (R., pp. 342-343; R., pp. 769-771.) Either failure violates prong two because these are available remedies that might have resulted in relief for the alleged **[*32]** harm. The district court ignored clear precedent to this effect, which is a reversible error.

Simply put, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Williamson Cnty. at 195*. *Alpine Village Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013)*; *Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013)*.

These cases establish definitively that by failing to avail themselves of potential state remedies, NIBCA forfeits its federal damage claims under the *Takings Clause. Hehr, 155 Idaho at 98, 305 P.3d at 542*. There is no precedent in Idaho or elsewhere that contradicts this conclusion. In its '*Memorandum Decision and Order on Defendant's Third Motion for Summary Judgment*" and its '*Memorandum Decision and Order on Motion to Reconsider*," the district court stated that the "notice-of-claim requirements imposed by state law do not apply to federal claims." (R., p. 438; R., p. 814.) While that is true, it is irrelevant in the context of *Williamson Cnty.* All it means **[*33]** is that NIBCA was not required to provide notice of its federal claims. The fact that the state of Idaho notice-of-claim requirements do

not apply to federal claims does not eliminate the requirement under *Williamson Cnty.* that NIBCA must pursue available state claims in accordance with state procedures in order to ripen the federal takings claims.

NIBCA argues that the Regulatory Takings Act is not mandatory, thus excusing its failure to employ that remedy. *See, Respondents/Cross-Appellants' Br.*, pp. 20-22. This argument ignores that prong two is not limited to the failure to employ mandatory state remedies; rather, prong two is about the failure to employ any available state remedies.

In *Alpine Village* and *Hehr*, the Court ruled that plaintiffs' failure to seek relief under the Regulatory Takings Act, *Idaho Code Section 67-8001 et seq.*, barred their federal claims under prong two of the *Williamson Cnty.* two-prong test. *Alpine Village, 154 Idaho at 939, 303 P.3d at 626*; *Hehr, 155 Idaho at 98, 305 P.3d at 542*.

The district court held that *Alpine Village* and *Hehr* are distinguishable because they involved a taking **[*34]** of real property and the Local Land Use Planning Act (LLUPA), *Idaho Code § 67-6501 et seq.* (R., p. 439.) The district court noted that the LLUPA provides a party subject to a regulatory taking with an opportunity to challenge the proposed taking through judicial review. (R., p. 439.) And, because those decisions were framed under LLUPA rather than as inverse condemnation cases, the district court held this Court's precedents were unpersuasive and distinguishable. (R., p. 440.) The district court went even further in its "*Memorandum Decision and Order on Motion to Reconsider*," holding "this Court determines that Plaintiff is not required to exhaust all state review procedures as a predicate to satisfying prong two of the ripeness analysis of *Williamson Cnty*." (R., p. 811) (emphasis added).

The fact that *Alpine Village* and *Hehr* involved municipal actions that could have been challenged under LLUPA, while the action here is not reviewable under LLUPA is inconsequential. The Regulatory Takings Act is not part of LLUPA nor is it limited to LLUPA. The Regulatory Takings Act is an independent statute that applies to and provides a remedy for all types of local government **[*35]** actions. The only connection to LLUPA is that LLUPA happens to contain a cross-reference to the Regulatory Takings Act. NIBCA argues "[a]bsent an applicable statute that specifically calls out *Idaho Code § 67-8001* [Regulatory Takings Act], as is done in the LLUPA, the regulatory takings analysis under § 67-8001 is not a mandatory requirement." *Respondents/Cross-Appellants' Br.*, p. 17. This makes no sense. The regulatory takings analysis is not mandatory under LLUPA and it is not mandatory outside of LLUPA; rather, the Regulatory Takings Act is an option available to anyone who believes they have suffered a regulatory taking. NIBCA's failure to timely pursue its available state inverse condemnation claims through a timely notice of claim under the ITCA, and to seek relief under the Regulatory Takings Act, resulted in forfeiture of its federal takings claims. *Alpine Village* and *Hehr* are on point, and it was error for the district court to ignore them.

The principle that failure to effectively employ an available (even if optional) state remedy results in forfeiture of the federal claim is widely recognized. [3] In *Alpine Village*, the Court applied the forfeiture **[*36]** principles of *Pascoag* even though it did not cite those cases. In *Hehr*, the Court cited both *Pascoag* and *Harbours Point*. The district court's sidestepping of this clear precedent is reversible error.

3. Any "prudential" exception to *Williamson Cnty.* does not apply here.

NIBCA presses on appeal an argument, rejected by the district court, that *Williamson Cnty.* is merely a prudential requirement **[*37]** and may be ignored by the Court if it wishes. *Respondents/Cross-Appellants' Br.*, p. 21. There is no Idaho authority to that effect. The few federal cases that have noted the prudential nature of the requirement have done so to enable the court to "assume" ripeness and thereby reach the merits in order to deny the plaintiff's claim rather than dismiss it on technical ripeness grounds. There is no authority in which a court has by-passed the *Williamson Cnty.* ripeness requirement in order to allow a federal taking claim to succeed.

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[3] *Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 93-95 (1st Cir. 2003)*, *cert. denied*, ***540 U.S. 1090 (2003)***; *Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations, 643 F.3d 16 (1st Cir. 2011)*; *Harbours Pointe of Nashotah, LLC v. Village of Nashotah, 278 F.3d 701 (7th Cir. 2002)*; *Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993)*; ***Daniel v. County of Santa Barbara, 288 F.3d 375, 381*** & 382 (9th Cir. 2002), *cert. denied*, ***537 U.S. 973***.

D. The District Court Committed Error when it Arbitrarily Rejected the City's Equitable Defenses and Ordered that Cap Fees that Had Been Paid to the City by Developers and Individuals in Excess of the $ 774 Rate be Refunded to the Class Members, which was a Cap Fee that is Less than the Pro Rata Replacement Value of the Portion of the System to which They were Allowed to Connect.

The district court rejected the City's equitable defense argument and held class members are entitled to a refund of the amount of the Cap Fees in excess of $ 774 - the amount of the fee prior to the 2007 increase - and pre-judgment interest at a rate of 6.5%. (R. **[*38]** , p. 838.) In so ruling, the district committed a reversible error.

1. The district court committed error when it ruled that it would not consider equitable defenses following remand.

At summary judgment and on the *Motion to Reconsider*, the City raised equitable defenses of unjust enrichment and quantum meruit to NIBCA's claims. (R., pp. 343-348; R., pp. 772-774.) The district court rejected these defenses, however, stating there was little to demonstrate what benefit was provided and what the value was. (R., 411; R., pp. 803-804.) Further, the district court held that there was nothing to show that NIBCA appreciated the benefit. (R., p. 442.) Although the district court later held in its "*Memorandum Decision and Order on the Issue of Just Compensation*" that NIBCA "received some value in the form of connection to the City's sewer service," though it never changed its reasoning on the City's claim for unjust enrichment. (R., p. 838.) The district court erred in rejecting the City's equitable defense of unjust enrichment because NIBCA did receive a benefit from the expenditure of Cap Fees on sewer infrastructure - each property was hooked up to the City's sewer system, **[*39]** and, without that hookup, the property could not have been further developed. Even if the Cap Fee is impermissible, it cannot be overlooked that NIBCA received a significant benefit from being able to hook into the sewer system. Further, a sewer connection is a requirement to build a habitable structure under *Idaho Code Section 50-1326*. While NIBCA argue that they did not receive any benefit, such argument is wholly unfounded. *See, Respondents/Cross-Appellants' Br.*, p. 23. Without the Cap Fee and associated sewer connectivity, the properties could not have been built and sold.

Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475, 478 (1931), is directly on point to this case. There, the Court held that where an illegal and unconstitutional contract has been executed, and the parties have benefited from its execution, the parties may not recover the money they have paid even when the contract is held to be constitutionally void. *Id. at 478*. In *Williams*, the issue before the Supreme Court was whether a city could enter into a two and a half year agreement for the lease of a street sprinkler, without voter approval. *Id. at 476*. The Court looked to *Article **[*40]** VIII, Section 3 of the Idaho Constitution* which prohibits a city from incurring "any indebtedness, or liability in any manner, or for that purpose, exceeding in that year, the income and revenue provided for it for such year, without assent of two-thirds of the qualified electors thereof..." *Idaho Const., Art. VIII, § 3*. The Court stated that due to the long-term nature of the lease, it violated the Idaho Constitution and was therefore void. *Williams, 51 Idaho 500, 6 P.2d at 478*.

Although the lease was void, the Court found that the parties had been carrying out the agreement in good faith. *Id. at 478*. The record before the Court reflected that the lease was based on reasonable value, the city had benefited under the agreement by use of the sprinkler, and the agreement was not shown to have been entered into by fraud. *Id.* The Court stated that the agreement simply represented a contract that was void and unenforceable; however, since the city received a benefit from use of the sprinkler, it would not be allowed to recover back the money it had paid under the agreement. *Id.*

Contrary to the arguments of NIBCA, *Williams* is applicable and should be applied **[*41]** to this case. *See, Respondents/Cross-Appellants' Br.*, p. 23. *Williams* stands for the proposition that in the event the Court deems the Cap Fee to be inappropriate, the benefit NIBCA received in exchange for the Cap Fee must be realized. Although NIBCA continues to argue, fictitiously, that it never received a benefit, quite the opposite is true - each home for which the Cap Fee was paid was hooked up to sewer, and the property was able to be developed and sold. *See, Respondents/Cross-Appellants' Br.*, p. 23. Therefore, in the event the fees are held to be impermissible, it is inappropriate for NIBCA to recover back the money it spent in light of the benefits received. If NIBCA were able to recover the money, after receiving the benefit of having each home built hooked up to sewer and sold, it would be

unjustly enriched. The district court committed a reversible error when it refused to consider the City's defense of unjust enrichment.

2. The district court erroneously rejected the City's defense of unjust enrichment based on the doctrine of unclean hands.

NIBCA asserts that the City has not demonstrated that it has any equitable defenses to NIBCA's claims, particularly **[*42]** where it allegedly does not come to court with clean hands. *See, Respondents/Cross-Appellants' Br.*, p. 24. For its assertion, NIBCA apparently relies upon statements of the district court in its *Memorandum Decision and Order on Motion to Reconsider*, wherein the district court rejected the City's equitable defenses of unjust enrichment and quantum meruit, stating: "It is a maxim of equity that equity will not permit a party to profit by his own wrong, (citation omitted) The doctrine of unclean hands permits a trial court to deny equitable relief to a party 'on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue, (citation omitted) ..."

It is true that the City acknowledged that the Cap Fee that was adopted by the City in 2007 was not based on the *Loomis* methodology, but rather on an analysis of future system expansion costs necessary to replace capacity consumed by new users. (*Second Affidavit of Angie Sanchez Virnoche*, P 7, R., p. 475; *Second Affidavit of Donna L. Phillips*, P 6, R., pp. 588-89.) The "capacity replacement" study was undertaken by Welch Comer & Associates in 2006 and computed **[*43]** a fee of $ 2,280. *Id.* But, such conduct does not rise to the level of "inequitable, unfair and dishonest, or fraudulent and deceitful," conduct which is necessary for the application of the doctrine of unclean hands. ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 271, 371 P.3d 322, 325 (2016)***.

As previously stated, nothing in *Loomis* mandates that the only methodology a city may follow to calculate a legal cap fee is that which was used by the City of Hailey or that the failure to follow the *Loomis* methodology would constitute conduct that is "inequitable, unfair and dishonest, or fraudulent and deceitful" sufficient to satisfy the doctrine of "unclean hands." On the contrary, this Court explicitly states in *Loomis*: "… when the rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act or are imposed pursuant to a valid police power, the charges are not construed as taxes" and "[t]he Idaho Revenue Bond Act authorizes the collection of sewer connection fees, (citation omitted)." *119 Idaho at 438, 807 P.2d at 1276*. The *Loomis* Court further stated:

> [I]t is clear that so long as **[*44]** the fees collected pursuant to the Idaho Revenue Bond Act are allocated and budgeted in conformity with that Act they will not be construed as taxes. However, if fees are collected under the disguise of the Act and allocated and spent otherwise, then the fees are primarily revenue raising and will be construed as taxes, (citation omitted) Thus, to determine whether the sewer connection fees are in reality taxes in disguise we must determine whether the monies collected from those funds are dispersed in accordance with that Act.

Id.

In *Loomis*, the Court explicitly noted that it was undisputed that the City of Hailey placed the connection fees into a separate fund to be used for replacement of sewer and water system components and that no monies from the fund were transferred to the city's general fund or used to retire the bond indebtedness. Such is the case with the City of Hayden; all connection fees were placed in a separate fund to be used for improvement of sewer system components and extension of the sewer collection system. There is no evidence that any of the funds were transferred to the general fund or used for general fund purposes. (R., p. 572, R., p. 576 Ordinance 422; **[*45]** *Stipulation of Undisputed Facts*, R., pp. 448-454; *Second Affidavit of Donna L. Phillips, Ex. E.*, R., pp. 89-90.) The *Loomis* Court stated:

> It is not the province of this Court to determine how a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld. The fees, rates and charges imposed by the municipality must be reasonable and

> produce sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act. *I.C. § 50-1028*.

119 Idaho at 442; *807 P.2d 1280*. Moreover, the *Loomis* Court stated that "merely because the charge represents something more than the actual cost of the actual physical hookup does not make the connection fee illegal. … Although fairness and equity must be considered, Idaho statutes require only that the fees be reasonable and not be imposed arbitrarily." *Id.* The *Loomis* Court reiterated that "in Idaho the statutory scheme in place requires only that the rates and charges be reasonable and sufficient to support the public works **[*46]** project, including the retirement of bond indebtedness and operating costs." *119 Idaho at 442-43*; *807 P.2d at 1280-81*. In its analysis, the *Loomis* Court further stated:

> Idaho's statutory scheme does not require a new user to "buy in" to the system, nor does it prohibit such a program. In this case the City of Hailey, after receiving an engineering report, selected a system in which the new user buys into a portion of the current value of the system capacity. The methodology used to determine the value of the system is not unreasonable, nor is it unreasonable to charge a new user the value of that portion of the system capacity that the new user will utilize at that point in time. The fact that the connection fee may be higher in Hailey than in other municipalities will not invalidate the fee as long as it is reasonable and is not primarily a source of revenue. The Ordinance specifically states that its intent is to 'recover the costs of operating, maintaining, replacing, and depreciating the existing water and sewer system and any extensions thereof.' Ordinance 495, Recitals. There is nothing in the ordinance that is not authorized by the **[*47]** Idaho Revenue Bond Act and we find no evidence in the record that the fees charged by the City of Hailey are arbitrary or unreasonable.

119 Idaho at 443-44; *807 P.2d at 1281-82*. (emphasis added).

Is it any wonder that the City thought, with the advice of its counsel, that it could legally charge a cap fee that would be reasonable and would provide funds to recover the costs of improving the existing sewer connection system and any extensions thereof that would be required to continue to provide services to the residents of the City of Hayden. Based on the statements and guidance of this Court in *Loomis*, such conduct certainly does not rise to the level of "inequitable, unfair and dishonest, or fraudulent and deceitful" conduct as to the Cap Fee that was collected from NIBCA.

One must remember that the City Council that adopted the 2007 Cap Fee was, like most city councils, made up of lay persons who were not benefiting from the decision to adopt the Cap Fee, and were just trying to do the best they could to adopt a reasonable fee that would provide for sewer service in the present and future as the need would arise. The Council held public **[*48]** hearings and relied on consultants and legal counsel. *See, Second Affidavit of Donna L. Phillips*, R., pp. 587-595. Without question, the City's consultants and legal counsel were not reading the *Loomis* decision in the same manner as did the district court, i.e., that failure to follow the *Loomis* methodology when determining the 2007 Cap Fee constitutes "inequitable, unfair and dishonest, or fraudulent and deceitful" conduct, and for good reason; the *Loomis* Court never said that the *Loomis* methodology was the exclusive methodology for determining a reasonable cap fee that can be charged under the governing statute. The *Loomis* Court said the issues are whether the cap fee is reasonable under the Idaho Revenue Bond Act and whether the funds are used to recover the costs of operating, maintaining, replacing and depreciating the existing sewer connection system and any extensions thereof. Those are the issues that are the subject of this case and should have been the issues before the district court on remand.

The district court clearly committed reversible error when it arbitrarily decided that the conduct of the City, in adopting the 2007 Cap Fee, constituted **[*49]** conduct that was "inequitable, unfair and dishonest, or fraudulent and deceitful," which is necessary for application of the doctrine of unclean hands. ***Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 271, 371 P.3d 322, 325 (2016)***.

3. The district court committed error when it failed to recognize that damages, if any, are limited to the excess charged by the City over the lawful amount.

Throughout this action, the City consistently maintained that because the FCS study established that the City could have charged $ 2,600 for the Cap Fees, which was more than what the City actually charged, and NIBCA paid $ 2,280 from 2007-2012, NIBCA suffered no damages. (R., pp. 450-451; R., p. 760.) In fact, NIBCA benefited under the previous Cap Fee analysis. The district court, however, failed to consider this evidence, and that failure is a reversible error.

The general rule on damages is that they "are not recoverable unless . . . clearly ascertainable both in their nature and origin, and unless it is also so established that they are the natural and proximate consequence of the breach and are not contingent or speculative." *Wing v. Hulet, 106 Idaho 912, 918, 684 P.2d 314, 320 (Ct. App. 1984)*. **[*50]** Moreover, the measure of damage - as well as the fact of damage - must be proven beyond speculation. *Id.* A party asserting a claim of damages has the burden of proving not only a right to damages, but also the amount of damages. *Bratton v. Scott, 150 Idaho 530, 537, 248 P.3d 1265, 1272 (2011)*. The amount of damages must be proved with reasonable certainty so that the existence of damages is "taken out of the realm of speculation." *Dunn v. Ward, 105 Idaho 354, 356-57, 670 P.2d 59, 61-62 (Ct. App. 1983)*.

The uncontested evidence in the record - the FCS study - affirmatively establishes that the per user depreciated replacement value of the City's sewer system, as it existed in 2007, was between $ 2,600 and $ 4,808 per ER, depending on whether surface replacement costs are included in the calculation. (R., p. 450, P 11.) NIBCA paid $ 2,280 per ER. (R., p. 449, P 2.) Thus, the evidence developed by FCS established that the Cap Fee, if calculated under the methodology approved by the Court in *Loomis*, would have been more than the Cap Fee that was actually paid by NIBCA. (R., p. 124, P 33; R., pp. 127-143; R., p. 450.) The district court, however, **[*51]** failed to consider the FCS study, stating:

> Rather, the FCS study was completed with the intent of demonstrating that what Defendant did nine years prior was reasonable, focusing solely on the amount charged. However, it is inescapable that both the 2007 and 2012 fee were impermissible taxes imposed without authority. The measure of just compensation must be the value of what is taken and not the value of what is received. *Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910)*.
>
> …
>
> Further, just compensation cannot be Defendant's retention of the entirety of the impermissible tax simply because, hypothetically, if Defendant had calculated the fee using the proper methodology it could have charged a fee that is close to that suggested by the low end range of the FCS study. Just compensation requires that Defendant provide in services the value, calculated in a lawful manner to those paying the fee.

(R., p. 832.)

Because NIBCA failed to contest the FCS study, or provide any other evidence of damages, it has not met its burden to prove the amount of damages it would be entitled to, if any. *Bratton, 150 Idaho at 537, 248 P.3d at 1272*. **[*52]** It is undisputed that the amount of the Cap Fee did not exceed the pro rata replacement value of the system in place in 2007. Ironically, class members would have paid more under the FCS study and the Loomis methodology than they paid in 2007-2012 (emphasis added). The reasonableness of the Cap Fee, as evidenced by the FCS study, further suggests that NIBCA's federal takings claims are without merit, as a "user fee" is only "a taking if it is not a reasonable fee imposed for the reimbursement of the costs of government services." *Hill-Vu Mobile Home Park, 162 Idaho 588, 402 P.3d at 1050*. Therefore, class members are not entitled to an award of damages. Even if the Court were to view the FCS study as coming too late to render the Cap Fee lawful, the study is relevant to establish that damages are zero. The City should not be required to repay millions of dollars when there was no overcharge at all. The district court's arbitrary refusal to consider this relevant evidence is a reversible error.

Even if the Cap Fee is deemed an impermissible tax, the award of damages is not a full refund; rather, it is limited to the excess charged by the City over the lawful amount. **[*53]** *See, McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18, 40, 110 S.Ct. 2238, 2252-53 (1990)*. Only in circumstances where the tax is invalid because it is imposed without authority will a full refund be mandated.

Ventas Finance I, LLC v. California Franchise Tax Bd., 81 Cal Rptr. 3d 823, 843, n. 19 (Cal. Ct. App. 2008), *cert denied*, *556 U.S. 1176 (2009)*.

In this case, the City has statutory authority to impose the Cap Fees. *See*, *I.C. § 50-1030(f)*. Therefore, any relief in the form of a refund should be limited to that portion of the Cap Fee that exceeds the properly calculated pro rata replacement value of the system. The uncontested evidence in the record establishes that the per user pro rata replacement value of the system in 2007 was between $ 2,600 and $ 4,808, depending upon whether surface restoration costs and/or unfunded (versus straight line) depreciation are taken into account. (R., p. 450, P 11.) Therefore, any damages class members would be entitled to would be limited to any amount they paid over $ 2,600. Because class members did not pay a Cap Fee that **[*54]** exceeded the pro rata measure established by the FCS study - class members paid $ 2,280 for one ER, not the true $ 2,600 minimum value - they are not entitled to any damages. (R., p. 449, P 2.) If the City has authority to charge a fee and use the funds for proper purposes, but makes an honest mistake in calculating that fee, it should only be required to pay the overcharge. However, it should not be required to repay millions of dollars when, as here, there was no overcharge at all.

The district court, as a result of failing to consider the FCS study, refused to acknowledge class members did not pay a Cap Fee that exceeded the pro rata replacement value. Instead, the district court determined that the proper course was to "consider the ordinances that imposed the 2007 and 2012 fees invalidated and effectively to reinstate the pre-2007 fee as a legitimate cap fee." (R., p. 836.) The district court, imposing its own sense of justice, determined that just compensation required the City to refund class members the difference between the "impermissible tax paid by Plaintiffs and the last lawful fee imposed, $ 774." (R., p. 836.) The district court's decision to award class members a refund **[*55]** of the fees, when class members did not pay an amount that exceeded the pro rata replacement value of the system in 2007, is a reversible error.

E. The District Court Committed Error when it Entered Judgment in Favor of NIBCA and Awarded Costs and Attorney Fees to NIBCA.

The district court erred when entered a money judgment in favor of NIBCA and against the City for an amount totaling $ 729,403.58, plus post judgment interest. (R., p. 888; R., pp. 1151-1153.) Additionally, the district court erred when it determined that NIBCA was the prevailing party and awarded NIBCA costs in the amount of $ 976.78 and attorney fees in the amount of $ 219,707.77. (R., Aug. p. 619.) However, the judgment and award of costs and attorney fees was entered as a result of the district court's refusal to consider evidence in the record which established that the sum of $ 2,280 was less than the actual cost of providing sewer service to a customer connecting to the City sewer system, as authorized by *Idaho Code section 50-1030(f)* and hold that the Cap Fee, following remand, was properly calculated by the City under the methodology prescribed by *Loomis*; the district court's error in ruling **[*56]** that NIBCA's failure to exhaust state law remedies does not bar the federal takings claim under *Williamson Cnty.*; and the district court's refusal to consider the City's equitable remedies. Accordingly, the district court committed a reversible error when it entered a judgment in favor of NIBCA and against the City.

F. The City is Entitled to an Award of Costs and Attorney Fees on Appeal Pursuant to *I.C. 12-120(3)*.

In accordance with I.A.R. 40, the City requests an award of its costs on appeal. In accordance with I.A.R. 41, the City requests an award of attorney fees on appeal, pursuant to *Idaho Code Section 12-120(3)*. Section 12-120(3) provides in relevant part that: "[i]n any civil action … in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs." *Id.* Under that statute, a "commercial transaction" is any transaction [] except transactions for personal or household purposes." *Id.* Further, the suit seeking relief in the form of a declaratory judgment that the amount of the cost of the permit is illegal and seeking recovery **[*57]** of the fees comes within scope of *Idaho Code Section 12-120(3)*. *See, Idaho Transportation Department v. Ascorp, Inc.*, 2015 Opinion No. 94 (Sept. 25, 2015); *Syringa Networks, LLC v. Idaho Dept. of Admin., et al.*, 2013 Op. No. 35 (March 29, 2013).

The purchase of building permits to connect to the City's sewer system is for the purpose of developing real estate involved commercial transactions. The payment of the Cap Fees were a requirement to obtaining building permits to connect to the City sewer system for the purpose of developing real estate, and further required by *Idaho Code*

Section 50-1326. As such, class members did not pay the Cap Fees or acquire building permits for a "personal or household purpose." *See,* Swafford v. Huntsman Springs, Inc., 2017 WL 6347031, at *5 (Idaho Dec. 13, 2017) (The subject of this lawsuit is the contract for the sale of the property, which is a commercial lot. Indeed, the Swaffords refer to the Property as a commercial lot in their complaint. Moreover, no facts indicate that the Property is for the Swaffords' personal or household purposes. Therefore, because the subject of the lawsuit is a commercial transaction).

This purchase **[*58]** of a permit to develop and sell real estate involves a commercial transaction, and the gravamen of this lawsuit involved the amount of the fees charged for such connections. Therefore, this action comes within the purview of Idaho Code Section 12-120(3). If the City prevails on the merits, it is entitled to an award of attorney fees on appeal under Idaho Code Section 12-120(3).

G. *NIBCA I* Did Not State That the City's Cap Fee was an Impermissible Tax.

In *NIBCA I*, the Court stated "We vacate the judgment of the district court and remand this case for further proceedings that are consistent with this opinion." 158 Idaho 79, 86, 343 P.3d 1086, 1093. In a concurring opinion by Justice J. Jones, and joined by Justice Burdick, Justice J. Jones stated - in discussing the lack of support or explanation for the three-fold increase in the Cap Fee - "[i]t is critical that this issue be addressed on remand." Id. at 87, 343 P.3d at 1094. Further, Justice J. Jones went on to state: "[f]inally, the issue of valuation addressed in footnote 2 of the Court's Opinion should be determined in the further proceedings below. The conclusion reached in **[*59]** the footnote as to the proper means of performing such an [a] valuation may be correct but it seems to me that expert opinion below should address that issue, as I feel uncomfortable deciding it upon appeal, especially where the case is being remanded for additional action." *Id.* (emphasis added).

Contrary to this Court's statements in *Manwaring Investments, L.C.*, this Court did not expressly hold in *NIBCA I*, that "this Court concluded the capitalization fee was an unconstitutional tax because it did not represent any attempt to approximate actual use. *See* id. at 81-85, 343 P.3d 1088-92." 162 Idaho 763, 405 P.3d at 31. Rather, in *NIBCA I*, this Court expressly held that: "[t]here is nothing in the record showing that the fee of $ 2,280 was based upon the value of that portion of the system capacity that the new user will utilize at the point in time when the new user connects to the system. The district court erred in holding that the fee was consistent with Idaho Code Section 50-1030(f)." Id. at 84, 343 P.3d at 1091.

It is clear from reading this Court's decision and its instructions that the parties and the district court should **[*60]** proceed in a manner that is consistent with its decision, and that the case was remanded for the purpose of allowing the district court to hear evidence to determine whether the fee was reasonable and compliant with the authorizing statutes, specifically Idaho Code Chapter 10, Title 50 to the Revenue Bond Act. The failure and refusal of the district court to comply with these instructions on remand is a reversible error.

Contrary to the rulings of the district court, the Court did not remand with instructions to enter judgment against the City. If the Supreme Court had such intent, it would have said so and it did not. In addition - contrary to the findings and rulings of the district court - the Court did not rule that the City's Cap Fee was an impermissible tax which precludes any need to determine whether it is reasonable in amount, as provided in the statutes. (R., p. 296; R., pp. 302-304; R., p. 441; R., pp. 801-803.) Indeed, nowhere in the opinion does it state that the Cap Fee was an impermissible tax. Rather, the Court clearly held that a Cap Fee is a legally authorized fee used for a legally authorized purpose, but, at the summary judgment stage, there was an absence of evidence **[*61]** that the amount of the Cap Fee was reasonable based on the methodology approved in *Loomis*. From the analysis and findings in *NIBCA I*, the Court remanded to the district court to allow the City to present evidence that the $ 2,280 Cap Fee per ER is equal to or less than the value of the system capacity that would be utilized by the new user who connected to the system on or after June 7, 2007.

H. Reply to NIBCA's Cross-Appeal Asserting the District Court Erred in Reinstating the Cap Fee Used in 2006.

NIBCA asserts that the district court erred when it determined to use the 2006 Cap Fee of $ 774 as the base for awarding just compensation to the Plaintiffs. NIBCA admits that the 2006 Cap Fee was never an issue in the suit, but was in the record. *NIBCA Response/Cross-Appellants' Br.*, p. 27. After admitting that the 2006 Cap Fee was never an issue in the suit, NIBCA, for the first time on appeal, presents argument and legal authorities in support of its contention that the 2006 Cap Fee was an illegal fee. Generally, this Court will not consider an issue that is raised for the first time on appeal to attack a judgment. *See,* *Deiter v. Coons, 162 Idaho 44, 47, 394 P.3d 87, 90* (20017) **[*62]** (quoting *Clements Farms, Inc. v. Ben Fish & Son, 120 Idaho 185, 207, 814 P.2d 917, 939 (1991))*. Thus, the Court should reject NIBCA's arguments that the 2006 Cap Fee was illegal.

Aside from its contention that the 2006 Cap Fee was illegal, NIBCA cites no legal authorities in support of its argument that the district court erred when it used the 2006 Cap Fee of $ 774 as the base for awarding just compensation to the Plaintiffs. The district court concluded that "[j]ust compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily [sp] as he would have occupied if this property had not been taken. *United States v. Miller, 317 U.S. 369, 373, 63 S. Ct. 276, 279-80 (1943)*. The remedy requires that a party subject to a taking be made whole." (R., p. 1255.)

In its *Memorandum Decision and Order on the Issue of Just Compensation*, the district court discussed NIBCA's proposal that it be awarded a refund of 100% of the fees it was charged for Cap Fees and the City's proposal that NIBCA be awarded no refund because the Plaintiffs received value equal to or greater than the costs **[*63]** of their connections. The district court determined to reject the proposals of both NIBCA and the City. In rejecting NIBCA's proposal, the district court stated that "[i]t cannot be, as Plaintiff argues, that the proper measure of just compensation is the return of the entire fee. Such a conclusion would offend the notion of what constitutes just compensation and would include a windfall." (R., p. 1252.)

The district court concluded that "[p]rior to March 4, 2016, the last lawful cap fee Defendant imposed was $ 774.00 in 2006. … This Court finds that the proper course is to consider the ordinances that imposed the 2007 and 2012 fees invalidated and effectively to reinstate the pre-2007 fees as a legitimate fee." (R., p. 1256.) The district court continued with its analysis of just compensation:

> The cap fees imposed in 2007 and 2012 utilized flawed methodology and were impermissible. It is axiomatic that the ordinances revoking the lawful cap fee were not based upon any authority and are void. Therefore, in order to place the Plaintiffs in the same position they would have been in but for the impermissible tax, the Court finds that just compensation requires Defendant **[*64]** to refund to Plaintiffs the difference between the impermissible tax paid by Plaintiffs and the last lawful fee imposed, $ 774.00.

(R., p. 1256.) NIBCA fails to cite any authority that this methodology for determining just compensation was in error.

The City still believes and contends that the district court's reasoning is erroneous and that the class members were not entitled to any refund of fees paid, because they received a value greater than the cost of their connections. Nevertheless, the City agrees with the district court that class members should be required to pay at least what the district court determined to be "the last lawful fee imposed, $ 774.00." (R., p. 1256.)

"This Court reviews a district court's decision following a bench trial to ascertain 'whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law.'" *Sherman Storage LLC v. Global Signal Acquisitions II, LLC, 159 Idaho 331, 335, 360 P.3d 340, 344, (2015)* (citing *Borah v. McCandless, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009))*. 'Since it is the province of the trial court to weigh conflicting evidence and testimony **[*65]** and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered' and 'will not set aside a trial court's findings of fact unless the findings are clearly erroneous.' *Id.*" "This Court exercises free review over matters of law.' *Id.*"

NIBCA fails to establish how the evidence in the record fails to support the finding and conclusion of the district court that class members should be awarded the difference between the Cap Fee of $ 774 and the Cap Fees they paid as just compensation for their losses. Simply claiming the district court was in error does not satisfy the governing standard of review.

I. Reply to NIBCA's Cross-Appeal Asserting the District Court Erred in Using Simple, Instead of Compound Interest to Determine the Amount of Prejudgment Interest Applicable to NIBCA.

NIBCA contends in the opening brief of its Cross-Appeal that the district court abused its discretion in using simple, instead of compound interest to determine the amount of prejudgment interest that would make the NIBCA Plaintiffs whole. *See, Respondents'/Cross-Appellants' Br.*, p. 29. The Respondents are in **[*66]** error.

First, although it acknowledges that the district court exercised its discretion in determining to award prejudgment interest using a simple interest rate rather than a compound rate and its contends the district court abused its discretion in using a simple interest rate, NIBCA fails to cite the standard for determining whether the district court abused its discretion under Idaho law. Rather, it contends that the district court erred by not applying federal takings case law. Other than citing the federal court decisions in which compound interest was awarded, NIBCA makes no attempt to show how the district court abused its discretion in this case.

In *Thornton v. Pandrea, 161 Idaho 301, 313, 385 P.3d 856, 868 (2016)*, the Court observed that Mr. Thornton had failed to articulate or apply the abuse of discretion standard in support of his argument that the district court had abused its discretion in that case. In *Thornton*, the Court, citing *Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010)* (internal quotation marks omitted), stated that it "will not consider an issue not supported by argument and authority in the opening brief' **[*67]** and "[b]ecause Mr. Thornton failed to articulate or apply the abuse of discretion standard, and because he failed to support his allegation of a due process violation with argument or authority, we conclude Mr. Thornton has not shown an abuse of discretion." *161 Idaho at 313, 385 P.3d at 868*. The same reasoning would support a finding by this Court that NIBCA has failed to show that the district court abused its discretion in awarding simple interest in this case.

This Court can also find that NIBCA has failed to show that the district court abused its discretion in awarding simple interest in this case, based on the law governing the district court's decision to award simple interest. It is the fundamental policy of the State of Idaho that compounding of prejudgment interest is not favored. It is not allowed under *Idaho Code § 28-22-104(1)*. *See, Holladay v. Lindsay, 143 Idaho 767, 769, 152 P.3d 638, 640 (Ct. App. 2006)* (citing *Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 814, 919 P.2d 334, 343 (1996)*. Furthermore, awarding compound interest is not favored when interest is awarded as an element of damages. In *Holladay* **[*68]** , the Plaintiff sought compound prejudgment interest as a item of damages on his claim for unjust enrichment. In its discussion whether Plaintiff was entitled to compound interest, the Court of Appeals acknowledged that it is not favored under Idaho law and concluded that compound interest should not be awarded under the circumstances of that case. In its discussion, the Court of Appeals recited what it characterized as an "important principle" that was pertinent to its discussion: "interest may be awarded at a rate within the trial court's sound discretion." *143 Idaho at 770, 152 P.3d at 770*.

In this case, the district court exercised its discretion to award prejudgment interest as an element of damages in the amount of 6.5% per annum simple interest. This rate was determined by the district court to be a reasonable and appropriate rate based on the evidence that was presented by the City. The district court expressly found that NIBCA failed to comply with the Court's Scheduling Order as it pertains to disclosure of expert witnesses and therefore rejected any testimony from Plaintiffs' witness regarding the reasonable rate of interest that the Court should, in its discretion, **[*69]** award to class members to compensate it for the loss of use of their money for the period that prejudgment interest was allowed. The district court, based on the evidence in the record, found "that a reasonably prudent investor could expect a reasonable rate of return of 6.5% for the years in question." R., p. 1258. The district court concluded that NIBCA was entitled to an award of prejudgment interest at a rate of 6.5%. R., p. 1258. When questioned whether the final judgment should reflect simple prejudgment interest or compound prejudgment interest, the district court again exercised its discretion and ordered that: "the final judgment shall reflect the simple interest calculation as contained in the City's proposed judgment … ." R., p. 1264.

The well-established test to determine whether a trial court has abused its discretion consists of three parts asking whether the trial court: "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3)

reached its decision by an exercise of reason." *Wechsler v. Wechsler, 162 Idaho 900, 407 P.3d 214, 222 (2017)* **[*70]** (citing *Parks v. Safeco Ins. Co., 160 Idaho 556, 562, 376 P.3d 760, 766 (2016)* (quoting *Marek v. Lawrence, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012))*.

The first prong of the abuse of discretion test is satisfied because the district court noted in its decision that NIBCA was entitled to just compensation and that the court needed to determine a reasonable rate of interest for just compensation, and that "the determination of a reasonable rate of interest for just compensation is a finding of fact, which should be disturbed only if clearly erroneous." R., p. 1257. The district court further quoted from the Ninth Circuit decision in *Schneider v. Cty. of San Diego, 285 F.3d 784, 793 (9th Cir. 2002)*, that "the Supreme Court has emphasized that under our takings jurisprudence 'just compensation' is a judicial, not a legislative function, (citation omitted)." R., p. 1257. Clearly, the district court perceived that the determination of a reasonable rate of prejudgment interest for just compensation in this case required the exercise of judicial discretion.

The second prong of the abuse of discretion test is whether the district court violated **[*71]** any legal standard or law in determining a reasonable rate of prejudgment interest for just compensation in this case. The district court clearly articulated the rule that:

> Where just compensation is delayed, something more than the value of what is taken "is required to make the property owner whole, to afford him "just compensation." This additional element of compensation has been measured in terms of reasonable interest. Thus, "just compensation" in the constitutional sense, has been held … to be fair market value at the time of taking plus interest from the date to the date of payment." (citation omitted) The determination of a reasonable rate of interest for just compensation is a finding of fact, which should be disturbed only if clearly erroneous.

R., p. 1257.

The district court further articulated the rule for determining the appropriate rate of interest when payment of just compensation is delayed, i.e., the district court must examine what 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal' would receive." United States v. 50.*50 Acres of Land, 931 F.2d 1349, 1354 (9th Cir. 1991)*. **[*72]** "The district court should apply an interest rate based on evidence of the rate that would be generated by investment in a diverse group of securities, including treasury bills. *See* United States v. 429.*59 Acres of Land, 612 F.2d 459, 465 (9th Cir. 1980)*." R., p. 1257.

The district court then found that NIBCA had failed to comply with the Court's Scheduling Order as it pertained to Plaintiffs' expert witnesses and rejected any testimony that Plaintiffs' witness would have offered regarding the reasonable rate of interest. The district court then applied the rules to the evidence that was submitted by Defendants and determined that a reasonable rate of interest to award as prejudgment interest is 6.5% simple interest. There is no evidence in the record that the district court violated any legal standard or law in determining and granting prejudgment interest at the rate of 6.5% simple interest. R., pp. 1257, 1264.

The third prong of the abuse of discretion test-whether the district court's award of prejudgment interest at the rate of 6.5% simple interest was outside the bounds of reason-is satisfied. The district court recognized that the decision required the exercise **[*73]** of discretion, cited the applicable federal law for determining a reasonable rate of interest for just compensation, cited NIBCA's failure to provide admissible evidence of a reasonable rate of interest for just compensation, analyzed the evidence that was submitted by the City, and explained why it was appropriate to award pre-judgment interest at a rate of 6.5% as just compensation to NIBCA. The District Judge, further followed the policy in Idaho that compounding prejudgment interest is not favored and ordered that the court was awarding simple interest. R., p. 1264.

The district's court's action was reasonable. Therefore, the district court did not abuse its discretion in awarding simple prejudgment interest.

IV. CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that this Court should find the evidence submitted by the City showing the cost of the Cap Fee was reasonable and in compliance with the standard set forth in *Loomis*; NIBCA's claims are barred by *Williamson Cnty.*; recognize that NIBCA received a benefit by gaining access to sewer, amounting to unjust enrichment; and reverse the district court's judgment in favor of NIBCA, and the **[*74]** district court's order awarding NIBCA costs and attorney fees. And, award attorney fees and costs to the City.

DATED THIS 21st day of February, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By /s/ [Signature]
Merlyn W. Clark, ISB No. 1026
Attorneys for Appellant City of Hayden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2018, I caused to be served a true copy of the foregoing APPELLANT'S/RESPONDENT'S REPLY AND RESPONSE BRIEF by the method indicated below, and addressed to each of the following:

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SELECT PORTFOLIO SERVICING v. DUNMIRE

CASE NO. 77251

SUPREME COURT OF NEVADA

April 17, 2019

Reporter
2019 NV S. CT. BRIEFS LEXIS 2783 *

SELECT PORTFOLIO SERVICING, INC., Appellant, vs. JEFFREY V. DUNMIRE; and ROSALIE DUNMIRE, Respondents.

Type: Brief

Prior History: APPEAL From the Eighth Judicial District Court, State of Nevada, Case No.: A-17-751386-C.

Counsel

WRIGHT, FINLAY & ZAK, LLP, Matthew S. Carter, Esq., Nevada Bar No. 9524, Christina V. Miller, Esq., Nevada Bar No. 12448, Las Vegas, Nevada, Attorneys for Appellant , Select Portfolio Servicing, Inc.

Title

OPENING BRIEF

Text

NRAP 26.1 DISCLOSURE [*1]

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Law firms that have appeared for Appellant Select Portfolio Servicing, Inc. ("SPS"): Matthew S. Carter, Esq. and Christina V. Miller, Esq., of the law firm Wright, Finlay & Zak, LLP; Thomas N. Beckom, Esq. and Kristin Schuler-Hintz, Esq. of the law firm McCarthy & Holthus, LLP; and Kent F. Larsen, Esq. and Katie M. Weber, Esq., of the law firm Smith Larsen & Wixom.

2. Select Portfolio Servicing is a wholly owned subsidiary of SPS Holding Corp., which is also a wholly-owned subsidiary of Credit Suisse Holdings (USA), Inc. which is jointly-owned by Credit Suisse AG and Credit Suisse Group AG. Credit Suisse AG is a wholly-owned subsidiary of Credit Suisse Group AG. /// The shares of Credit Suisse Group AG are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares.

Dated this 17th day of April, 2019.

WRIGHT, **[*2]** FINLAY & ZAK, LLP

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II. JURISDICTIONAL STATEMENT

The Findings of Fact and Conclusions of Law and Judgment are an appealable final judgment under NRAP 3A(b)(1). The Notice of Entry of Order and the Notice of Entry of Judgment, respectively, were filed and served on September 24, 2018. (IV:APP0820-28 and IV:APP0809-19, respectively) The Notice of Appeal was timely filed on October 19, 2018. (V:APP0980-94).

III. NRAP 17 ROUTING STATEMENT

This appeal raises questions that are not only of statewide public importance to both residential borrowers and lenders/loan servicers in the state of Nevada but also concern questions of first impression for this Court: (1) whether a single word in a stamp on a note can release a borrower from his or her obligation to repay over $ 1 million in debt, where the entire context in which that word is placed and the admissible evidence both indicate there was no such intent, and (2) whether a loan **[*3]** servicer can authenticate and rely upon its own business records, which include the records of a prior loan servicer, at a trial consistent with Nevada law. Accordingly, this Court should retain jurisdiction over this matter pursuant to NRAP 17(11) and (12).

IV. STATEMENT OF ISSUES PRESENTED

1. Motions for reconsideration should not be granted absent a proper legal or factual basis. *Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)*. Also, subsequent district court judges should not overrule their predecessors' decisions, which constitute the law of the case. *Rohlfing v. Second Judicial Dist. Court, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990)*. Could Judge Gonzalez of the district court properly reconsider district court Judge Bell's prior entry of summary judgment in favor of SPS in the same action?

2. Where the record reflects that no legal authority or analysis was presented to or considered by the newly-assigned district court judge to support reconsideration, can reconsideration nonetheless be granted?

3. Contracts must be interpreted in favor of internal consistency and legality. *Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 501 (2003)*. Did the district court err by failing to consider that basic principle, misinterpreting the plain language and legal effect of the FHLBC stamp **[*4]** and reaching a result contrary to the circumstances surrounding its placement on the Note, including the subsequent acts and statements of the parties, thus resulting in a harsh and unreasonable result?

4. Plaintiffs in quiet title actions must affirmatively prove title in themselves at trial. *Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996)*. They must also prove all elements of their claims by a preponderance of the evidence. *Pease v. Taylor, 88 Nev. 287, 290, 496 P.2d 757, 759 (1972)*. Did the district court err by (1) quieting title in favor of the Dunmires, where they provided no evidence that title should be quieted in their name, and (2) shifting the burden of proof and persuasion at trial from the Dunmires to SPS?

5. A district court's findings of fact must be supported by substantial evidence. *Grisham v. Grisham, 128 Nev. 679, 687, 289 P.3d 230, 236 (2012)*. Did the district court err by quieting title in favor of the Dunmires where (1) its Final Judgment contains assumptions without evidentiary support, (2) it failed to consider the Dunmires' admissions in the record that they did not pay the Loan in full, still owed $ 1.25 million on the Loan and voluntarily entered into a loan modification that included express terms agreeing to repay the Loan, and (3) its findings **[*5]** of fact and conclusions of law were internally inconsistent?

6. Federal law provides that a mortgage or deed of trust cannot be invalidated by an inadequately documented agreement. *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt., 921 F.2d 241, 245-246 (9th Cir. 1990)*. Did the district court err by entering judgment in favor of the Dunmires on an inadequately documented purported release of the Dunmires' repayment obligation despite federal law expressly prohibiting the use of such agreements against the FDIC as conservator of AmTrust?

7. Public records of the activities of an official or agency are not hearsay and are admissible to prove their contents. *NRS 51.155*. Nevada statute also provides that a party's business records are not hearsay and are admissible to prove their contents. *NRS 51.135*. Did the district court err in refusing to consider SPS witness Mark Syphus to be an "other qualified witness" under Nevada law so as to admit the business record exhibits offered by SPS at trial?

8. Nevada law and public policy disfavors windfalls. *Salas v. Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1169, 14 P.3d 511, 514 (2000)*; *Restatement (Third) of Proper.: Mortgages § 5.4* (1997). Did the district court err by entering quiet title in favor of the Dunmires, which **[*6]** resulted in an inequitable windfall to the Dunmires of $ 1.25 million at the expense of SPS?

V. STATEMENT OF THE CASE

After intentionally becoming delinquent on repayment of their mortgage loan (V:APP0839 at 13-14), the Dunmires elected to mediate under Nevada Foreclosure Mediation Program (V:APP0836 at 23-25). Following the mediation, SPS' predecessor-in-interest, New York Community Bank (" **NYCB**"), filed a Petition for Judicial Review with the district court, challenging the mediator's refusal to issue a certificate. *See* Case No. A-16-741289-J (the " **PJR Action**"). After a hearing held on October 6, 2016 regarding whether NYCB was the beneficiary under the Deed of Trust and holder of the Note, the district court found there was no break in the chain of title and that there was not a missing assignment (the " **PJR Order**") (II:APP0340-42). Specifically, the district court found that

> [T]he appropriate and accurate reading of *NRS § 104.3207* and assessment of the chain of endorsements evidenced on the original Promissory Note produced in open court was that the release of all interest in the written note and/or mortgage or deed of trust by Federal Home Loan Bank of Cincinnati **[*7]** reverted the note back to AmTrust Bank the prior holder by closed endorsement, who subsequently (through the FDIC as the receiver for AmTrust Bank) endorsed the original Promissory Note to New York Community Bank, the Petitioner herein.

(II:APP0341 at 23 - II:APP0342 at 2).

Unhappy with this outcome, the Dunmires filed the underlying Complaint on February 21, 2017, seeking to quiet title to the Property on the grounds that any obligation to repay the loan was no longer enforceable, contrary to the PJR Order. (I:APP0001-38) The Complaint also sought a declaration from the district court that the promissory note is invalid, the deed of trust is invalid, and the deed of trust "on the Property is discharged." *See id.*

On May 25, 2018, the district court granted summary judgment in favor of SPS, determining that the Dunmires' claims were barred under the doctrine of claim preclusion based on the outcome of the earlier PJR Action (the " **Summary Judgment Order**"). (III:APP0442-45)

On June 18, 2018, the Dunmires moved for reconsideration of the Summary Judgment Order. (III:APP0452-501). On July 2, 2018, the case was reassigned to a new department and judge. (V:APP1026) The Dunmires' **[*8]** motion for reconsideration was devoid of any legal argument or authority setting forth the legal standard for reconsideration nor were any permissible grounds presented for the new district court judge to reconsider the prior department's ruling. (III:APP0452-501; III:APP0550-9) Indeed, as discussed in greater detail below, there were no issues of fact or law that would have allowed reconsideration - the only difference between the evidence presented at the time of the granting of SPS's motion for summary judgment and the time of the Dunmires' motion for reconsideration was the identity of the judge hearing the respective motions.

The newly assigned judge granted the motion for reconsideration by minute order entered on July 20, 2018 (" **Reconsideration Minute Order**"). (III:APP0560) Neither the Reconsideration Minute Order nor the subsequent written order (" **Reconsideration Order**") (III:APP0573-4) identified *any* ground upon which reconsideration by the newly-assigned judge was based. It simply appears that the newly-assigned judge disagreed with the prior district judge's ruling in the Summary Judgment Order. The reassigned district judge then rescheduled the parties' motions **[*9]** for summary judgment for hearing, and denied the previously granted motion based solely on the new district court judge's finding that the PJR Order had no preclusive effect, and that factual issues remained regarding the stamp and holders of the note. (III:APP0561; III:APP0573-4; V:APP1021 at 7-10)

On September 14, 2018, the district court conducted a one-day bench trial. (V:APP1026) At the conclusion of the bench trial, the district court took the matter under submission. (V:APP0960 at 5-7) On September 21, 2018, the district court issued its Findings of Fact and Conclusions of Law (" **Final Judgment**") quieting title to the Property in favor of the Dunmires and holding that "no other party has rights or interest in the Property superior to that of the Dunmires." (V:APP0987-994) On September 24, 2018, the Notice of Entry of Judgment was filed and served on SPS. (V:APP0984-86) SPS filed its Notice of Appeal on October 19, 2018. (V:APP0980-994)

VI. STATEMENT OF RELEVANT FACTS [1]

A. INTRODUCTION

This action **[*10]** is an attempt by mortgage borrowers to avoid repaying a debt owed in excess of $ 1 million. Through self-serving statements, unsubstantiated by any evidence at trial, the borrowers claimed that the single word "release" contained within a stamp on an allonge to a promissory note operated to release their entire obligation to repay the debt they owed, despite the plain meaning and intent of the entire stamp and the contextual evidence showing the absurdity and unfairness of this result. After impermissibly reconsidering and overturning the prior judge's ruling in favor of SPS, despite the lack of supporting evidence, and even despite an admission from the borrowers that they did owe the debt and had not repaid it in full, the district court concluded that the borrowers were entirely released from any obligation to repay their mortgage.

This harsh and unreasonable outcome, which flies in the face of Nevada's public policy against inequitable results and unjustified windfalls, must be reversed. To leave this judgment intact would have a chilling effect on lenders' decisions to loan money within this state, a concern which reaches further than the four corners of this action.

B. IT [*11] IS UNDISPUTED THAT THE DUNMIRES BORROWED AND NEVER REPAID A LOAN AGAINST THE PROPERTY IN THE AMOUNT OF $ 1.3 MILLION.

Respondents Jeffrey and Rosalie Dunmire (the " **Dunmires**") owned residential real property commonly known as 2599 San Giorgio Circle, Henderson, Nevada 89052 (the " **Property**"). (V:APP0834 at 9-11) The Dunmires admit that in 2008 they borrowed $ 1.3 million to refinance the Property. As part of a refinance, on or about March 4, 2008, the Dunmires executed a $ 1.3 million promissory note (the " **Note**") (III:APP0591-95; IV:APP0784-88) in favor of CCSF, LLC dba Greystone Financial Group (" **CCSF**"). The loan was evidenced by the Note and secured by a deed of trust, executed on March 5, 2008 (the " **Deed of Trust**") (IV:APP0596-612). The Deed of Trust was recorded in the official records of the Clark County Recorder on March 12, 2008. (IV:APP0596-612) The Note and Deed of Trust are collectively referred to herein as the " **Loan**"

Section 1 of the Note states, "[t]he Lender or anyone who takes this Note by transfer and who is entitled to receive payments is the Note Holder." (III:APP0591)

Mortgage Electronic Registration Systems, Inc. (" **MERS**") is identified as the **[*12]** "beneficiary" of the Deed of Trust. (IV:APP0597) CCSF subsequently endorsed the Note to AmTrust Bank (" **AmTrust**"). (III:APP0594)

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[1] These facts are gleaned from documents in the record as well as documents which SPS respectfully submits should have been admitted by the district court, as discussed *infra*.

At some point, AmTrust "pledged, negotiated, endorsed and assigned" "various promissory notes" to the Federal Home Loan Bank of Cincinnati (" **FHLBC**"), as security for a loan from FHLBC to AmTrust. (IV:APP0617-18) An allonge to the Note contains an endorsement from AmTrust to FHLBC. (III:APP0594)

At some point thereafter, a stamp, upon which this case turns, was placed on the Note stating: "[t]he undersigned hereby releases all ***its*** interest in the written note and/or mortgage or deed of trust, without recourse." (emphasis added) (the " **FHLBC Stamp**") (III:APP0594). The plain language of the FHLBC Stamp reflects FHLBC's intent to release its interest in the Loan back to AmTrust. The following facts support the plain language of the FHLBC Stamp and AmTrust's repossession of the Loan.

On December 4, 2009, the Office of Thrift Supervision closed AmTrust and appointed the Federal Deposit Insurance Corporation (" **FDIC**") as receiver. (IV:APP0768-70) On the same date, New York Community Bank (" **NYCB**") purchased the Loan and the whole bank assets **[*13]** of AmTrust from the FDIC, as receiver for AmTrust. (IV:APP0619-748) A second allonge to the Note identifies a special endorsement from the FDIC, as Receiver of AmTrust, to the order of NYCB, as well as an endorsement in blank by NYCB. (IV:APP0788)

On February 3, 2012, prior to the time the Dunmires entered into the Loan Modification with NYCB (IV:APP0793-97), MERS assigned the Deed of Trust to NYCB via Corporate Assignment of Deed of Trust, which was recorded in the official records of the Clark County Recorder on April 3, 2012. (IV:APP0613-15)

On January 26, 2018, NYCB assigned the Deed of Trust to U.S. Bank Trust National Association, as trustee for Towd Point Master Funding Trust 2017-PM13 (the " **Trust**"), via Corporate Assignment of Deed of Trust, which was recorded in the official records of the Clark County Recorder on March 5, 2018. (IV:APP0791-92) SPS is the loan servicer on behalf of the Trust. [2] (IV:APP0781)

On or about August 1, 2013, the Dunmires entered into a Loan **[*14]** Modification Agreement (the " **Loan Modification**") with NYCB, who was the owner of the Loan at that time. (IV:APP0793-97) The Loan Modification includes certain express terms whereby the Dunmires acknowledged their obligation to make repayment of the Loan to NYCB, its successors and assigns. Even beyond acknowledging the obligation, the Dunmires expressly agreed to assume liability for repayment and extend the lien on the Property going forward:

> . " ***Borrower, if not presently primarily liable for the payment of the Note, does hereby expressly assume the payment of said Note*** " (IV:APP0793) (emphasis added);
>
> . " ***Borrowers, Jeffrey S. Dunmire and Rosalie Dunmire, now desire to extend or rearrange the time and manner of repayment of the Note and to extend and carry forward the lien(s) on the Property whether created by the Security Instrument or otherwise"*** (IV:APP0794) (emphasis added);
>
> . " ***All covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect*** , except as herein modified, and ***none of the Borrower's obligations or liabilities under the Note and Security Instrument [*15] shall be diminished or released by any provisions hereof*** " (IV:APP0795) (emphasis added.)

The Dunmires admit that they have not made payment on the Loan since beginning the foreclosure mediation program [in or about 2016] (V:APP0839 at 11-14) and admit that neither they nor any other person has paid the Loan in full. (V:APP0938 at 19 - V:APP0939 at 2; V:APP939 at 6-14; 19; V:APP0940 at 2-8)

Currently the principal balance of the Loan is approximately $ 1.25 million, not including interest, late fees, and other expenses advanced by SPS for the direct benefit of the Dunmires for the payment of property taxes,

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[2] It was undisputed at trial that SPS is in actual possession of the Note. (V:APP0924 at 5-7) ("Q. Okay. And in this specific case, SPS does have actual possession of Mr. Dunmire's note? A. Correct.").

homeowners association dues and homeowners' insurance (V:APP0894 at lines 14-19; V:APP895 at lines 6-9) and charged to the Loan (as provided by the Deed of Trust). (V:APP0894 at 4-6)

VII. SUMMARY OF ARGUMENT

1. The district court abused its discretion by reconsidering the prior district court judge's entry of summary judgment in favor of SPS where no legal authority or argument in support of reconsideration was presented to or considered by the district court to justify reconsidering a co-equal judge's determination that the PJR Action precluded the subsequent quiet **[*16]** title action on the same basis - the word "release" in the FHLBC Stamp.

2. The district court committed reversible error by:

(a) shifting the burden of proof and persuasion to SPS at trial to prove the intent behind placing the FHLBC Stamp on the Note;

(b) entering quiet title in favor of the Dunmires despite the Dunmires failing to provide any evidentiary support for the conclusions that the FHLBC Stamp released their repayment obligation under the Loan;

(c) entering the Final Judgment which contained assumptions regarding the timing and intent behind placing the FHLBC Stamp on the Note unsupported by any evidence offered by the Dunmires;

(d) entering conclusions of law that the FHLBC Stamp manifested an intention to release the Dunmires from their repayment obligations, which were inconsistent with the district court's findings of fact that there was no evidence presented during trial regarding the intent of FHLBC in releasing its interest in the Note;

(e) failing to properly consider and apply the plain meaning of, and circumstances surrounding, the FHLBC Stamp, as well as the subsequent acts and declarations of the parties (including but not limited to the FDIC **[*17]** receivership of AmTrust, AmTrust, NYCB and the Trust's continued assertion that the Loan remained unpaid, collection and foreclosure efforts, and assignments of the Deed of Trust) in accordance with basic principles of contract law to reach a result that was fair and reasonable to the parties;

(f) failing to consider the Dunmires' admissions in the record that they had not paid the Loan in full, still owed $ 1.25 million on the Loan and voluntarily entered into a loan modification agreement with NYCB; and

(g) determining that the FHLBC Stamp was a release of the Dunmires repayment obligation despite the D'Oench Doctrine, defined *infra*, precluding enforcement of purported, inadequately documented agreements from being enforced against the FDIC.

3. The district court abused its discretion by refusing to admit: (1) Proposed Exhibits 7 and 9 as public records of the FDIC, admissible under *NRS 51.155*, and of which the district court could also have taken judicial notice of, pursuant to *NRS 47.130(2)(b)*; and (2) Proposed Exhibits 6 and 13 despite witness Mark Syphus being an "other qualified witness" under *NRS 51.135* to discuss those records, which are incorporated into SPS's **[*18]** business records and upon which SPS relies in its day-to-day loan servicing operations, and to which no objection or evidence alleging the untrustworthiness of the exhibit was offered at trial by the Dunmires.

4. The district court erred by using its equitable powers to give the Dunmires a windfall of $ 1.25 million, in contravention of Nevada's policy against unjustified windfalls, despite the Dunmires' admissions during trial that neither they nor anyone else has paid the Loan in full and the district court's own acknowledgement in the record that it would be giving the Dunmires a windfall.

VIII. STANDARD OF REVIEW

Reconsideration of a prior judge's ruling in the same case is reviewed for an abuse of discretion. *Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976)*; *Harvey's Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 606 P.3d 1095 (1980)*. "An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason." *Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)*; *State v.*

Hambright, 388 P.3d 13, 619 (Kan. Ct. App. 2017) ("A judicial action constituted an abuse of discretion if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.").

"The district courts of this state **[*19]** have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts." Rohlfing v. Second Judicial Dist. Court, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) (citing Nev. Const. art. 6, § 6, NRS 3.220; Warden v. Owens, 93 Nev. 255, 563 P.2d 81 (1977)). "Generally, a district court judge's decision in a case becomes the "law of the case" and cannot be overruled by a coequal, successor judge." *Regent at Town Center Homeowners' Association v. Oxboq Construction, LLC, 419 P.3d 702, 2018 WL 2431690 (Nev. May 24, 2018)* (unpub.) (citing Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984) ("[T]he doctrine of 'law of the case' has evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case"); *see also* Messenger v. Anderson, 225 U.S. 436, 444 (1912) (explaining that 'law of the case' "merely expresses the practice of courts generally to refuse to reopen what has been decided").

This Court reviews questions of law *de novo.* Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992). This Court "defer[s] to the district court's findings regarding questions of fact unless they are clearly erroneous or not based on substantial evidence." Grisham v. Grisham, 128 Nev. 679, 687, 289 P.3d 230, 236 (2012) (internal **[*20]** quotes omitted). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." Whitemaine v. Aniskovich, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

"Mixed questions of law and fact are those in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." Khan v. Holder, 584 F.3d 773, 780 (9th Cir. 2009) (internal quotes omitted). Questions of law and fact require *de novo* review. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). "[A] district court's interpretation of a contractual term is a question of law" and so should be reviewed de novo. Whitemaine, 124 Nev. at 308, 183 P.3d at 141. The issues raised in this appeal concerning the district court's actions during trial and resulting findings of fact and conclusions of law require de novo review because they involve pure questions of law and mixed questions of law and fact.

The standard of review for admission or exclusion of exhibits at trial is for an abuse of discretion where the district court failed to apply the correct evidentiary standard to justify its exclusion of the exhibits. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (the Nevada Supreme Court "review[s] a district court's decision to admit or exclude evidence for an abuse of discretion.") **[*21]** (citing Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006), *cert. denied*, *552 U.S. 1140, 128 S.Ct. 1061 (2008)*); Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006).

IX. LEGAL ARGUMENT

A. THIS ACTION SHOULD NEVER HAVE REACHED TRIAL BECAUSE THE DISTRICT COURT IMPERMISSIBLY RECONSIDERED THE PRIOR JUDGE'S RULING.

The district court abused its discretion by reconsidering and overturning summary judgment in favor of SPS where the record reflects that no grounds for reconsideration were presented to or considered by the Court.

Pursuant to N.R.C.P. 59(e), a court may grant relief through reconsideration where "(1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law." *See* Turner v. Burlington Northern Santa Fe R.R. Co., 338 F.3d 1058, 1063 (9th Cir. 2003)(emphasis added); [3] *see also* AA Primo Builders, LLC v. Washington, 126 Nev. 578, 245 P.3d

[3] "The Nevada Supreme Court considers federal law interpreting the Federal Rules of Civil Procedure, 'because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" Barbara Ann Hollier Trust v. Shack, 356 P.3d

1190 (2010)" ("Among the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law" (emphasis added) (*citing* Coury v. Robison, 115 Nev. 84, 124-127, 976 P.2d 518) (1999)). "A motion to alter or amend judgment under Rule 59(e) is an extraordinary remedy which should be used sparingly." Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013) (internal quotation marks and citation omitted). Although the district court has considerable discretion in deciding whether to grant such a motion, the Rule 59(e) motion may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Id.* This warning is repeated in applicable local rules. *See* D.C.R. 13(7) ("No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, **[*23]** after notice of such motion to the adverse parties."); EDCR 2.24(a) (same).

Here, the district court (via Judge Bell, the original district court judge in this matter) entered its order granting SPS's motion for summary judgment and denying the Dunmires' motion for summary judgment on May 25, 2018, concluding that the October 2016 Order entered by the district court in the earlier PJR Action "stands under the doctrine of claim preclusion." (III:APP0444 at line 25.) Notice of Entry of the Summary Judgment Order was filed on May 31, 2018. (III:APP0446-0451). The Dunmires then filed their Motion for Reconsideration, which was heard by Judge Gonzalez instead of Judge Bell, on June 18, 2018. (III:APP0452-501.) Although the Motion for Reconsideration includes a section titled "Standard for Reconsideration" (III:APP0458 at lines 7-15), it fails to identify *any* legal standard or authority for reconsideration. In fact, no discussion of or citation to the standard for reconsideration is present anywhere in the Dunmires' motion. The Dunmires' reply is equally void of any discussion of or citation to the standard for reconsideration. (III:APP0550-59) Judge Gonzalez's July 20, 2018, minute **[*24]** order states that no hearing on the Motion for Reconsideration was held but that the district court "having reviewed and [sic] the related briefing and being fully informed, GRANTS the motion to reconsider." (III:APP0560.) Further, the resulting order granting reconsideration (III:APP0573-74) was similarly vague and unsupported by any substantive analysis or conclusion for reconsideration of the prior judge's ruling other than a blanket statement that "Plaintiff's Motion for Reconsideration is hereby GRANTED based on the Court's review (sic) Motion for Reconsideration and review of the summary judgment pleadings filed by the parties." (III:APP0574 at lines 1-3.)

The record reflects that no newly discovered or previously unavailable evidence was presented to the district court after entry of the Summary Judgment Order. AA Primo Builders, LLC, 126 Nev. 578, 245 P.3d 1190. The Dunmires did not identify any applicable change in controlling law after entry of the Summary Judgment Order. (III:APP0452-501; III:APP0550-59) Nor did the Dunmires argue at any point that reconsideration was necessary to correct a manifest error of law by Judge Bell or to prevent a manifest injustice. *Id.* Where no such argument or supporting **[*25]** authority was presented to Judge Gonzalez, the decision to grant reconsideration was necessarily an arbitrary and capricious act without any legal or factual basis.

The district court therefore abused its discretion in granting reconsideration, overturning summary judgment in favor of SPS and deciding the merits of the Dunmires' claims after trial. Judge Gonzalez, the co-equal successor to Judge Bell, had no authority to reconsider the Summary Judgment Order. Accordingly, SPS respectfully requests that this Court reverse the Final Judgment and remand the action to the district court to reinstate the Summary Judgment Order in favor of SPS.

B. THE DISTRICT COURT'S CONCLUSION THAT THE DUNMIRES' OBLIGATION UNDER THE LOAN WAS RELEASED WAS ERRONEOUS BECAUSE IT (1) MISINTERPRETED THE FHLBC STAMP AS A RELEASE OF THE ENTIRE LOAN AS A MATTER OF LAW, (2) IMPROPERLY SHIFTED EVIDENTIARY BURDENS, AND (3) WAS THE RESULT OF THE DISTRICT COURT'S FAILURE TO ADMIT CRITICAL EVIDENCE AS REQUIRED BY NEVADA LAW.

1085, 1089 (Nev. Aug. 6, 2015) (quoting Executive Management, Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 782, 786 (2002)); Nelson **[*22]** v. Heer, 121 Nev. 832, 833, 122 P.3d 1252, 1253 (Nev. 2005) ("[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.").

The Final Judgment in favor of the Dunmires should be reversed because it is clearly erroneous and not based on substantial evidence presented to the district court during trial. First, the **[*26]** district court misread the FHLBC Stamp to conclude that it released the Dunmires from their repayment obligation under the Loan without any evidentiary support and contrary to longstanding principles of contract law and the plain language of the Stamp itself. Second, the district court erroneously shifted the burden of proof from the Dunmires to SPS. Third, the district court disregarded admissions in the record that the Dunmires assumed the Note with an agreement that the Deed of Trust remains a valid lien on the Property. And fourth, the district court refused to admit exhibits presented by SPS during trial based on an incorrect conclusion that SPS' corporate designee witness was not an "otherwise qualified" person to testify regarding those records, and with due consideration for the admissibility of those documents under Nevada law. Any one of these actions by the district court is sufficient for this Court to reverse the Final Judgment.

i. The Final Judgment is not supported by evidence in the record, is internally inconsistent, and fails to consider basic principles of contract law .

The district court quieted title in favor of the Dunmires and against SPS (invalidating **[*27]** the Note and Deed of Trust) based ***solely*** on the language in the FHLBC Stamp. (IV:APP0807 at PP11-13) Yet, in reaching its conclusion on the language of the FHLBC Stamp, the district court failed to apply basic contract principles in interpreting the "release" language. Instead, the Court reached an illogical and inequitable conclusion, providing the Dunmires with a $ 1,250,000 financial windfall. The district court's findings of fact and conclusions of law regarding the language in the FHLBC Stamp are inconsistent, clearly erroneous, and ***not*** supported by substantial evidence.

First, the district court found that "[t]he FHLBC release was prior to the FDIC approval." (IV:APP0804 at P17) However, the Dunmires failed to bring anyone from FHLBC to trial to confirm when the Stamp was placed on the allonge to the Note. [4] Moreover, Mr. Dunmire testified that he was not aware of the language in the FHLBC Stamp until 2016 when he and his wife were going through the foreclosure mediation program. (V:APP0837 at 24 - V:APP0838 at 2) ("Q. Were you aware of that particular stamp on any document related to this loan before the foreclosure mediation in 2006? A. Not until I was sitting at the table."). There simply was no evidence presented at trial by the Dunmires to establish when the FHLBC Stamp was placed on the allonge to the Note. Yet, evidence to the contrary was presented by SPS, which the Court wrongfully refused to admit into evidence during trial. As such, the district court's Finding of Fact No. 17 was pure speculation, unsupported by any evidence (let alone substantial evidence) and was therefore clearly erroneous.

Second, the district court held that the **[*29]** FHLBC Stamp " ***manifested*** an intention to discharge the Dunmires from an existing duty, in this case, repayment of the Note." (IV:APP0807 at P12) (Emphasis added.) However, the district court's Finding of Fact No. 23 states, in relevant part, " ***[n]o evidence was presented during trial regarding the intent of FHLBC*** in releasing ***its*** interest in the Note." (IV:APP0805 at P23) (Emphasis added.) This Finding of Fact is telling for at least two reasons: (1) it reveals that the Dunmires, as the plaintiffs with the burden of production and persuasion, did ***not*** present any evidence as to the intent of FHLBC; and (2) it highlights the actual language of the Stamp, which states that the FHLBC was releasing ***its*** *interest* in the "written note and/or mortgage or deed of trust"- *i.e*. back to AmTrust. Nothing in the Stamp signifies an intention to release ***the Dunmires*** from their $ 1.3 million obligation under that instrument. Therefore, the district court's conclusion that the Stamp released them from repayment of the Loan was clearly erroneous and not supported by any (let alone substantial) evidence.

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[4] Although no evidence was presented to the district court by the Dunmires concerning when the FHLBC Stamp was placed on the Note, SPS submits that the district court's conclusion is the most logical conclusion to reach. The FHLBC Stamp was likely placed on the Note after the endorsement from AmTrust to FHLBC but before the endorsement from FDIC, as receiver **[*28]** for AmTrust, to NYCB. Placing the FHLBC Stamp on the Note prior to the FDIC endorsement supports a finding that the plain meaning of the FHLBC Stamp was to release FHLBC's interest back to AmTrust such that its receiver, FDIC, could then endorse the Note over to NYCB as part of the whole bank sale of AmTrust's assets to NYCB. (IV:APP0619-748)

Third, the district court held that "[w]hen **[*30]** FHLBC placed its stamp on the Allonge ... the only conclusion that can be drawn from the plain language of the stamp is that a release occurred." (IV:APP0807 at P11) This conclusion is refuted by basic principles of contract law.

"Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015) (quoting Redrock Valley Ranch, LLC v. Washoe Cnty, 127 Nev. 451, 460, 254 P.3d 641, 648-49 (2011)). The objective of interpreting contracts "is to discern the intent of the contracting parties. Traditional rules of contract interpretation are employed to accomplish that result." *Id.* (quoting Davis v. Beling, 128 Nev. 301, 278 P.3d 501 (2012)) (internal citations omitted). "A contract is ambiguous if it is reasonably susceptible to more than one interpretation." Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 501 (2003) (quoting Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994)). "The best approach for interpreting an ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." *Id.* (quoting Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 231, 808 P.2d 919, 921 (1991)). "This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties." *Id.* (citing Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982)). Most importantly, " **[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract**." *Id.* (quoting Dickenson v. State, Dep't of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994)). *See also* Trans Western Leasing, 98 Nev. at 447, 652 P.2d at 1183 ("This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties."); Mohr Park Manor, Inc. v. Mohr, 83 Nev. 107, 424 P.2d 101 (1967) (interpretations which render the contract valid or its performance possible are preferred to those which render it invalid or its performance impossible); United Rentals Hwy. Techs v. Wells Cargo, 128 Nev. 666, 676, 289 P.3d 221, 229 (2012) ("Every word [in a contract] must be given effect is at all possible.") (citing Royal Indem. Co. v. Special Serv., 82 Nev. 148, 150, 413 P.2d 500, 502 (1966); Ellison v. C.S.A.A., 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)); Bielar v. Washoe Health Sys., Inc., 129 Nev. 459, 465, 306 P.3d 360, 365 (2013) ("A basic rule of contract interpretation is that '[e]very word must be given effect if at all possible.'").

The language and timing of the FHLBC Stamp is clear: that FHLBC released its interest in the Note only. **[*31]** But the district court reached the opposite conclusion, that the Dunmires repayment obligation was released in full, by finding that the Dunmires had met their burden of proof by a preponderance of the evidence. [5] The Dunmires ***did not*** prove that it was "more likely than not" that the Stamp released the Dunmires from their repayment obligation under the Note. *See* Caraveo v. Perez (In re Estate of Bethurem), 129 Nev. 869, 876, 313 P.3d 237, 242 (2013). At best, it is only apparent from the express language of the FHLBC Stamp that FHLBC was releasing ***its own interest in the Note, not the Dunmires' repayment obligation*** . If the language had been intended to release the Dunmires from their repayment obligation, there would not be a stamp on an allonge rather the face of the Note would have been marked "VOID" or "CANCELLED" or the Note would have been returned to the Dunmires. *See, e.g.* NRS 104.3604(1) and (2), the latter of which specifically states that: "Cancellation or striking out of an endorsement pursuant to subsection 1 does not affect **[*32]** the status and rights of a party derived from the endorsement." [6]

The Dunmires failed to provide the district court with any evidence (let alone substantial evidence) about the intention of FHLBC. The district court stated as much: " ***No evidence was presented during trial regarding the intent of FHLBC*** in releasing its interest in the Note." (IV:APP0805 at P23) Thus, the district court erred as a matter of law in interpreting the language of the Stamp to be a release of the Dunmires' obligation to repay the Loan

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[5] *See* Pease v. Taylor, 88 Nev. 287, 290, 496 P.2d 757, 759 (1972) ("A great number of jurisdictions require the usual standard of proof in civil matters, *i.e.*, 'preponderance of the evidence,' which we now adopt.").

[6] The language "without recourse" on the stamp is equally unavailing of an intent to Dunmires' repayment obligation. NRS 104.3415(2) ("If an endorsement states that it is made "without recourse" or otherwise disclaims liability of the endorser, the endorser is not liable under subsection 1 to pay the instrument.").

rather than just a release of FHLBC's own interest back to AmTrust. That would be the only sensible interpretation of the FHLBC Stamp, based on the surrounding circumstances (Soro, 359 P.3d at 106; Redrock Valley Ranch, LLC, 127 Nev. at 460, 254 P.3d at 648-49). The actions of the parties to the Note, i.e. the transfer of the Loan as collateral to secure a loan from FHLBC to AmTrust (IV:APP0617-18), **[*33]** placement of AmTrust under FDIC receivership (IV:APP0768-70), sale of AmTrust's whole bank assets to NYCB (IV:APP0619-748) and corresponding endorsements (III:A[[0591-95; IV:APP0784-88) support such a conclusion, as do the Dunmires' admissions that they did not know about the FHLBC Stamp (V:APP0837 at 13 15), entered into a loan modification assuming all obligations due under the Loan (IV:APP0793), and did not repay the Loan (V:APP0835 at 21-25), as well as the endorsements to the Note and subsequent actions of AmTrust, FDIC, NYCB and SPS after the FHLBC Stamp was allegedly placed on the allonge. *See* Assignment of Deed of Trust (IV:APP0613-16); Special Power of Attorney (IV:APP617-18); Purchase and Assumption Agreement (IV:APP0619-748); FDIC Annual Report to Congress Merger Decisions 2009 (IV:APP0749-767); FDIC Press Release regarding AmTrust (IV:APP0768-70); FDIC Failed Bank Information regarding AmTrust (IV:APP0771-75); Servicing Transfer letter from SPS to the Dunmires (IV:APP0776-80); Limited Power of Attorney (IV:APP0781-83); Note, with endorsement from NYCB in blank (IV:APP0784-88); Recorded Corporate Assignment of Deed of Trust (IV:APP0791-92); Loan Modification Agreement **[*34]** (IV:APP793-97); and Goodbye Letter from NYCB to the Dunmires (IV:APP0798 99). All parties to the Note believed that the Loan remained a valid debt and servicing and collection efforts continued in the regular course of business. *Id.*

Lastly, despite this Court's caution to lower courts to seek to avoid doing so, the district court reached a conclusion which resulted in a harsh and unreasonable outcome: a financial windfall to the Dunmires and loss of SPS secured interest worth approximately $ 1.3 million. Shelton, 119 Nev. at 497, 78 P.3d at 501; Dickenson, 110 Nev. at 937, 877 P.2d at 1061. *See also*, section B, *infra*.

Given the Dunmires' failure to prove when the FHLBC Stamp was placed on the Note, the intent, or the meaning of the Stamp, and the district court's failure to apply basic contract principles in reaching its conclusion, the district court's Final Judgment quieting title in favor of the Dunmires and holding that the Dunmires' repayment obligations under the Note and Deed of Trust were released was clear error, not supported by substantial evidence, and should be reversed.

ii. The district court improperly shifted the burden of production and persuasion to SPS .

It is well-established under Nevada law that "[i]n **[*35]** a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself." Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996). While it is likely that the Dunmires will argue that there is a presumption in favor of the record titleholder (*i.e*. the Dunmires), *see id.*, that presumption, if any, has been overcome by the undisputed facts that (i) the Dunmires borrowed the money (V:APP0835 at 13-17), (ii) the Dunmires have not paid back the money (Id. at 21 25), (iii) SPS has demonstrated that it is the note holder for the Trust (V:APP0870 at 18-25; V:APP0891 at 11-13; V:APP0892 at 3-5; V:APP0896 at 21-24; V:APP0924 at 5-7; V:APP0930 at 20-23), (iv) the Trust is the beneficiary of the Deed of Trust (IV:APP0791-92), and (v) no other entity is seeking repayment of the Loan from the Dunmires. (V:APP0838 at 3-6)

Unfortunately, at trial, the district court improperly shifted the burden of proof to SPS. The district court found that "[n]o evidence was presented during trial regarding the intent of FHLBC in releasing its interest in the Note." (IV:APP0805 at P23) Yet, despite this finding, the district court concluded that the Stamp operated to release the Dunmires' repayment obligation **[*36]** in full. (IV:APP0807 at P12) Moreover, despite the district court's erroneous finding about the timing of when the FHLBC Stamp was placed on the Note, it is undisputed that no evidence was presented about that issue either. Yet the district court somehow found the "manifested" intention of the FHLBC through the "plain language" of the Stamp. (Id. at P11)

The problem is that the district court wrongfully shifted the burden to SPS to prove the intent of the Stamp instead of requiring the Dunmires to do so. The language of the Stamp is "plain," as FHLBC expressly set forth that it was a release of "its" interest, not the Dunmires', and it certainly does not support a finding that the Dunmires were released from their repayment obligation despite not repaying the Loan or providing other consideration. The district

court erred by relying solely on the language of the Stamp in quieting title. The Dunmires did not present any evidence in their case-in-chief to make a *prima facie* showing that the word "release" was intended to and did operate as a release of all repayment obligations under the Deed of Trust. The Dunmires admitted that they were unaware of the Stamp at any time prior **[*37]** to the Foreclosure Mediation. (V:APP0837 at 13-18) Instead, they admitted that they considered the Loan was still valid and enforceable and obtained a loan modification, evidencing their intent to repay the debt. (IV:APP0793-797)

Accordingly, SPS requests that this Court reverse the Final Judgment and remand to the district court with instructions for judgment to be entered in favor of SPS either pursuant to the original Summary Judgment Order or, at least, under the renewed motion for summary judgment following the grant of the motion for reconsideration.

iii. The Dunmires expressly acknowledged that the Note and Deed of Trust remained valid .

Even though the district court was aware of the existence of the Loan Modification, and admitted it into evidence (V:APP0842 at 12), it disregarded the effect of the Loan Modification as a reaffirmation of the Dunmires' debt. The express language of the Loan Modification constituted an admission by Dunmires that they were indebted to NYCB (and now SPS) and that the Property was still security for the Loan under the Deed of Trust. By disregarding the effect of the Loan Modification, the district court committed clear, reversible **[*38]** error.

SPS maintains its position that there is no evidence in the record to support a finding that the debt was ever released. However, even if the FHLBC Stamp is considered to be a release of the repayment debt, then FHLBC's use of the "release" stamp language, instead of other language clarifying its intent to transfer the Loan back to AmTrust, is simply a mistake and reinstatement of the Loan is required in accordance with the terms of the Loan Modification. In Nevada, principles of law and equity, including the law relative to mistake supplement NRS Chapter 104, the Uniform Commercial Code. *NRS 104.1103(2)*. "Equity affords relief where an encumbrance has been discharged through a mistake." *Alliance Funding Co. v. Stahl, 829 A.2d 1179 (Pa. 2003)* (citing *St. Clement's Building & Loan Ass'n v. McCann, 126 Pa.Super. 20, 190 A. 393, 394 (1937))*; *U.S. Bank Nat. Ass'n v. Oliverio, 109 Wash.App. 68, 73, 33 P.3d 1104, 1106 (2001)* ("The law will not relieve a party of an obligation due to another's mistake."); *NationsBanc Mortg. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 733 N.E.2d 557 (2000)* (when a mortgage is discharged by mistake, equity will set the discharge aside, and reinstate the mortgage in the position the parties intended it to occupy).

Because contract interpretation is a matter of law, this Court must review the district **[*39]** court's decision de novo and without any deference to the district court's findings regarding the Loan Modification. *Whitemaine, 124 Nev. at 308, 183 P.3d at 141*. On page 1 of the Loan Modification, it states in relevant part:

> This Loan Modification Agreement ... between Jeffrey S. Dunmire and Rosalie Dunmire, Husband and Wife as Joint Tenants ("Borrower") and New York Community Bank ("Lender"), amends and supplements (1) the Deed of Trust (the "Security Instrument") ... dated March 4, 2008 and granted and assigned to CCSF ... and (2) the Note, bearing the same date as and secured by, the Security Instrument ...payable to the order of the Lender in accordance with the terms set forth therein. ***Borrower, if not presently primarily liable for the payment of the Note, does hereby expressly assume the payment of said Note*** . Borrower acknowledges that Lender is the holder and owner of the Note and understands that Lender may transfer the Note ... and anyone who takes the Note by transfer and is entitled to receive payments under the Note is called the "Lender" in this agreement.

(IV:APP0793) (Emphasis added.) Although SPS disputes the district court's finding regarding the effect of the FHLBC Stamp, it is **[*40]** clear from the foregoing language that even if the Dunmires had been previously "released" from their payment obligations arising under the Note, the Dunmires "expressly" acknowledged and agreed to "assume payment of said Note" anyway.

Additionally, on page 2 of the Loan Modification, it states as follows in relevant part:

> ***Borrowers, Jeffrey S. Dunmire and Rosalie Dunmire, now desire to extend or rearrange the time and manner of repayment of the Note and to extend and carry forward the lien(s) on the Property whether created by the Security Instrument or otherwise*** . Lender, the legal holder and owner of the Note and of the lien(s) securing the same has agreed at the request of Borrower to extend or rearrange the time and manner of repayment.

(IV:APP0794) (Emphasis added.) In case the foregoing was not clear enough, on page 3 of the Loan Modification it states in relevant part:

> ***All covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect*** , except as herein modified, and ***none of the Borrower's obligations or liabilities under the Note and Security Instrument shall be diminished or [*41] released by any provisions hereof*** , nor shall this Agreement in any way impair, diminish, or affect any of Lender's rights under or remedies on the Note and Security Instrument, whether such rights arise thereunder or by operation of law.

(IV:APP0795) (Emphasis added.) Finally, it is undisputed that the Dunmires signed the Loan Modification, which was notarized. *See id.*; *see also* (V:APP0841 at 23 - V:APP0842 at 1).

In the Final Judgment, the district court failed to address or acknowledge any of the foregoing contractual agreements by the Dunmires. However, it is irrefutable that even if the district court were correct about the timing and effect of the FHLBC Stamp, ***the Dunmires' actions reflect their express agreement to affirm the debt evidenced by the Note and desire that the Deed of Trust*** "extend and carry forward" as a lien on the Property. *Shelton, 119 Nev. at 497, 78 P.3d at 501*; *Margrave, 110 Nev. at 827, 878 P.2d at 293*.

Thus, the district court committed clear, reversible error by failing to even consider and effectuate the express promises in the Loan Modification, despite admitting the Loan Modification into evidence at trial.

iv. The district court abused its discretion in refusing to admit certain evidence [*42] proffered by SPS at trial .

During trial, the district court refused to admit (or even view) Proposed Exhibits 6, 7, 9, and 13. (IV:APP0617-18, IV:APP0619-748, IV:APP0768-70 and IV:APP0784-88, respectively). Proposed Exhibits 7 and 9 (IV:APP0619-748, IV:APP0768-70, respectively) were relevant and should have been admitted under Nevada statute and the public records exception to the hearsay rule. Proposed Exhibits 6 and 13 (IV:APP0617-18 and IV:APP0784-88, respectively) were relevant and should have been admitted under Nevada law, including the business records exception to the hearsay rule. Although SPS did not bear the burden of proof at trial, the district court's refusal to admit the foregoing records prevented SPS from presenting a full picture of the Loan and the Dunmires' continuing repayment obligation. This was important given the district court's improper shift of the evidentiary burden to SPS. If the district court would have admitted the foregoing documents, it would have understood why the FHLBC Stamp was placed on the Note and the full history of the ownership of the Loan.

a. Proposed Exhibit 7 was admissible under the public records exception to hearsay.

Proposed **[*43]** Exhibit 7 is a copy of the Purchase and Assumption Agreement Whole Bank between the FDIC, receiver of AmTrust, and NYCB (the " **PAA**"). (IV:APP0619-748) When the PAA was offered for admission into evidence at trial, the Dunmires objected based on lack of foundation, hearsay, and relevance. (V:APP0928 at 20-21) The Dunmires did not object on the basis that the source of information indicated a lack of trustworthiness. SPS' trial counsel argued that the PAA was relevant to show that NYCB acquired all of AmTrust's mortgages. *See id. at 17-18*. However, the district court sustained the objection "because this is not a report of a public agency as part of their work." *Id. at 23-24*.

The district court's ruling was erroneous as a matter of law and an abuse of discretion for failing to apply applicable law because the public records exception to hearsay is not limited to "reports" of public agencies.

NRS 51.155 states:

> Public records and reports. **Records**, reports, statements or data compilations, **in any form**, of public officials or agencies are not inadmissible under the hearsay rule if they set forth:
>
> 1. **The activities of the official or agency**;
>
> 2. Matters observed **[*44]** pursuant to duty imposed by law; or
>
> 3. In civil cases and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,
>
> unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.

(Emphasis added).

First, the PAA reflects an activity of the FDIC (the sale of AmTrust while under conservatorship of the FDIC to NYCB) maintained by the FDIC on its website and is accessible to the public. [7] Additionally, the district court should have taken judicial notice of the PAA as a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. NRS 47.130(2)(b). Indeed, this court and numerous other courts have taken judicial notice of substantially similar asset purchase agreements available on the FDIC's website. *See, e.g.,* R&S St. Rose Lenders, LLC v. Branch Banking & Trust Co., No. 56640, 2013 WL 3357064, at *5 n.1 (Nev. Feb. 21, 2014) (Justice Pickering, dissenting) (citing Jaimes v. JP Morgan Chase Bank NA, No. 12 C 3162, 2013 WL 677740, at *1 n.2 (N.D. Ill. Feb. 25, 2013) (taking judicial notice of an FDIC P & A Agreement "because **[*45]** it is a public record and not the subject of reasonable dispute" and collecting cases in which other courts also took judicial notice of the P & A Agreement and its provisions) and Allen v. United Fin. Mortg. Corp., 660 F.Supp.2d 1089, 1093-94 (N.D. Cal. 2009) (consulting web version of P & A Agreement to clarify exhibit)); Scott v. JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 743, 752-55 (Cal. Ct. App. 2013) (the FDIC's official act of transferring certain WaMu assets to JP Morgan as evinced by the P & A Agreement is an official act subject to judicial notice and the P & A Agreement posted on the official FDIC website is subject to judicial notice).

Second, the PAA is a "record" under any definition. Black's Law Dictionary (10th ed. 2014) (defining "record" as "[a] documentary account of past events, usually designed to memorialize those events" or "[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form."). Third, the PAA undisputedly sets forth the activities of the FDIC in its capacity as conservator of AmTrust: the PAA records the FDIC's whole bank sale of AmTrust to NYCB. (IV:APP0619-748)

Thus, the district court should have admitted the PAA at trial pursuant to the public **[*46]** records exception to hearsay or, alternatively, should have taken judicial notice thereof. Had the district court admitted the PAA, it would have known that all of AmTrust's assets (including the Dunmires' Loan, discussed *infra*) had been purchased by NYCB. (IV:APP0633 at Section 3.1) The district court's failure to do so, relying on an incorrect evidentiary standard and application of NRS 51.155, amounts to an abuse of discretion.

b. Proposed Exhibit 9 was admissible under the public records exception to hearsay

Proposed Exhibit 9 is a copy of the FDIC's Press Release (the "Press Release") announcing that the FDIC closed AmTrust and entered into the PAA with NYCB. (IV:APP0768-70) When the Press Release was offered for admission, the Dunmires first objected that it lacked foundation and the district court sustained the objection. (V:APP0915 at 12-13) After SPS' witness, Mark Syphus, testified that it was a publicly-available press release from

[7] https://www.fdic.gov/bank/individual/failed/amtrust-p-and-a.pdf, last visited February 4, 2019.

the FDIC, a federal agency, the Press Release was again offered for admission, but the Dunmires objected based on lack of foundation and hearsay, which the district court then sustained. (V:APP0916 at 14-16)

Although SPS argued that **[*47]** the Press Release should be admitted under the public records exception to the hearsay rule, the district court held "[i]t's hearsay. It's a press release not by a party to this litigation. So it can't be a party admission, and while it may be allegedly issued by the FDIC, that doesn't mean that the contents of the press release are admissible." *Id. at 21-25*. The court further held that the Press Release is "not a record of a public agency. It's a press release." (V:APP0917 at 4-5) The district court's erroneous application of *NRS 51.155* and refusal to admit the Press Release into evidence at trial was an abuse of its discretion.

First, a public statement on a government website is subject to judicial notice. *See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010)* [8]; *Fannie Mae v. KK Real Estate Inv. Fund, LLC*, No. 2:17-cv-1289-*JCM CWH, 2018 WL 525297, at *2* & n.3 (D. Nev. Jan. 23, 2018) (taking judicial notice of FHFA's statement in related case); *Eagle SPE NV 1, Inc. v. S. Highlands Dev. Corp., 36 F. Supp. 3d 981, 985, 988 n.6 (D. Nev. 2014)* (taking judicial notice of document on FDIC website).

Second, the Press Release is certainly a "statement," **[*48]** as it informs the world of the PAA and other items related to the FDIC's closure of AmTrust and sale of assets to NYCB. *See NRS 51.155*; *see also* Black's Law Dictionary (10th ed. 2014) (defining "statement" as "[a] formal and exact presentation of facts.").

Third, the Press Release is a statement of the FDIC's activities as it expressly states,

> AmTrust Bank, Cleveland, Ohio, was closed today by the Office of Thrift Supervision, which appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. To protect the depositors, the FDIC entered into a purchased and assumption agreement with New York Community Bank, Westbury, New York, to assume all of the deposits of AmTrust Bank.

(APP0768). *See also DeRosa v. First Judicial Dist. Court, 115 Nev. 225, 232, 985 P.2d 157, 161 (1999)* (overruled on other grounds) ("To qualify as a public record in both a traditional sense and pursuant to Nevada's statutory codification of that exception, the record must have been prepared by a public official or agency.").

Based on the public records exception, the Press Release was authenticated and should have been admitted by the district court when offered at trial. [9] As with the PAA, had the Press Release been admitted into evidence, the district court would have known how NYCB ended up owning the Note.

c. Proposed Exhibit 6 was admissible under the business records exception to hearsay.

The district court's refusal to admit Proposed Exhibit 6 into evidence at trial was erroneous as a matter of law and an abuse of discretion for failing to apply applicable law because the district court failed to apply the business records exception to hearsay.

The business records exception to hearsay, *NRS 51.135*, states,

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other

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[8] The bottom portion of the Press Release shows the FDIC's web address from which the Press Release was obtained. (IV:APP0768-70)

[9] Although the district court did not inquire about the relevance **[*49]** of the Press Release, it was clearly being offered to demonstrate that NYCB acquired the assets (including mortgage loan documents) of AmTrust, which explains how NYCB was entitled to possess the Note and own the Deed of Trust.

> qualified person, is not inadmissible under the hearsay rule unless the source of **[*50]** information or the method or circumstances of preparation indicate lack of trustworthiness.

Courts routinely permit a loan servicer witness to testify to and authenticate records created by a prior loan servicer. *See* *U.S. Bank Trust, N.A. v. Jones, 330 F.Supp.3d 530 (D. Me. 2018)* (noting that current servicer relies on other servicers' records in its day-to-day business once it believes they are correct, and current servicer then treats the records as party of its own business records. Noting that,

> [m]ost other circuit courts have applied the business records exception flexibly to admit records created by a different business entity once incorporated and relief upon by the business entity producing the witness to testify about the other requirements of [the business records exception].

See, e.g., *U.S. v. Adefehinti, 510 F.3d 319, 326 (D.C. Cir. 2007)*; *Air Land Forwarders, Inc. v. U.S., 172 F.3d 1338, 1344 (Fed. Cir. 1999)*; *U.S. v. Childs, 5 F.3d 1328, 1333 (9th Cir. 1993)*; *Matter of Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1981)*."); *Mason v. Midland Funding LLC*, No. 1:16-cv-02867 LMM-RGV, 2018 WL 3702462, at *81 (N.D. Ga. May 25, 2018) (overruled on other grounds) (applying the business records exception under *Fed. R. Evid. 803(6)* [10] to records which were not created by the business, but rather gathered by the business and kept in the course of its business).

Proposed Exhibit 6 is a copy of the Special Power of Attorney between FHLBC and NYCB, as successor in interest to AmTrust (the " **POA**"). (IV:APP0617-18) It references a lending relationship between FHLBC and the failed AmTrust, and that the Note had been FHLBC's collateral for that lending facility. [11] Mr. Syphus explained at trial that while he is not the custodian of records for SPS (V:APP0851 at 22-24), he is an "other qualified person," pursuant to *NRS 51.135*.

It is unclear exactly why the district court rejected Mr. Syphus as a "qualified person." But in *Thomas v. State*, this Court held that the term "'qualified person' ... ***has been broadly interpreted*** " and the proponent of the record "need only make a prima facie showing of [its] **[*52]** authenticity so that a reasonable juror could find that the [record] is what it purports to be." *114 Nev. 1127, 1148, 967 P.2d 1111, 1124 (1998)* (emphasis added); *see also Cager v. State, 124 Nev. 1455, 238 P.3d 799 (2008)* (unpub.) (The term "qualified person" is broadly interpreted to include anyone who knows that the documents were kept in the ordinary course of business and understands the record-keeping system that was involved) (citing *Thomas, 114 Nev. at 1148, 967 P.2d at 1124*). The Ninth Circuit has set a low bar for what constitutes "other qualified witness." "The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the record-keeping system." *U.S. v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990)* (finding that welfare fraud investigator familiar with the reporting and filing requirements for public assistance benefits was an "other qualified witness" although she was not a custodian of record); *U.S. v. Basey, 613 F.2d 198, 201 n.1 (9th Cir. 1979)* (college records properly admitted to establish defendant's address even though custodian did not record the information herself nor knew who did).

Here, sufficient testimony was elicited from Mr. Syphus during trial for the district court to have deemed Mr. Syphus a qualified person to testify about the POA. Mr. Syphus explained multiple times how SPS obtains loans and **[*53]** loan information, boards loan information into its systems, the systems SPS uses for these functions, and the strict vetting process the information goes through during the boarding process. (V:APP0863-64; V:APP0866-67; V:APP0870; V:APP0881; V:APP0831 at 18-32 at 1) Mr. Syphus' testimony was based on his 19 years as an

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[10] *Fed. R. Evid. 803(6)* is substantially similar to *NRS 51.135*. This Court may look to federal law "discussing an analogous federal rule of evidence" for guidance **[*51]** in interpreting its own evidence rules. *Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Ct., 130 Nev. Adv. Rep. 37, 325 P.3d 1259, 1265 (2014)*.

[11] It is SPS' position that the FHLBC Stamp was really an indication that the collateral interest of the FHLBC was "released" by the placement of the Stamp - not that the Note was in any way satisfied by the Dunmires.

SPS employee and his familiarity with SPS' systems. (V:APP0864 at 9-14; 17) The foundational requirements for admission of the POA as a business record were met.

Unfortunately, despite the undisputed fact that Mr. Syphus was qualified to testify about SPS' business records, the district court refused to admit the POA based on hearsay and foundation. (V:APP0932 at 14-16) The district court did not conclude that the source of the POA or the method or circumstance of its preparation indicated a lack of trustworthiness. In fact, there was no objection from the Dunmires claiming the POA lacked trustworthiness. Not only was Mr. Syphus an "other qualified person," but he testified that the POA was the type of document that SPS receives from other servicers ***and*** relies on as part of SPS's business in servicing loans. In fact, the POA is maintained in SPS's business **[*54]** records. (V:APP0932 at 2-11) While the POA may not have originated from SPS, the standard for admissibility is not that the entity offering the document created it. *Supra*. Instead, the document need only be kept and maintained in the offering party's regularly conducted business, which Mr. Syphus confirmed was the case, and which Mr. Syphus also confirmed was part of the transfer of records to SPS related to the Loan. (V:APP0932 at 8-11) Moreover, the POA is not lacking in trustworthiness, as it was signed and notarized. (IV:APP0618) There simply was no reason for the district court to believe that the POA was anything other than what it purports to be.

The importance of the POA is that it demonstrated that FHLBC did not intend to release the Dunmires' obligations when it put the FHLBC Stamp on the Note. [12] Although it is not SPS' burden **[*55]** to prove why the Stamp was on the Note or the meaning of the Stamp, this business record, if admitted, would have provided the district court with an explanation for the Stamp (*i.e*. that FHLBC had taken loan documents from AmTrust as collateral and then those collateral documents were transferred to NYCB as part of the FDIC sale of AmTrust's assets to NYCB), which was more than the Dunmires did.

d. Proposed Exhibit 13 was admissible under the business records exception to hearsay.

Proposed Exhibit 13 is a copy of the Note, which had already been admitted into evidence (*see* Trial Exhibit 1, III:APP0591-93, Trial Exhibit 2, III:APP0594, and Trial Exhibit 3, III:APP0595) but contained one additional endorsement - which is an endorsement in blank from NYCB. (IV:APP0784-88). Frankly, it is unclear why the court denied the admission of this document when it had already admitted the same document per stipulation of the parties. (V:APP0833 at 13-18)

With regard to the authenticity of Proposed Exhibit 13, Mr. Syphus testified, without dispute, that he had seen Proposed Exhibit 13 in SPS's business records. (V:APP0868 at 19-23) He also testified that he has no reason to believe **[*56]** that Proposed Exhibit 13 is anything other than what it purports to be. (V:APP0869 at 6-12) In fact, Mr. Dunmire himself testified that the Note bears his signature and that of his wife. (V:APP0835 at 15-17)

Thus, the only apparent problem with Proposed Exhibit 13 from the district court's point of view was that the blank endorsement stamp by NYCB is hearsay. *Id. at 16-22*. The Dunmires argued that the blank endorsement was being offered for the truth of the matter asserted (*i.e*. "to demonstrate the transfer of the interest from New York Community Bank to SPS."). *Id. at 18-19*. On that basis, the district court sustained the objection and refused to admit Proposed Exhibit 13. *Id. at 22*. However, the district court's ruling was erroneous for at least three reasons.

First, the blank endorsement does not say that a "transfer of interest" from NYCB to SPS occurred. (IV:APP0788) In fact, if it did, that would not be a "blank" endorsement. *See* NRS 104.3205(2) (describing a blank endorsement as ***not*** specifying the payee).

Second, nowhere on Proposed Exhibit 13 does it mention SPS or the Trust. (IV:APP0784-88)

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[12] The POA also supports SPS' trial argument that the FHLBC Stamp was an endorsement under Nevada law, *see* NRS 104.3204(1), and entitled to protection under the Shelter Rule found in NRS 104.3207, because it was actually negotiating the Note back to AmTrust (as part of the collateral assignment) and then NYCB, as described in the POA. (V:APP0945-57)

Third, SPS never specified, and was never given a chance **[*57]** to specify, the reason it was offering Proposed Exhibit 13. (V:APP0869) It appears that the district court assumed that Proposed Exhibit 13 was being offered for the truth of the matter asserted rather than its legal effect.

Proposed Exhibit 13 should have been admitted as evidence that NYCB had endorsed the Note in blank, making it bearer paper (*i.e*. demonstrating the legal effect of the endorsement, not a transfer or negotiation to SPS). *See* NRS 104.3205(2). However, because the district court did not give SPS a chance to provide those reasons (V:APP0869 at 18-19), the district court abused its discretion in refusing to admit Proposed Exhibit 13.

As a result, the district court unfairly prevented SPS from defending itself in this matter.

C. THE DISTRICT COURT ABUSED ITS EQUITABLE POWERS BY GIVING THE DUNMIRES AN UNJUSTIFIED AND INEQUITABLE WINDFALL.

It is undisputed that, despite receiving a $ 1.3 million loan in 2008, the Dunmires still owe more than $ 1.25 million on the Loan. (IV:APP0805 at P22) Mr. Dunmire testified multiple times at trial that neither he, nor his wife, nor anyone on their behalf, has paid off the Loan. (V:APP0835 at 21-25) Mr. Dunmire also admitted **[*58]** at trial that he is not aware of any other party besides himself, his wife, or SPS claiming right or entitlement to this particular loan. (V:APP0838 at 3-6)

Despite these undisputed facts, the district court quieted title in favor of the Dunmires, providing them with ownership of the Property free and clear of their obligation to repay $ 1.3 million, without any evidentiary basis that this was the intended outcome by any of the parties to the Loan. (IV:APP0807) The district court acknowledged at trial that if it granted the Dunmires' requested relief, it would be " ***giving a windfall of a million, three, on a quiet title case*** ." (V:APP0958 at 8-9) (Emphasis added.) However, despite its own acknowledgment, the district court ignored Nevada's strong public policy providing that an unjustified windfall is profoundly inequitable.

"A "windfall" describes a situation in which the recipient receives some benefit undeserved or unmerited." *Salas v. Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1169, 14 P.3d 511, 514 (2000)*. "For example, a windfall occurs when a developer purchases several separate parcels, that, when combined, result in land worth far more than the sum paid for the individual parcels." *County of Clark v. **[*59]** Sun State Properties, Ltd., 119 Nev. 329, 72 P.3d 954 (2003)* (citing *County of Los Angeles v. American Savings & Loan Ass'n, 26 Cal.App.3d 7*, 102 Cal.Reptr. 439, 443 (1972) (*citing* Mike Talley, Note, The Undivided Fee Rule in California, 20 Hastings L.J. 717, 721 (1969)). *See generally Ellison v. California State Auto. Ass'n, 106 Nev. 601, 797 P.2d 975 (1990)*; *Am. Sterling Bank v. Johnny Mgmt. LV, Inc., 126 Nev. 423, 245 P.3d 535 (2010)* (citing *Houston v. Bank of Am. Fed. Sav. Bank, 119 Nev. 485, 489, 78 P.3d 71, 74 (2003))*. *See also **Countrywide Home Loans, Inc. v. Sheets, 160 Idaho 268, 371 P.3d 322 (2016)*** (attorney's fees awarded to Bank of America where borrower "failed to pay on his loan for six years, apparently hoping to obtain a windfall due to Bank of America's error[.]"); *Oliverio, 109 Wash.App. at 73, 33 P.3d at 1106* ("leaving the Bank without security for its loan would create an inequitable windfall for the Oliverios.") (citing *Duley v. Westinghouse Elec. Corp., 97 Cal.App.3d 430, 158 Cal.Rptr. 668, 669 (1979))*.

The case of *Beazie v. Amerifund Financial, Inc., 2011 WL 2457725*, Case No. 09-00562 JMS/KSC (D. Haw. June 16, 2011), presented a factual situation very similar to the one before this Court. The *Beazie* court held that merely voiding a mortgage transaction is not an appropriate remedy because the mortgagor **"would receive a windfall of holding title to the subject property free and clear of any mortgage, as well as taking benefit of the $ 1.26 million that was originally loaned by [the mortgagee]**." *Id.* (*citing Davis v. Wholesale Motors, Inc., 86 Hawai'i 405, 949 P.2d 1026 (1997)* ("while a plaintiff should be compensated for loss suffered, he or she should not be permitted to reap a benefit received from the defendant under the contract.")). *See also Ichimura v. Deutsche Bank Nat. Trust Co., 2013 WL 2149737*, Case No. 11-00318 SOM/RLP (D. Haw. May 16, 2013) ("This court has recognized that, although **[*60]** a bank may not have done anything in violation of applicable law, a mortgagor can seek to have his or her mortgage documents declared void pursuant to that law as long as the mortgagor is able to place the parties in as close a position as they held prior to the mortgage transaction...This means that the mortgagor must be able to tender the loan proceeds back to the current mortgagee to avoid giving the mortgagor a windfall.") (*citing Beazie, 2011 WL 2457725*).

Here, releasing the Dunmires from their acknowledged repayment obligations under the Loan would result in a windfall to the Dunmires of $ 1.3 million, unduly burdening SPS and the Trust with a loss of over $ 1.25 million through no fault of their own. There is no evidence in the record that the Dunmires repaid or tendered the debt owed; in fact, Mr. Dunmire openly acknowledged the debt was still owed in his trial testimony. (V:APP0835 at 21-25). Mr. Dunmire further admitted that the Dunmires have never paid off their $ 1.3 million debt:

> Q. At any point in time, have you ever paid off your mortgage loan in full?
>
> A. ...No.
>
> Q. Okay. So at no point in time have you ever paid on it?
>
> A. Me personally, no.
>
> Q. Tendered $ 1.2 million **[*61]** to any entity to satisfy this debt?
>
> A. Correct.
>
> ...
>
> Q. Has your wife tendered any funds to pay off this mortgage loan?
>
> A. No.
>
> Q. Okay. Are you aware of anyone under any circumstances that has tendered the full balance of the mortgage to any entity at any point?
>
> A. No.
>
> Q. Okay. So the - so you can agree with me that there is money still owed on that loan -
>
> ...
>
> A. I think that's why we're here.
>
> ...
>
> Q. But do you contend that you have paid off the funds -
>
> A. No.
>
> Q. - at all?
>
> A. No.
>
> Q. And no one has done it on your behalf?
>
> A. Correct.

(V:APP0938 at 19 - V:APP0939 at 2; V:APP939 at 6-14; 19; V:APP0940 at 2-8, respectively)

There was no explanation or evidence proffered by the Dunmires at trial sufficient for the district court to justify, and this Court to uphold, an undeserved and unmerited benefit of $ 1.25 million to the Dunmires. *Salas, 116 Nev. at 1169, 14 P.3d at 514*.

Upholding the Final Judgment and the district court's erroneous and unsubstantiated reading of the word "release" in the FHLBC Stamp on appeal would also abandon the purpose of *Restatement (Third) of Proper.: Mortgages § 5.4* (1997), which this Court confirmed is part of Nevada law. *See In re **[*62]** Montierth*, 131 Nev. Adv. Op. 55, *354*

P.3d 648, 650-51 (2015); Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249, 257-58 (2012). Section 5.4 of the Restatement emphasizes the need for courts to "be vigorous in seeking to find such a relationship" in which the loan owner maintains a secured property interest, "since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the loan owner's] expectation of security." Restatement § 5.4 cmt. e. Moreover, Section 5.4 stated objectives emphasize practicality over formalistic technicalities: **even if "mortgagees fail to document their transfers," to properly reflect that the owner of the loan also has a secured property interest (something that happens with "fair frequency"), the parties will "achieve the same result even if one of the two aspects of the transfer is omitted."** *Id.* cmt.a. Section 5.4 thus seeks to "carry out the parties' intention," even if that intention is "not fully documented." *Id.* cmt. c. Here, the intention *was* documented, as demonstrated by the trial testimony and evidence, but the district court nevertheless chose an inequitable result at odds with that intention.

Further, the district court also ignored SPS's closing argument that emphasized this Court's multiple, recent references to Miller v. Provost, 26 Cal. App. 4th 1703, 1707 (1994), which highlights the " ***equitable principle that a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee*** ." (emphasis added). *See* (V:APP0945 at 9-18); *see also* Penrose v. Quality Loan Serv. Corp., No. 68946, 2016 WL 1567517 (Nev. Apr. 15, 2016) (unpub.) (citing *Miller*); Piazza v. U.S. Bank, N.A., No. 70628, 2017 WL 3996819 (Nev. Sept. 11, 2017) (unpub.) (same).

Even though *Penrose* and *Piazza* were addressing statute of limitation challenges to foreclosures, this Court was clearly concerned, as it should be, in each case that the borrower was seeking to gain a financial windfall by precluding foreclosure, even though in each case the borrower had not paid off his debt. Here, the district court recognized the same **[*63]** issue (V:APP0958 at 8-9), but nevertheless exercised its equitable powers to grant quiet title and provide the Dunmires with an unwarranted, unjustified and exorbitant windfall. No explanation was given for this unprecedented departure from established Nevada law.

The Dunmires are not entitled to have the entire Loan discharged based on the misinterpretation of the meaning and intent of the FHLBC Stamp. Mr. Dunmire's trial testimony acknowledging the Dunmires' debt demonstrates the manifest unfairness of this result, which violates Nevada's policy against unjust windfalls. The district court's decision should therefore be rejected by this Court.

D. FEDERAL LAW PRECLUDES THIS COURT FROM ENFORCING THE PURPORTED RELEASE OF THE DUNMIRES' OBLIGATION TO REPAY THE LOAN.

Even if this Court upholds the Final Judgment and concludes that the FHLBC Stamp operated as a release of the Dunmires' repayment obligation, federal law operates to avoid this inadequately documented release once AmTrust was placed under FDIC conservatorship.

In its simplest terms, the *D'Oench Duhme Doctrine* ("D'Oench Doctrine"), as codified under the Financial Institutions Reform, Recovery, and Enforcement Act **[*64]** of 1989 ("FIRREA"), *Pub. L. No. 101-73*, *103 Stat. 183* (1989), applies to bar defenses to a lender's collection of a debt based on an alleged inadequately documented or unrecorded agreement between borrowers and the failed banks placed under conservatorship or receiverships administered by federal insurers, such as the FDIC. The D'Oench Doctrine encompasses inadequately documented agreements that would tend to mislead the FDIC charged with administering the failed bank's assets. *See* Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt., 921 F.2d 241, 245-246 (9th Cir. 1990). The fundamental purpose behind the D'Oench Doctrine is "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets," and the Ninth Circuit has long subjected agreements that are "not clearly evidenced in the bank's records...[and] would not be apparent to bank examiners" to D'Oench scrutiny. Gemini Mgmt., 921 F.2d at 245-46 (citing Langley v. FDIC, 484 U.S. 86, 93, 108 S.Ct. 396, 402 (1988); *see also* Newton v. Uniwest Fin. Corp., 967 F.2d 340, 345 (9th Cir. 1992) (rejecting appellant's argument that "although not immediately evident from the face of USB's records, sufficient evidence existed to notify bank examiners of the tying agreement...Unless some clear statement of the **[*65]** agreement itself is accessible to the examiners, the agreement is "secret" for purposes of the D'Oench doctrine.").

For an agreement to be valid it must be: (A) in writing; (B) executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the FDIC; (C) approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee; and (D) has been, continuously, from the time of its execution, an official record of the depository institution. *12 U.S.C. § 1823(e)*. If it does not comply with these requirements, it is not an enforceable agreement against the FDIC and cannot be used as the basis to defend against a repayment obligation. *12 U.S.C. § 1821(d)(9)(A)*.

The release of the Dunmires' obligation, if that is how the FHLBC Stamp was intended to operate, was inadequately documented to withstand D'Oench scrutiny. The D'Oench Doctrine "favor[s] the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, **[*66]** who can." *Below the Rim, LLC v. Fed. Deposit Inc. Corp. for Silver State Bank*, No. 2:09-cv-01909-RLH-LRL, 2010 WL 11579639, at *2 (D. Nev. Feb. 26, 2010) (quoting *Bell & Murphy & Assoc. v. Interfirst Bank Gateway, N.A., 894 F.2d 750, 754 (5th Cir. 1990)*, *cert. denied*, *498 U.S. 895 (1990)*.

> The D'Oench doctrine and the statutory provisions embody a public policy designed to protect diligent creditors and innocent depositors from bearing the losses that would result if claims and defenses based on undocumented agreements could be enforced against a failed institution.

FDIC Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, dated February 4, 1997. [13]

Here, the actions of AmTrust and the FDIC, as conservator of AmTrust, evidence that the Loan remained an asset of AmTrust after the assumed release of FHLBC's interest back to AmTrust, so that FDIC could transfer the Loan to NYCB, as part of the whole bank sale of AmTrust, and endorse the Note from FDIC to NYCB. (IV:APP0613-788; **[*67]** V:APP0791-99) Conversely, assuming that the FHLBC Stamp was intended to release the Dunmires' repayment obligation and essentially cancel the debt, the FHLBC Stamp is the only evidence of this theory and the FHLBC Stamp is inadequate to meet the requirements under D'Oench; specifically, the FHLBC Stamp was not executed by AmTrust and any person claiming an adverse interest thereunder, including the Dunmires, contemporaneously with the acquisition of the asset by the FDIC, and was not approved by the board of directors of AmTrust or its loan committee, which approval shall be reflected in the minutes of said board or committee. *12 U.S.C. § 1823(e)*. The Dunmires admit that the FHLBC Stamp was unknown to them prior to the foreclosure mediation. (V:APP0837 at 24 - V:APP838 at 2) They did not disclose during discovery, or seek to admit during trial, any documentation showing why their repayment obligations would suddenly be released where the Loan remained outstanding or that they had executed any documentation evidencing a release of the repayment obligation. Had the Loan been released, discharged or otherwise cancelled, some record of this charge off would have to be present in the Loan **[*68]** records.

The Dunmires cannot identify any written document which they signed along with FHLBC and/or AmTrust confirming an agreement to consider the Loan satisfied or cancelled to justify its "release" such that the Loan did not revert (or release) back to AmTrust and was not sold by the FDIC as part of the whole bank sale of AmTrust to NYCB. The Dunmires have simply interpreted the word "release" appearing in the FHLBC Stamp in the most self-serving fashion, without explanation or evidence. Their conclusion is unsupported by the evidence in the record, the context, circumstances and actions of the parties surrounding the FHLBC Stamp and federal law. To the contrary, the evidence in the record evidences the continuing intent and belief among all financial institutions involved, that the Loan remained intact. *See* Assignment of Deed of Trust, Special Power of Attorney, Purchase and Assumption Agreement, FDIC Annual Report to Congress Merger Decisions 2009, FDIC Press Release regarding AmTrust, FDIC Failed Bank Information regarding AmTrust, Servicing Transfer letters from SPS and NYCB to the Dunmires, Limited Power of Attorney, Note, recorded Corporate Assignment of Deed of Trust **[*69]** and Loan Modification

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[13] Publicly- available on the FDIC's website at *https://www.fdic.gov/regulations/laws/rules/5000-4300.html#fdic5000statementop12*.

Agreement. (IV:APP0613 88; IV:APP0791-99). The Dunmires' position does not pass common-sense scrutiny and certainly does not comport with D'Oench. Accordingly, reversal of the Final Judgment and entry of judgment in favor of SPS is necessary.

X. CONCLUSION

Based upon the foregoing, SPS respectfully requests that this Honorable Court reverse the Judgment and remand with instructions for the district court to enter judgment in favor of SPS on both of the Dunmires' claims for relief.

Dated this 17th day of April, 2019.

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XI. ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

(a) This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font **[*70]** size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

(a) Proportionately spaced, has a typeface of 14 points or more, and contains 13,808 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 17th day of April, 2019, the foregoing **OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

Service via electronic notification will be sent to the following:
Jamie Cogburn
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Micah Echols
Kristin Schuler-Hintz

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service **[*72]** was made.

/s/ Faith Harris
An Employee of WRIGHT, FINLAY & ZAK, LLP

End of Document

Oregon-Idaho Utils. Inc. v. Skitter Cable TV Inc.

Case No.: 1:17-cv-03016-ELR

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

December 11, 2017

Reporter
2017 U.S. DIST. CT. MOTIONS LEXIS 133518 *

Oregon-Idaho Utilities Inc et al v. Skitter Cable TV Inc. et al

Type: Motion

Judges

Eleanor L. Ross

Title

RESPONSE IN OPPOSITION

Text

[*1])

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FILED BY SKITTER DEFENDANTS

Plaintiffs Oregon-Idaho Utilities, Inc. and MediaSnap Solutions, LLC], (collectively, "OIU") hereby submits this Memorandum in Opposition to the Motion to Dismiss filed by Defendants Skitter Cable TV, Inc., Skitter, Inc., Robert Saunders, Galva Cable Company, LLC, Southeast Content Group, LLC, and TBM

Content Partners, LLC (collectively, "Skitter").

Skitter seeks to have four of OIU's claims dismissed - the fraud claim (Count II), the unjust enrichment claim (Count V), and both the Idaho state and federal RICO claims (Counts VI and VII, respectively). Additionally, Skitter claims that all of OIU's claims should be dismissed under Rule 12(e), for violating the Eleventh Circuit's rule against shotgun pleadings. However, as set forth below, Skitter's arguments are specious, and OIU's Amended Complaint sufficiently pleads all counts and should not be dismissed.

ARGUMENT

I. Choice of Law Skitter claims that all of OIU's claims "must be evaluated under Georgia law in light of the Franchise Agreement's governing law provision." (Skitter Defendants' Memorandum of Law in Support of their Motion to Dismiss **[*2]** the Amended Complaint, Doc. #80-1 ("Skitter Mem.") at 10.) However, this is incorrect. The Franchise Agreement ("Agreement") states as follows: "The validity and effect of this Agreement are to be governed by and construed and enforced in accordance with the laws of the State of Georgia." (See Franchise Agreement, Doc. #80-2, at [18(c) (emphasis added).) In other words, OIU's breach of contract claims are subject to the Agreement's choice-of-law provision, but OIU's tort and statutory claims are not.

The Court's jurisdiction over this case is based on both federal question and diversity of citizenship, and as such, it should apply "the forum state's choice-of- law rules." Raak Techs., Inc. v. Marx CryptoTech, LP, 2016 WL 9451440, at *3

(N.D. Ga. May 2, 2016) (citing *Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020 (1941)*). Georgia "adhere[s] to the traditional conflict of law rules." Convergys Corp. v. Keener, 582 S$ .E.2d 84, 86-87 (Ga. 2003). Under the traditional rule, lex loci delicti, tort actions are adjudicated according to the law of the place where the tort or wrong occurred. Carroll Fulmer Logistics Corp. v. Hines, 710 $ .E.2d 888, 890 (Ga. App. 2011). And Georgia law states that "the place of wrong, the locus delicti, is the place where the injury sustained was suffered rather than **[*3]** the place where the act was committed, or, as is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place." Risdon Enters. v. Colemill Enters., 324 $ .E.2d 738, 740 (Ga. App.1984).

The case of Garland v. Advanced Med. Fund, L.P. II, $ *6 F. Supp. 2d 1195*

(N.D. Ga. 2000) is instructive. In that case, the plaintiffs (the Garlands) entered into certain agreements and paid the defendants money based on fraudulent misrepresentations. Thereafter, the Garlands brought claims against the defendants for breach of contract, common law fraud, securities fraud (under federal and

Florida state law), and civil theft. The agreements the Garlands had signed had choice-of-law provisions, stating that "all . . . matters pertaining to this [agreement] shall be construed and enforceable in accordance with and governed by the laws of the State of Georgia." *Id. at 1203*.

The defendants argued that Georgia law applied to all of the Garlands(r) claims. The court disagreed, holding that while the breach of contract claims was governed by Georgia law under the choice-of-law provision, *id. at 1204*, the tort and statutory claims **[*4]** were not. The court first reasoned that, because the Garlands lived in Florida, executed the agreements in Florida and wrote the checks in Florida, the Florida securities law applied. *Id. at 1204-05*. The court further stated:

Plaintiffs' remaining claims all sound in tort. Therefore, the choice-of- law provisions found in the promissory note and guaranty do not apply to those claims, and the court must address which state's law does apply. . .. With regard to Plaintiffs' claims for fraud in the inducement, negligent misrepresentation . . . and civil theft and conspiracy, the rule of lex loct delicti provides for the application of Florida law. Under Georgia law, "the place of wrong, the locus delicti, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place."

Garland, 86 F. Supp. 2d at 1204-05 (quoting Risdon Enters., 324 $ .E.2d at 740).

The court went on to state that "the place of the injury is where the economic loss

occurred rather than the state where the fraudulent misrepresentations **[*5]** were made," and held that Florida law applied: [T]he Garlands resided at all relevant times in Florida and bore the economic impact of the alleged torts in Florida. Therefore, any harm suffered as a result of the fraud, misrepresentation . . . or civil theft occurred in Florida. Similarly, the Garlands(r) detrimental reliance is the last event necessary to make Defendants liable, and their reliance and any damages attributable thereto occurred in *Florida. Garland, 86 F. Supp. 2d at 1205*.

Similarly here, the harm suffered as a result of Skitter's misconduct occurred in Idaho. OIU and MediaSnap's principal place of business is Nampa, Idaho, (Am. Comp., Doc. #75, at 12), and as such, OIU suffered its financial harm there. Indeed, after OIU signed the Franchise Agreement, it spent a significant amount of money (more than $ 45,000) buying equipment and preparing its Nampa facility for the head-end equipment that Skitter was supposedly going to provide. (Jd. (((64, 66, 81). Additionally, as OTU is headquartered in Idaho, it is axiomatic that OIU wired its payments (the $ 295,000 franchise fee and the $ 4,500 loan so Skitter could "make payroll") from Idaho. (/d. (q[57, 93.) Finally, OIU **[*6]** has provided tele- communication services to people throughout Idaho since 1990. (Jd. [[19.) Last,

OIU was finally able to "soft-launch" Skitter local TV services to the Boise, Idaho area in mid-2015. However, Skitter "went dark" and refused to provide further

television content to OIU six months later. (7d. [J[109, 111, 114, 119.) As a result, OIU's reputation in Idaho (and particularly in Boise) suffered. In sum, all of the harm suffered in this case occurred in Boise, and as such, Idaho law should apply to OIU's tort and statutory claims."

II. _ The Fraud Claim Should Not be Dismissed.

Skitter claims that OIU's fraud claim is deficient for three reasons. First, Skitter claims that OIU's Amended Complaint only contains allegations of unfulfilled promises, which cannot be the basis of a fraud claim. (Skitter Mem. at 10-12.) Second, Skitter argues that OIU failed to plausibly allege "scienter," (id. at 12-13), and third, they contend that the merger clause contained in the Franchise Agreement bars the fraud claim, (id. at 14). For the following reasons, Skitter's arguments are specious, and the fraud claim should not be dismissed.

A. The Misrepresentations Alleged in the Amended Complaint are

Actionable.

Skitter claims that OTUs fraud claim should be dismissed because "the accused representations - Remillard and Saunder's alleged pre-Franchise Agreement representations as to the parties' expected performance and profitability

' As set forth above, Idaho law applies to OIU's tort and statutory claims. In the event that the Court disagrees with OIU, OIU has included citations to Georgia cases as well.

under the Franchise Agreement - are at most unfulfilled predictions, which cannot support a fraud claim." **[*7]** (Skitter Mem. at 10-11.) However, Skitter misapprehends OU's fraud claim. OTU's fraud claim is not based on a handful of statements made prior to the Franchise Agreement. To the contrary, it is predicated on multiple misrepresentations made over the course of years (from 2012 to 2015, including some contained in the Franchise Agreement), all of which were made in an attempt:

(1) to induce OIU to sign the Franchise Agreement and pay the $ 295,000 franchise fee; and thereafter (2) to prevent OTU from terminating the Agreement and seeking a $ 295,000 refund. To contend that OIU's fraud claim is based on statements made over a two-month period in 2012 grossly understates OIU's fraud claim.

Skitter's argument is also legally and factually incorrect. First, the misrepresentations that Skitter, Remillard and Saunders (Skitter's VP of Sales and

CEO, respectively) made prior to the Franchise Agreement were of presently existing facts. Second, Idaho (and Georgia) law is clear that broken promises may support a fraud claim if the promisor had no intention of keeping them.

1. OIU has Alleged Multiple Misrepresentations of Presently Existing

Facts.

Skitter contends that OIU's **[*8]** fraud claim is based on "unfulfilled predictions" and "broken promises" of future performance. To the contrary, the majority of the

misrepresentations made prior to Franchise Agreement concern presently existing facts. For example, the Amended Complaint alleges that:

In April 2012, Remillard represented that Skitter, at that time, had a working platform by which OIU could provide its customers with a full television line up, even though Skitter did not have the capability to install the necessary head-end equipment or provide the content. (Am. Comp. 23(a), 28.) In April 2012, Remillard indicated that all channels (7 local and 54 Satellite channels) could be run through an inexpensive Roku or Western Digital box, even though the inexpensive boxes could only provide local channels and not Satellite channels. (Jd. ((29, 30.) In April 2012, Remillard represented that Skitter could and would install all head-end equipment at OIU within 90 days of

the execution of the Franchise Agreement. (Jd. [27 Yet Skitter lacked the capabilities and finances to do so. Indeed, in January 2013 (more than 6 months after

OIU executed the Franchise Agreement), Skitter tried to raise funds to "complete **[*9]** the build out and deployment of systems that have been contracted for with the Company." (Jd. A few weeks later, Saunders stated that Skitter had to sell two more Franchise Agreements (and get two more franchise fees) to be able to afford OTUs head-end equipment, and asked OTU to pay an additional $ 145,000 to help with the costs. (Jd. 75, 76.) On April 30, 2012, Remillard gave OIU a Franchise Disclosure Document

("FDD"), which overstated the company's cash flow and financial stability. (Jd. (q[37, 38.) Indeed, in January 2013, Skitter sought investments of five million dollars, and a few months later, Saunders indicated that Skitter was "flat broke." (Jd. (73, 82.) When Ryan Clark (OIU's Vice President) raised concerns in mid-May 2012 that Skitter lacked transmission rights for certain channels such as Fox, ABC and CBS, Saunders assured Mr. Clark that Skitter had valid

retransmission rights in OIU's areas. (Jd. (q[48, 49.) Yet in June 2013, Skitter informed OIU that it had not yet received retransmission rights from certain local channels, and that Skitter might not be able to provide west coast channel feeds to OIU's subscriber base. (Jd. (83.)

e - The June 2012 Franchise **[*10]** Agreement itself contains several misrepresentations of presently existing fact. Indeed, it stated that at that time (in June 2012), Skitter owned or otherwise possessed "sufficient rights" in the equipment and content to allow OIU to distribute 7 local channels and 54 Satellite channels. (See id. [54(a); Ex. B to Franchise Agreement.) Yet Skitter (at that time) did not have sufficient capabilities to deliver the equipment nor did it possess sufficient rights in the content to allow OIU to distribute the channels. (Am. Comp. 83.) In short, the Amended Complaint alleges numerous misrepresentations of presently existing facts. Indeed, Skitter repeatedly indicated that they currently (at the time of the misrepresentations) had the capability to provide content and install head-end equipment, even though they lacked those capabilities. Skitter also misstated its financial viability, and even how the system would run (claiming that an inexpensive Roku box was all that the customer would need). These are all misrepresentations of presently existing facts.

2. Skitter's Broken Promises Support a Fraud Claim.

In addition, Skitter also misstates the law, stating that "broken promises" **[*11]** cannot support a fraud claim. (Skitter Mem. at 10-11.) However, a promise to do something in the future, which is subsequently broken, may constitute a misrepresentation of existing fact if "at the time of making the promise the

promisor had no intention of performing the promise." *Weatherhead v. Griffin, 123 Idaho 697, 702, 851 P.2d 993, 998 (Ct. App. 1992)*; see also *W.O. Kepler v. WHW Mgmt., Inc., 121 Idaho 466, 478*, $ *25 P.2d 1122, 1134 (Ct. App. 1992)* ("If . . . at the time of contracting, [defendant] had no intention of performing the contract, [defendant] has misrepresented a material fact; his present intention.") Additionally, although a mere breach of a contract or promise is not enough in itself to show fraudulent intent, that intent may be inferred from circumstantial evidence.

See *Weatherhead, 123 Idaho at 702*, $ *51 P.2d at 998*."

Here, as set forth above, most of Skitter's misrepresentations prior to the Franchise Agreement were misrepresentations of presently existing facts. However, assuming arguendo, that they were simply promises, OIU has alleged sufficient circumstantial evidence to show that Skitter had no intention of performing these promises at the time it made them. For example, Skitter promised to provide head- * Georgia courts have also held that a promise about future events **[*12]** may support a fraud claim if it "is made with a present intent not to perform or where the promisor knows that the future event will not take place." JTH Tax, Inc. v. Flowers, 691 $ .E.2d 637, 642 (Ga. App. 2010). ' See also JTH Tax, Inc. v. Flowers, 691 $ .E.2d 637, 642 (Ga. App. 2010) ("Fraudulent intent at the time of contracting can be inferred based on subsequent conduct of the defendant that is unusual, suspicious, or inconsistent with what would be expected from a contracting party who had been acting in good faith. . ..

Fraud may be proved by slight circumstances, and whether a misrepresentation is fraudulent and intended to deceive is generally a jury question.")

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end equipment within 90 days of execution of the Franchise Agreement, yet Saunders told OIU's General Manager eight months later that Skitter needed two more franchise fees to be able to afford the build-out, stating "that's just how we operate." (Am. Comp. 76.) Additionally, Skitter promised to provide content to OIU customers 90 days after the Franchise Agreement was signed, even though they admitted a year later that they still did not have retransmission rights from certain local channels on the west **[*13]** coast. In short, there is ample evidence in the Amended Complaint that Skitter did not intend to fulfill the promises they made.

Additionally, after OTU and Skitter executed the Franchise Agreement and Skitter failed to provide the necessary content and equipment, Skitter continued to make misrepresentations in an attempt to string OIU along. Specifically, in June 2013, Skitter admitted that it had not delivered to OIU the necessary content and equipment required by the Franchise Agreement. As such, Skitter and OTU signed another agreement giving OIU the right to terminate the Franchise Agreement and receive a $ 295,000 refund if Skitter did not deliver all necessary content licensing and equipment by March 2014. (Am. Comp. (|(84, 86.) Thereafter, Skitter continued to make misrepresentations, in an attempt to prevent OTU from terminating the Franchise Agreement and receiving the refund. For example, in October 2013, Skitter told OIU that Skitter services would be available in January

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2014, and in December 2013, they told OIU that the services would be available in February 2014. (/d. (Y[99, 100.) In March 2014, Skitter told OIU that the services would be available to OIU **[*14]** customers in July 2014, and in June 2014, they represented that the services would be available in August or September 2014. (Jd. 103-105.) Thereafter, in October 2014, Skitter misrepresented to OIU that the Skitter services would be available in February 2015, yet Skitter services did not launch for several months thereafter. (Jd. Considering all of the circumstances, OIU has alleged sufficient circumstantial evidence that Skitter had no intention of keeping these promises and were instead simply stringing OIU along so it would not cancel the Franchise Agreement and seek a refund.

B. OIU Sufficiently Pled Scienter.

Skitter claims that OIU's fraud claim must be dismissed because the fraud allegations "fail to support a plausible inference that Skitter intended to deceive

OIU." (Skitter Mem. at 12-13.) Under *Federal Rule of Civil Procedure 9(b)*, intent and other states of mind may be averred "generally." *Fed. R. Civ. P. 9(b)*. However, "[Glenerally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading . . . intent under an elevated pleading standard. It **[*15]** does not give [a plaintiff] license to evade the less rigid - though still operative - strictures of Rule 8.

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Ashcroft v. Iqbal, 556 U.S. 662, 686-87, 129 S. Ct. 1937, 1954 (2009). Under Rule 8, a complaint must contain factual allegations "sufficient to plausibly suggest [defendants'] . . . state of mind." *Id., 556 U.S. at 683, 129 S. Ct. at 1952*. Additionally, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id., 556 U.S. at 678, 129 S. Ct. at 1949*.

Here, OIU has pled factual content that allows the Court to draw a reasonable inference that Skitter knew that their representations were false and/or made promises that they never intended to keep. Indeed, Skitter's VP of Sales told OIU that all of its channels (including Satellite) could be run through inexpensive boxes (like Roku boxes), when he knew that these inexpensive Roku boxes could only provide local channels. (Am. Comp. 30.) He also provided an FDD with overstated financial information, (id. (37, 38), and told OTU that Skitter would be able to install all head-end equipment within 90 days of execution of the Franchise Agreement, (id. [[27(a),(c)). Considering that Skitter had no money to install this head-end equipment **[*16]** (and actually had to offer a Private Placement

Offering several months later in an attempt to raise funds to "complete the build out"), (id. (73), it is axiomatic that Remillard knew that his representations regarding the financial viability and the ability to install head-end equipment were false. Saunders also

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repeatedly told OIU (and the Franchise Agreement indicated) that Skitter had the rights to transmit 7 local channels and 54 Satellite channels, even though Skitter did not have those retransmission rights. (Jd. 83.) And finally, after Skitter gave

OIU the right to terminate the Franchise Agreement and seek a refund, Skitter continued to make promises it knew it could not keep. In sum, OIU has pled sufficient facts to allow the Court to reasonably infer that Skitter knew that their representations were false and/or made promises that they never intended to keep.

C. The Merger Clause does not Bar OIU's Fraud Claim.

Skitter argues that OIU's fraud claim fails because the Franchise Agreement contains a merger clause, and OIU has not rescinded that Agreement, a prerequisite to maintaining a fraud claim under Georgia law. (Skitter Mem. at 7-9.) However, as set forth **[*17]** in Section I above, Idaho law applies to the fraud claim, and under Idaho law, a merger clause does not bar evidence of fraudulent inducement. Even under Georgia law, a merger clause does not a bar a fraud claim that is based on misrepresentations contained in the contract itself, which is the situation here.

1. Under Idaho Law, a Merger Clause Does Not Bar a Fraud Claim.

Idaho law allows a party who has been fraudulently induced to enter into a contract containing a merger clause to bring an action in fraud without rescinding the contract. In *Thomas v. Campbell, 690 P.2d 333 (Idaho 1984)*, the plaintiff was

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induced to enter into a land purchase agreement based on misrepresentations that the adjoining property could not be developed. When the buyer learned that the seller actually planned on building an extensive condominium complex there, litigation ensued. The trial court refused to allow testimony about the misrepresentations because the parties had executed integrated agreements. On appeal, the Idaho Supreme Court held that such testimony was admissible because "[f]raud in the inducement is always admissible to show that representations by one party were a material part of the bargain." *Id. at 337*.

Not only **[*18]** are misrepresentations admissible to show that a party has been fraudulently induced to enter into a contract, but if proved, they can form an independent basis for an award of damages. In Apiazu v. Mortimer, $ *2 P.3d 830 (Idaho 2003)*, the defendants agreed to purchase the plaintiffs' restaurant for $ 375,000. Because of a limit on the amount the bank would lend, the sales contract was amended to reflect a sale price of only $ 335,000, and the defendants agreed to make up the difference by paying the plaintiffs $ 40,000 on a separate consulting agreement. When the defendants refused to pay the additional amount, the plaintiffs sued for fraud, which defendants contended was barred by the integrated sales contract. The appeals court disagreed:

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While normally the terms of a written contract will control. Idaho law firmly allows that "[f]raud in the inducement is always admissible to show that representations by one party were a material part of the bargain." . . . Fraud vitiates the specific terms of the agreement and can provide a basis for demonstrating that the parties agreed to something apart from or in addition to the written documents. *Id. at 833*.

As alleged in the **[*19]** Amended Complaint, Skitter made numerous fraudulent misrepresentations for the purpose of inducing OIU enter into the Franchise Agreement, and thereafter, to not rescind that Agreement. (Am. Comp. 50, 63-67, 133-135.) Although the Franchise Agreement contains a merger clause and purports be an integrated contract, such misrepresentations are admissible and the fraud claim is not barred under Idaho law.

Moreover, these misrepresentations can be used to show the true extent of what had been promised by the defendants and form an independent basis for an award of damages.

2. The Fraud Claim is not barred even if Georgia law applies.

Skitter overstates the preclusive effect that a merger clause has under Georgia law. Although it has been criticized as leaving a defrauded party with no remedy," Georgia law does prohibit a party from suing both for breach of contract and fraud based on pre-contract misrepresentations when there is a valid merger

N Carpenter v. Curtis, 395 $ .E.2d 653, 656 (Ga. App. 1990) (concurring opinion).

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clause. See *Meadow River Lumber Co. v. University of Georgia, 503 S.E.2d 655, 660 (Ga. App. 1998)*. However, Georgia law is also clear that "a valid merger clause does not prohibit a claim based upon a misrepresentation in the contract **[*20]** itself." *Chhina Family Partnership, L.P. v. S-K Group of Motels, Inc., 622 S.E.2d 40, 43 (Ga. App. 2005)*.

Here the essential misrepresentations which form the basis of the fraud claim were also set forth in the Franchise Agreement and the Franchise Disclosure Document ("FDD"), which was incorporated by reference into the Franchise Agreement. (See Franchise Agreement [18(1).) Indeed, the Franchise Agreement contains misrepresentations about the content and services that Skitter could provide, namely that Skitter: had sufficient rights in the products, equipment, content and licensed software to perform the services under the Franchise Agreement (and could provide OIU customers 7 local channels and 54 Satellite channels); had full and authority to undertake the obligation in the Franchise agreement; would comply with all laws and regulations; and had not been notified that they were violating any copyrights, trade secrets, trademarks, patent or other intellectual property right. (Am. Comp. ([54.) Additionally, the FDD also contained numerous false and misleading statements, including statements that: the customer could use inexpensive Roku or Western Digital boxes; the initial start-up would be

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12 months; and Skitter would deliver all equipment needed to broadcast **[*21]** television to OIU's customers. (Am. Comp. [38.) As set forth above, all of these representations were material and false and were reasonably relied upon by OIU. In sum, the key misrepresentations which form the basis of the fraud claim were set forth in either the Franchise Agreement or the FDD. Accordingly, the merger clause in the Franchise Agreement does not bar that claim, even if Georgia law applies."

III. - OIU's Unjust Enrichment Claim Should not be Dismissed.

Skitter contends that the unjust enrichment claim against them fails because

OIU has not alleged that they knew about the benefit or that repayment was deg There is another potential basis for finding that the merger clause does not bar the fraud claim. The cases relied upon by Skitter only address the issue of misrepresentations which were made to induce a party to enter an agreement. See, e.g., Stricker v. Epstein, 444 $ .E.2d 91 (Ga. App. 1994). It is unclear under Georgia law that a merger clause would bar a fraud claim based on representations that were made after the Franchise Agreement was signed, such as occurred in part here. The distinction between pre- and post-contract misrepresentations, and that **[*22]** only the former are barred by a merger clause under Georgia law, is discussed at some length in *Paternak & Fidis, P.C. v. Recall Total Information Management, Inc., 95 F.Supp.3d 886, 905-6 (D. Maryland 2015)* ("But, Defendant has not identified any authority that applies these limitations under the circumstances of this case, in which Plaintiff's fraud claim is based on misrepresentations that postdated the Agreement.") While this distinction has not been directly addressed by a Georgia court, the cases do recognize an exception to the preclusive effect of a merger clause when the misrepresentations apply to an "intrinsic defect in the article forming the subject matter." SCM Corp. v. Thermo Structural Prod., 265 $ .E.2d 598, 600 (Ga. App. 1980). Here, arguably the misrepresentations went to intrinsic defects in the Skitter product and service which were not discernible to OIU.

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expected. (Skitter Mem. at 21.) However, there is no such argument under Idaho law, which is as follows:

Unjust enrichment occurs where a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff ....

The elements of unjust enrichment are that (1) a benefit is conferred on the defendant by the plaintiff; (2) the defendant appreciates the benefit; and (3) it would **[*23]** be inequitable for the defendant to accept the benefit without payment of the value of the benefit.

Countrywide Home Loans, Inc. v. Sheets, 371 P.3d 322, 329 (Idaho 2016).deg

Here, OIU alleged that it provided a benefit to the Skitter Defendants by paying $ 4500 to Kingdom Telephone; that Skitter "accepted the benefits"; and that it would be unjust under the circumstances to retain the money "without compensating [OIU] for the value received." (Am. Comp. Additionally, the Amended Complaint makes it clear that this payment was "a loan, not a gift."

deg Georgia law regarding unjust enrichment is the same:

Unjust enrichment is an equitable concept and applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.

Wachovia Ins. Servs., Inc. v. Fallon, 682 $ .E.2d 657, 665 (Ga. App. 2009). Moreover, when the issue is the payment or overpayment of money, as is the case here, a claim for unjust enrichment "is appropriate where the plaintiff overpays or deposits more than was necessary with another, who has no legal right to retain the money. ... Such action is based **[*24]** upon the equitable principle that one ought not retain money where one would thereby be unjustly enriched at another's expense."

Cochran v. Ogletree, 536 $ .E.2d 194, 197 (Ga. App. 2000).

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(Id. These paragraphs alone satisfy the requirements set forth in Countrywide (and under Georgia law as well). However, the Amended Complaint also specifies that Skitter was aware of and received the benefit of the loan, in that the loan was forwarded to Skitter to help Skitter "make payroll." (Am. Comp. 93.) In sum, the facts as pled show that OIU loaned money to Skitter, that Skitter benefitted from the money by using it to make payroll, and that the payment was a loan and therefore repayment is expected. Under either Idaho or Georgia law, unjust enrichment is sufficiently pled and should not be dismissed.

IV. - OIU's RICO Claims Should not be Dismissed.

Skitter claims that OIU cannot satisfy RICO's continuity requirement. (Skitter Mem. at 17-20.) A RICO plaintiff must show a pattern of racketeering that "amount[s] to or pose[s] a threat of continued criminal activity." H.J. Inc. v. Nw.

Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 2900 (1989). Continuity may be established through either "closed-ended continuity" or "open-ended continuity." **[*25]**

Here, the Amended Complaint sufficiently pleads both.

A. OIU's Amended Complaint Sufficiently Alleges Closed-Ended Continuity.

The Supreme Court has stated that "[a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related

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predicates extending over a substantial period of time." *H.J. Inc., 492 U.S. at 242, 109 S. Ct. at 2902* (emphasis added). What a "substantial period" means changes depending on the Circuit. In the Eleventh Circuit, "closed-ended continuity cannot be met with allegations of schemes lasting less than a year,"" whereas the Ninth Circuit has refused to establish a "hard and fast, bright line, one-year rule" because "establish[ing] such a rigid requirement . . . would contradict the fluid concept of continuity enunciated by the Supreme Court in H.J. Inc." *Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (Oth Cir. 1995)*. Regardless, the Supreme Court has made it clear that "[pJredicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement" for closed-ended continuity." *H.J. Inc., 492 U.S. at 242, 109 S. Ct. at 2902*.

Skitter misrepresents OIU's Amended Complaint, claiming that it alleges misrepresentations between April and May 2012. (Skitter Mem. at 19.) However, this is patently false. **[*26]** Indeed, as set forth above, OIU has alleged misrepresentations ranging from April 2012 to at least October 2014, all of which caused financial harm to OIU. Specifically, e - OTU alleged misrepresentations in April, May and June 2012, which induced OIU to enter into the Franchise Agreement and pay the franchise ' *Ferrell v. Durbin, 311 F. App'x 253, 256 (11th Cir. 2009)* (quoting *Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1266 (11th Cir.2004))*.

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fee. (Am. Comp. Y(51, 57.) Thereafter, OIU spent a significant amount of money (more than $ 45,000) buying equipment and preparing its facility for the head-end equipment that Skitter was supposedly going to provide. (*Id. 66, 81*.)

e - OTU alleged further misrepresentations in October and December 2013, and more misrepresentations in March, June and October 2014. These misrepresentations (made after OIU executed the Franchise Agreement) further harmed OIU, in that they prevented OIU from terminating the Agreement and receiving a full refund.

In sum, the Amended Complaint alleges predicate acts - misrepresentations made over email and the phone, all of which financially harmed OIU - over a number of years. In sum, the Amended Complaint sufficiently alleges closed-ended continuity.

B. OIU's Amended Complaint Sufficiently Alleges Open-Ended

Continuity.

[*27] The Supreme Court has defined "open-ended continuity" as "past conduct that by its nature projects into the future with a threat of repetition." H.J. Inc., 492

U.S. at 241, 109 S. Ct. at 2902. Open-ended continuity may be established by showing that the predicate acts at issue are the company's "regular way of doing business." *Id., 492 U.S. at 242, 109 S. Ct. at 2902*.

Here, Skitter made multiple misrepresentations over email and the phone, in an attempt to induce OIU and other potential franchisees to contribute money to the scheme. There is evidence that this was Skitter's "regular way of doing business."

For example, although OIU executives reasonably believed that their $ 295,000

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franchise fee would go toward building out their own (OIU's) head-end equipment, Saunders informed OIU's VP that Skitter had to sell two more Franchise Agreements (and get two more franchise fees) to be able to afford building out such equipment. Saunders stated: "that's just how we operate." (Am. Comp. (76.) Based on this statement, it appears that Skitter was engaged in a type of Ponzi scheme, whereby they used OIU's $ 295,000 franchise fee to build out the head-end equipment for a prior franchisee, and thereafter, they continued to make misrepresentations **[*28]** to find other franchisees who could pay for OIU's equipment.

Additionally, in January 2013, Skitter participated in a Private Placement Offering ("PPO"), wherein they sought 5 million dollars from investors and indicated that they were going to target 625 small to mid-sized telephone

companies to sell their services. The PPO documents (like the documents provided to OIU) falsely claimed that Skitter held the rights to distribute "the most popular cable channels," had received retransmission rights to almost all major cable channels, and had the capability to provide head-end equipment for their franchisees. (Am. Comp. ((68-73.) In short, there is sufficient evidence in the Amended Complaint to demonstrate open-ended continuity.*

deg Skitter makes additional RICO arguments that are addressed by other sections of OU's brief. First, Skitter claims that the misrepresentations do not constitute

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V. _- The Amended Complaint Clearly Lays Out the Causes of Action and

Therefore Is Not an Impermissible Shotgun Pleading.

In its Amended Complaint, OIU "incorporate[d] by reference all of the paragraphs and allegations set forth above" at the beginning of each of its seven Causes **[*29]** of Action. OIU apologizes for doing so. The Amended Complaint was filed when the matter was still before the District Court in Idaho, where the phrase is regularly used and not considered to constitute a "shotgun pleading."

Notwithstanding the use of the offending phrase, the Amended Complaint really does not constitute a shotgun pleading because of the clarity and specificity with which it has been pled. As the Court noted in *Weiland v. Palm Beach County Sheriff's Office, 792 F.3d 1313* (1 1deg Cir. 2015), "[the unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way

"predicate acts" under RICO because they "show at most unfulfilled promises and predictions, as opposed to the knowing misrepresentation of an existing fact." (Skitter Mem. at 16, 20.) However, as set forth in Section II.A. above, OIU clearly alleged that Skitter made multiple misrepresentations of presently existing facts, and even if they didn't, OTU alleged sufficient facts to show that Skitter made promises they did not intend to keep. Second, Skitter claims that OTU failed to sufficiently plead "scienter." (Skitter Mem. at 17, 20.) However, as set forth in Section ILB. above, OIU has pled sufficient facts that **[*30]** would allow the Court to reasonably infer that Skitter knew that their representations were false and/or made promises that they never intended to keep. Third, Skitter claims that OIU's Idaho

RICO claim should be dismissed because "it is barred by the Franchise Agreement's governing law clause," which "selects Georgia law." (Skitter Mem. at 19.) However, as set forth in Section I above, Idaho law should apply to this claim.

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or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id. at 1323*."

The Amended Complaint here does not contain such infirmities. To the contrary, it gives a detailed recitation of what occurred (through paragraph 122), and thereafter, the individual Causes of Action are pled with detail. By way of example, the First Cause of Action (Breach of Contract) sets forth the agreement which was breached (the Franchise Agreement), and then sets forth 13 separate ways in which Skitter breached that Agreement. (Am. Comp. (127.) Similarly, the Second Cause of Action (Fraud) details the multitude of fraudulent statements that were made, and then pleads the other elements of a fraud claim. (Am. **[*31]** Comp. 134-142.) Indeed, Skitter does not actually allege that they do not understand the claims being made or the factual basis therefor. To the contrary, Skitter just objects to OIU's incorporation by reference. In sum, the offending phrase notwithstanding

deg Under Georgia law, and the rule of lex fori, "procedural . . . questions are governed by the law of the forum." *McCabe v. Daimler AG, 948 F. Supp. 2d 1347, 1361 (N.D. Ga. 2013)* (citing Fed. Ins. Co. v. Nat'l Distrib. Co., 417 $ .E.2d 671, 673 (Ga. App. 1992)). As such, OIU relies on Georgia law here.

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the Amended Complaint makes clear the basis for each cause of action and the allegations against Skitter.""

CONCLUSION

For the foregoing reasons, Oregon-Idaho Utilities, Inc. and MediaSnap Solutions, LLC, respectfully requests that the Court deny Skitter's Motion to Dismiss.

Respectfully submitted, this 11th day of December, 2017.

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' If the Court so orders, OIU would be glad to redraft the complaint minus that offending phrase.
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CERTIFICATION OF COMPLIANCE WITH L.R. 5.1

I hereby certify that the foregoing has been computer processed with 14 point New Times Roman font in compliance with the United States District Court for the Northern District of Georgia Local Rule 5.1.

Dated: December 11, 2017 /s/ Robert R. Ambler, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within and foregoing PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FILED BY SKITTER DEFENDANTS was electronically filed with the Clerk of Court using the **[*33]** CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

This 11th day of December, 2017.

[s/ Robert R. Ambler, Jr.

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